José Juan Moreso

Legal Indeterminacy and Constitutional Interpretation

LEGAL INDETERMINACY AND CONSTITUTIONAL INTERPRETATION

Law and Philosophy Library

VOLUME 37

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A C.I.P. Catalogue record for this book is available from the Library of Congress.

Printed on acid-free paper

To Lidia, sine qua non.

Truth was their model as they strove to build
a world of lasting objects to believe in.

W. H. Auden

PREFACE

In this book, I present the results of an investigation which began with an extended stay
at Oxford's Balliol College during the first half of 1995. My visit to Oxford was made
possible by a grant from the Spanish Ministerio de Educación y Ciencia.

My sincere thanks go to Joseph Raz who served as my supervisor in Oxford. For
several points of the present study, conversations with Timothy Endicott in Oxford
were also of great help.

The book is part of a larger project of investigation, directed by Albert Calsami-
glia, which is a joint effort of a group of legal philosophers from the Universitat Pom-
peu Fabra (Barcelona) and the Universitat de Girona, and which also receives financial
support from the Spanish Ministerio de Educación y Ciencia.

An earlier version of the manuscript was presented in June 1996 to the selection
committee for a tenured professorship in Legal Philosophy at the Universitat de Girona.
The members of the committee were Francisco Laporta, Albert Calsamiglia, Gregorio
Peces-Barba, Camilo J. Cela Conde, and Francesca Puigpelat. I am grateful to all of
them for their comments, which have been extremely useful in preparing the final ver-
sion of this book.

I also had the opportunity to discuss parts of my ideas with different audiences:
in August 1996, at the Universidad de Buenos Aires and the Universidad de Palermo
(Buenos Aires) as well as at the Encuentro Anual de Filosofía del Derecho at the Va-
querías complex of the Universidad Nacional de Córdoba (Argentina), on invitations by
Eugenio Bulygin, Ricardo Guibourg and Ricardo Carraciolo; in September 1997, at the
VII Seminario Eduardo García Máynez organized by the Instituto Tecnológico Autó-
nomo de México (Mexico City), on an invitation by Rodolfo Vázquez; and in Decem-
ber 1997, at the Instituto de Ciencias Políticas y Sociales of the Universidad Autónoma
de Barcelona, on an invitation by Isidre Molas.

In addition, comments by Carlos Alchourrón — who, unfortunately, is no longer
with us —, Ernesto Garzón Valdés, Daniel Mendonca and Stanley Paulson helped me
clarify my own views and thus, I hope, improve the final version. Eugenio Bulygin,
Ricardo Caracciolo and Riccardo Guastini read the entire manuscript and formulated
sharp objections which helped me correct substantial deficits. With Víctor Ferreres,
Pablo Navarro and Cristina Redondo, who also read the entire manuscript, I have dis-
cussed almost all the questions treated in the book. Working with them has been, and
continues to be, one of my greatest intellectuals stimulants.

I also wish to thank all those who made the publication of this English version of
the book possible: Ernesto Garzón Váldes, who encouraged me to present the manu-
script to Kluwer Academic Publishers; Ruth Zimmerling, who translated the book and
with keen observations and numerous questions forced me to formulate a number of
points more clearly; and, last but not least, several institutions which generously bore
the costs of the translation: the Fundación Cultural Enrique Luño Peña (Sevilla) and its
director, Antonio-Enrique Pérez Luño; the Instituto de Ciencias Políticas y Sociales
(Barcelona), directed by Isidre Molas; and the Departamento de Filosofía del Derecho
at the Universitat Pompeu Fabra (Barcelona) with its director, Albert Calsamiglia. I also

owe thanks to the publishers of the Spanish version of the book, the Centro de Estudios Políticos y Constitucionales (Madrid), for ceding the rights of the English publication.

Finally, I wish to point out that in Appendices A and B to Chapter I, I use some ideas already presented in Moreso/Navarro (1996c) and Moreso (1996), respectively, as well as, in Chapter III, some notions presented earlier in Moreso (1994b), Moreso/Navarro (1996a) and Moreso/Navarro (1996b).

Girona, March 1998   José Juan Moreso

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In recent years, we have witnessed the resurgence of a strong interest in questions of *legal interpretation*.[1] One reason for this may be that interpretation is the key notion when it comes to determining the truth-value of statements like 'Legally, all *F* have the obligation to pay tax *A*' or 'Legally, *x* has the right to obtain damages *B*', etc. Such statements are commonly used by legal officials when they describe, or inform about, the rights of some social group, and they are what we expect to hear from a lawyer we consult about a legal problem or what we expect to be taught in Law School.

Despite their apparent simplicity, such statements have a complex logical structure, and it is not always easy to determine their truth-conditions. Therefore, the main purpose of this book is to offer a logical analysis of that class of legal statements and to determine their truth-conditions.

Obviously, an answer to the question about the truth-conditions of such statements cannot be had without considering the question of the existence of legal norms. Generally, the foundation for the truth of a normative statement is the existence of certain norms. In the words of G. H. von Wright (1983b, 68):

„*One* important type of answer to the question 'Why ought (may, must not) this or that be done?' is the following: *There is a norm* to the effect that this thing ought to (may, must not) be done. The existence of the norm is here the foundation or truth-ground of the normative statement."

Now, the notion of existence of a norm requires detailed analysis. On the one hand, we must answer the question of what kind of entities norms are; on the other, we need a theory that can account for what it is that makes a norm a *legal* norm.

In the first chapter of this book, I will try to lay the foundations for an answer to both questions. For this purpose, we must adopt a theory of meaning for certain sentences and statements since, as we will see, the question about what kind of entities norms are will prove to be more a *semantic* than an *ontological* matter. The question about the legal nature of norms, in turn, will be answered, as it is common practice in legal theory at least since Kelsen, with the help of the notion of a 'legal system'.

The objective of the second chapter is a logical analysis of legal propositions, i. e., propositions expressed in statements like 'Legally, *x* ought to (may, must not) do ϕ'. The analysis will be supplemented by an investigation of the truth-conditions of such statements. This will enable us to take a stand on one of the most important issues in recent scholarship on legal interpretation, concerning the notion of *legal indeterminacy* and its relation to gaps, contradictions and the vagueness of legal concepts.

The third chapter will show that the simple model of a legal system is not sufficient to account for the complexity of legal propositions referring to legal systems of some degree of maturity. Several notions from legal dynamics will be presented in

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[1] In a collection of papers published very recently, the editor, A. Marmor (1995b, v) begins his preface saying: „Interpretation has become one of the main intellectual paradigms of legal scholarship in the last fifteen years. Like the interest in rules during the 1960s and in legal principles during the 1970s, much of the legal theorizing in the last decade has been built around the concept of interpretation."

order to bring to light the importance of concepts like *applicability* or *hierarchy* for the determination of the truth-value of a legal proposition.

Once these ideas have been developed, we can, in the fourth chapter, introduce an approach to a central idea in the theoretical reconstruction of most contemporary legal systems, namely, that of the *primacy of the constitution*. A conceptual explication of this idea will be presented, and some conclusions from that explication will be drawn.

Finally, in the fifth and last chapter, a particular conception of constitutional interpretation will be proposed, which will then be compared with other, alternative conceptions. Special attention will be paid to the relationship between the interpretation and the indeterminacy of the law and, more specifically, to the problem of the discretion enjoyed by the organs entrusted with applying the constitution. We can then also analzye several theses that have been discussed controversially in the context of constitutional interpretation, as, for example, about the relevance of intentions for the interpretation of the constitution and for the justification of judicial review.

I. LEGAL NORMS AND LEGAL SYSTEM

1. Introduction

Norm-authorities perform certain acts the result of which is that certain *norm-formulations* are issued. By attributing meaning to such formulations, we can assess the deontic status of certain actions performed by their addressees or norm-subjects.[1]

Norm-formulations can consist in at least two basic kinds of statements: (i) *prescriptions*, i. e., statements commanding, prohibiting, or permitting some conduct, and (ii) *definitions*, i. e., statements explicating the meaning of certain terms used in other norm-formulations. The meaning of a prescription I will call a *prescriptive rule* or simply a *norm*; the meaning of a definition I will call a *conceptual rule*.[2] Just as a *proposition* is the meaning of a declarative statement (or sentence), a *norm* is the meaning of a prescription.

One of the questions that immediately arise at this point is that about the relationship between norm-formulations and norms: What is the criterion for specifying norms? I will follow the well-known idea of Alchourrón and Bulygin (1971, 42) according to which norms are meanings of sentences correlating generic cases with normative solutions. This conception presupposes a distinction between generic and individual cases. An individual case is an instance, an occurrence at a certain time and place, of a generic case. Generic cases are *classes* of events or states of affairs defined by some property. For instance, there is a clear difference between the case of the political murder of John F. Kennedy and political murder as an abstract category. Alchourrón and Bulygin introduce the distinction between generic and individual cases as follows:

„[T]he term 'case' is ambiguous in legal language as it is in ordinary language in general. Thus, for example, we speak about the case of political murder and the case of the murder of Mahatma Gandhi, of the case of divorce and the case of the divorce of Brigitte Bardot ... It is obvious that the word 'case' has not the same meaning in these phrases. Gandhi's murder is a real event, that happened in a certain place and at a certain moment in time. The expression 'case of political murder' does not refer to any concrete event; it is the mere description of certain properties which certain events may have. The property of being a political murder may be instantiated in an unlimited number of concrete occurrences." (Alchourrón/Bulygin 1971, 28)

Norms, thus, assign normative consequences to generic cases and in this way enable us to know the deontic status of certain individual cases which are instances of those generic cases.[3] The deontic status of a generic case is determined by a universe of solutions. The universe of solutions deontically modalizes a universe of act-categories. The pos-

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[1] For the concepts of norm-authority and norm-subject, cf. von Wright 1963a, 75-79.

[2] The term 'definition' must be understood in a broad sense, such that it not only includes semantic rules, but also other kinds of rules that can (partially or completely) explicate the meaning of certain concepts. Cf. on this Mendonca/Moreso/Navarro 1995, 226 f.

[3] Here, I will not go into the question of how generic cases are constructed on the basis of a selection from a universe of relevant properties. On this, cf. Alchourrón/Bulygin 1971, 22-27.

sible deontic characters are: P (permitted), Ph (prohibited), O (obligatory), and F (facultative), the latter being defined as 'permitted to do and permitted to omit'. Here, it is important to distinguish between *maximal solutions* and *partial solutions*. If we take the operator 'permitted' (P) as the basic one, we can formulate the following equivalences:

$$Op = Pp \wedge \neg P\neg p,$$

meaning that 'p is obligatory' is equivalent to 'p is permitted and not-p is not permitted';

$$Php = \neg Pp \wedge P\neg p,$$

meaning that 'p is prohibited' is equivalent to 'p is not permitted and not-p is permitted'; and

$$Fp = Pp \wedge P\neg p,$$

meaning that 'p is facultative' is equivalent to 'p is permitted and not-p is permitted'.

A maximal solution is a solution that determines *all* the contents corresponding to some universe of actions. Given a single action p as the possible normative content, maximal solutions are the following: $\{Op, O\neg p, Php, Ph\neg p, Fp, F\neg p\}$. They can be reduced still more, to only three elements, since Op is equivalent to $Ph\neg p$, $O\neg p$ to Php, and Fp to $F\neg p$. A partial solution is one that does not determine all the contents corresponding to a universe of actions. Given a single action as the possible normative content, minimal solutions, as a subset of partial solutions, are the following: $\{Pp, P\neg p, \neg Fp\}$. In the first case (Pp), we do not know whether p is obligatory or facultative; in the second $(P\neg p)$, we do not know whether p is prohibited or facultative, and in the third case $(\neg Fp)$, we do not know whether p is prohibited or obligatory.

On the other hand, conceptual rules correlate generic cases with other generic cases. Thus, if we have a norm-formulation like 'Persons aged 18 years or older are of age', the generic case (C_1) of being 18 years old or older is correlated with the case (C_2) of being of age, i. e., $C_1 = C_2$. The correlation must not necessarily be one of identity. Thus, when it is said that 'Rivers are public property', what happens is that the class of rivers (C_3) is included in the class of public properties (C_4), i. e. $C_3 \subset C_4$. Generally, therefore, conceptual rules establish the following relationship between two generic cases C_i and C_j: $C_i \subseteq C_j$. Conceptual rules thus enable us to identify the content of certain prescriptive rules, i. e., if there are two norm-formulations such as 'Persons aged 18 years or older are of age' and 'Persons of age must vote', then the case of being 18 years or older is correlated with the normative solution 'It is obligatory to vote'.

We now have a criterion for the identification of norms and conceptual rules which associates them with the existence of certain norm-formulations.[4] But what gives

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those entities the property of being *legal* entities? My answer to this question is to say that what gives them this property is the fact that they belong to a certain set. Besides, that set can be given a *structure*, i. e., it is systematically ordered. The relation which defines the structure of that set is the relation of logical consequence. Thus, a set of norm-formulations can be regarded as a *normative system* — as a set, that is, which contains all its logical consequences, where at least one of them is a norm (Alchourrón/ Bulygin 1971, 54-59). It is the relation of *deductibility* that converts a set into a system (Caracciolo 1988, 57; Moreso/Navarro 1993a, 36 f.). Though one can also establish other relationships in a set of norms (all of them associated with the dynamic character of legal systems; cf. chap. III), in this chapter I will only look at sets of norms as static systems.

From what has been said so far, it should be clear that any set of norms can be structured as a deductive system. But the notion of a legal system is a very general one. We may be interested in the set of norms actually belonging to Spanish law, or in the set of norms actually applied by the courts in Spain (as we will see, these sets are not necessarily identical), or — as is usually the case — in more limited sets of norms (e. g., the set of norms regulating extra-contractual liability). All these sets can be presented as systems structured by the relation of deductibility. The discussion of the criterion for the identification of a legal system must wait until later.

Some authors (e. g., Caracciolo 1996) have asked how there can be an association of norms (which, being propositions, are abstract entities) and systems (which, being sets, also are abstract entities) with the social facts of norm-creation and norm-elimination that — in contrast to abstract entities — exist in a real position in space and time. But note that our linguistic usage may be confusing us here. We usually speak of the creation and elimination of norms, of systems that emerge and disappear, etc. Such statements must be understood in the following sense: We associate certain abstract entities (existing outside of time and space) with certain social facts. Thus, to say that a norm N has been created only means that we associate some act of some authority with a certain abstract entity. Thus, *qua* abstract entities, norms too cannot be cancelled. But we speak of the cancellation of a norm in the sense that after an act of derogation of norm N, we associate a new system of norms (that does not contain N as an element) with that moment in time. We can draw an analogy that can help us understand this. The set of beliefs of a person x can be seen as a *deductive system* (Hintikka 1962) consisting of the propositional contents of x's beliefs and closed under the notion of logical consequence. When we say that at some time t x replaces belief p with belief $\neg p$, we do not mean to say that x cancels the existence of proposition p and creates the existence of proposition $\neg p$. In fact, since propositions are abstract entities, their existence cannot be affected by mental acts of x. What we mean to say is that we associate another set of

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with norm-subjects. Cf. von Wright 1963a, 117 f. We can, however, abstract from this pragmatic requirement and call a 'norm' any meaning of certain linguistic expressions of a prescriptive nature, just as a proposition is the meaning of any declarative sentence, even if no-one has ever used that sentence for stating anything. Cf. Alchourrón/Bulygin 1979, 1989.

propositions with time *t* than the one we associated with time *t*-1, namely, a set containing ¬*p* instead of *p*.

   The purpose of this chapter, however, is not to investigate such ontological questions, but to present a possible explanation of how we can attribute meaning to prescriptions. The notion of meaning plays a crucial role in the philosophy of language. It is strongly linked to the notion of *understanding*. The meaning of an expression in some language is what a competent speaker understands by that expression (Platts 1979,43).

   Since Frege (cf. the insistence on this point in Dummett 1978, 105 f. and 449 f.), it is common to distinguish two important elements in all theories of meaning: *sense* and *force*. In Dummett's words:

> „We thus arrive at the distinction, originally drawn by Frege, between the *sense* (*Sinn*) of a sentence and the *force* (*Kraft*) attached to it. Those constituents of the sentence which determine its sense associate a certain state of affairs with the sentence; that feature of it which determines the force with which it is uttered fixes the conventional significance of the utterance in relation to that state of affairs (i. e., according as the speaker is asserting that the state of affairs obtains, asking whether it obtains, commanding that it should obtain, expressing a wish that it obtain, etc.).
> It is difficult to see how a systematic theory of meaning for a language is possible without acknowledging the distinction between sense and force ..." (Dummett 1978, 449 f.)

Therefore, the purpose of this chapter is to offer a conception of the sense and a conception of the force of prescriptive sentences.

   Conceptual rules, on the other hand, can safely be said to be less problematic. Their role in a normative system is similar to that of definitions in axiomatic theories (where, in a normative system, the role of the axioms is occupied by the prescriptive rules). Actually, the association of certain *legal* properties, like being 'of age', with certain *natural* properties, like being 18 years old, can be seen as a relation of *supervenience*. That relation is usually considered to be an *a priori* relation. According to Kim, the following three elements are distinctive of supervenience:

> „*Covariance*: Supervenient properties covary with their subvenient, or base, properties. In particular, indiscernibility in respect of the base properties entails indiscernibility in respect of the supervenient properties.
> *Dependency*: Supervenient properties are dependent on, or are determined by, their base properties.
> *Nonreducibility*: Supervenience is to be consistent with the irreducibility of supervenient properties to their base properties." (Kim 1993, 140)

The idea that the relations of covariance and dependency can be attributed to the relationship between legal properties and natural properties seems to be widely accepted. More controversial is the notion of nonreducibility — in fact, it is a characteristic of supervenience that has been much discussed in the pertinent literature (cf. again Kim 1993, 149). But if we define legal properties as the circumstances under which a set of normative consequences comes about (e. g., being of age as the property with which we associate the right to vote, the capacity to make valid contracts, etc.), we can regard them as irreducible to natural properties, since natural properties must be defined in another way.

2. The Theory of Sense for Prescriptions

Some of the most important achievements in the area of the logic and philosophy of language have been made in the field of *semantics*. In this context, the reconstructions of the concept of truth developed by Tarski (1944, 1956) and Davidson (1967, 1973) for formalized and for natural languages, respectively, deserve special mention. The object of their investigations was the sense and referent of declarative statements. Other kinds of statements, e. g., prescriptive or imperative statements, have received less attention. The resulting deficit acquires special relevance when the core of a theory of meaning — i. e., the theory of sense — depends on the notion of truth. In proposition 4.063 of the *Tractatus*, for instance, Wittgenstein asserts that

„in order to be able to say »'p' is true (or false)«, I must have determined in what circumstances I call 'p' true, and in so doing I determine the sense of the proposition" (Wittgenstein 1921, 24).

But if non-declarative statements have no truth-value, we must say what the link between such statements and the theory of truth and, therefore, of meaning, is. Following Davidson (1979, 109), we can say that the question is „how it might be possible to represent mood within the confines of a theory of truth".

In this section, I will treat the semantics of imperative or prescriptive statements. Some authors (Hofstadter/McKinsey 1939; Ross 1941; Dummett 1978, 9; Platts 1979, 63; Searle 1979, 13 f.; Smart 1984, 14-19; Hernández Marín 1989, 297 ff., 302 f.; Hierro S. Pescador 1990, 59) have suggested that the semantic value of an imperative is (non-)compliance, and that this value is parasitic on truth.[5]

The basic intuition on this point is that an imperative *i* is *effective* if and only if the corresponding declarative statement *d* is *true*. As is well-known, Tarski used the relational notion of *satisfaction* in order to define the predicate 'to be true'. I will use the relation of *compliance* in order to define the notion of efficacy.[6]

The term 'efficacy' has been used in different ways in different contexts, e. g., in the legal or the moral context. This seems to suggest that the word expresses a *family* of concepts. A common characteristic of many members of that family is that they refer to some relation *R* between the content of a prescription, e. g. the content of an imperative, and some state of affairs. One of my main objectives will be to explicate that relation *R* in an abstract and formally rigourous way. In order to offer a general approach that can serve as a guiding frame for different conceptual investigations, in this reconstruction of the concept of efficacy I will not give privileged treatment to any one of the uses normally associated with that word. In this sense, it may be useful to recall the following assertion by Rudolf Carnap:

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[5] Hierro S. Pescador (1990, 59), e. g., asserts: „We need to elaborate, *à la* Tarski, a semantic theory of compliance with imperatives, or of any other semantic value we may introduce in order to account for other modes. As long as we use, as I have just done, the concept of truth as the criterion of comparison, the elaboration of a semantic theory of the new values introduced may not be difficult. But it must be done."

[6] In Appendix A to this chapter, I will try to show how the notion of efficacy can be constructed with the help of a recursive definition of Tarski's concept of truth.

„A *philosophical* thesis on logic or language, in contrast to a psychological or linguistic thesis, is not intended to assert anything about the speaking or thinking habits of the majority of people, but rather something about possible kinds of meanings and the relations between these meanings. In other words, a philosophical thesis does not talk about the haphazard features of natural languages, but about meaning relations, which can best be represented with the help of a constructed language." (Carnap 1963, 1002)

a) Convention-T

The meaning of prescriptive or imperative statements is determined by the truth-conditions of certain statements that describe a world in which imperatives are always complied with — a deontically perfect world.

Earlier, I said that to determine the meaning of a sentence is to establish the conditions under which it is true. My starting point was to assume that *convention-T*

(T) X is true if and only if *p*

(where X is the name of p) is valid for the descriptive statements of natural languages. Similarly, we can propose a *convention-E* in order to give meaning to imperative or prescriptive sentences. Suppose X is an imperative sentence and X' is the corresponding declarative statement (the name of p'):

(E) X is effective if and only if X' is true.

Now, it is clear that *(E)* is parasitic on *(T)*. Therefore,

(E') X is effective if and only if *p'*.

With the ideas presented before, convention-E can be refined for a language of deontic and propositional logic. For this, the following idea of von Wright is useful:

„We introduce the symbol $\wedge$ for 'always' and $\vee$ for 'sometimes'. The second may also be regarded as an abbreviation for $\neg\wedge\neg$; and the first as an abbreviation for $\neg\vee\neg$.
The notions of 'sometimes' and 'always' I shall call *temporal quantifiers*. The scope of these quantifiers can also be relativized to a time-span of limited duration. Then '$\wedge$p' says that the state that p obtains always throughout this span. The span can be, for example, the time during which a certain norm *exists* ...
The variable 'p' in 'Op' or 'Pp' ... is a schematic representation for an *open* sentence expressing a *generic* proposition, e. g. 'p' = 'it is raining' ... Generic propositions are not 'by themselves' true or false; but '$\vee$p' and '$\wedge$p' are *closed* sentences expressing true or false individual propositions — for example that it sometime(s) is raining or is always raining respectively." (von Wright 1983a, 160)

With the help of temporal quantifiers, we can say that the declarative statement corresponding to the prescription '*Op*' is '$\wedge$p', since for a norm of obligation to be complied with it must be complied with on every occasion as long as the norm exists; and the declarative statement corresponding to '*Pp*' is '$\vee$p', since in the case of a permission it suffices that the permission is used on some occasion during the norm's existence. In this way, convention-E can be specified as follows, distinguishing norms of obligation and norms of prohibition from permissive norms:

(E_1) 'Op' is effective if and only if '$\wedge p$' is true.[7]
(E_2) 'Pp' is effective if and only if '$\vee p$' is true.

Now, since because of convention-T

(T_1) '$\wedge p$' is true if and only if $\wedge p$

and

(T_2) '$\vee p$' is true if and only if $\vee p$,

convention-E can be presented as follows:

(E_1') 'Op' is effective if and only if $\wedge p$

and

(E_2') 'Pp' is effective if and only if $\vee p$.

b) A semantics for deontic logic

This semantics provides an interpretation of deontic logic or the logic of *i-formulae* (cf. Hofstadter/McKinsey 1939). To say that a norm N implies a norm N' means that if N is effective, N' necessarily is effective too. For instance, 'Op' implies 'Pp', since '$\wedge p$' implies '$\vee p$'.

Now, something must be said about *mixed inferences*. An inference is mixed when its premises contain at least (a) one *d-formula* and (b) one *i-formula* or *m-formula* (i. e., a formula containing d-formulae as well as i-formulae, e. g., '$p \rightarrow Oq$'). In that case, we can say that a set of true or effective premises necessarily implies an effective solution.

We must, however, point out the following restrictions intended to avoid that the resulting calculus violate *Hume's law* (cf. Weinberger 1991, 285):

(a) Only d-formulae can be deduced from sets of d-formulae.
(b) If a set of premises contains an i-formula or an m-formula, the conclusions can only be i-formulae or m-formulae.

With these restrictions, deontic logic becomes an extension of classical logic. Its semantic legitimation is given by the notion of truth. This allows us to assume that the notion of logical consequence can be applied to imperatives.

Since the notion of a normative system presupposes that there are logical relationships between norms, we must have some notion of logical consequence between norms that provides an escape from the well-known dilemma formulated by Jörgensen:

„According to a generally accepted definition of logical inference only sentences which are capable of being true or false can function as premises or conclusions in an inference; nevertheless it seems evident that a conclusion

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[7] Since 'Php' is equivalent to '$O\neg p$', the convention for prohibitions is only an application of (E_1): 'Php' is effective if and only if '$\wedge\neg p$' is true.

in the imperative mood may be drawn from two premises one of which or both of which are in the imperative mood." (Jörgensen 1938, 290)

If one accepts this presentation of the dilemma — i. e., if one accepts that the meanings of imperative sentences have no truth-value —, then either a logic of norms is impossible, or there is a logic beyond truth.

There are several ways in which the second horn of the dilemma can be conceived. Recently, the interesting version of adopting an abstract general approach and thus abandoning the primacy of semantics for the notion of logical consequence has been proposed (Alchourrón/Martino 1987/88, Alchourrón 1993). The version I will suggest here, however, is a semantic version. What must be shown is that in the case of norms efficacy is an appropriate substitute for truth, and that efficacy can be defined with the help of the notion of truth, i. e., that efficacy is parasitic on truth. This also seems to be the version proposed by Jörgensen:

„An imperative sentence has a meaning if and only if the corresponding indicative sentence which may be derived from it and which describes its contents is meaningful." (Jörgensen 1938, 291)

c) Does convention-T provide a complete theory of meaning?

Some philosophers, like Quine and Davidson, seem to think that the question of whether convention-T provides a complete theory of meaning should be answered affirmatively. Thus, Quine writes:

„You have given all the meanings when you have given the truth-conditions of all the sentences. Davidson took the connection to heart and drew this conclusion: the way to develop a systematic account of meanings for a language is to develop Tarski's recursive definition of truth for that language." (Quine 1969, 33)

According to Davidson, a theory of meaning proves a sentence of the form '*s* means that *p*' for every sentence in the object-language. And he adds:

„The theory will have done its work if it provides, for every sentence *s* in the language under study, a matching sentence (to replace '*p*') that, in some way yet to be made clear, 'gives the meaning' of *s*. One obvious candidate for a matching sentence is just *s* itself, if the object language is contained in the metalanguage; otherwise a translation of *s* in the metalanguage. As a final bold step, let us try treating the position occupied by '*p*' extensionally: to implement this, sweap away the obscure 'means that', provide the sentence that replaces '*p*' with a proper semantical connective, and supply the description that replaces '*s*' with its own predicate. The plausible result is
    (*T*) *s* is *T* if and only if *p*.
What we require of a theory of meaning for a language *L* is that without appeal to any (further) semantical notions it places enough restrictions on the predicate 'is *T*' to entail all sentences got from schema *T* when '*s*' is replaced by a structural description of a sentence of *L* and '*p*' by that sentence." (Davidson 1967, 23)

In fact, even most critics of this theory of meaning hold it to be adequate, though incomplete (cf. Strawson 1971, 188; Grice 1989, 231-237). The purpose of this book is not to provide a complete theory of meaning; nevertheless, there are certain questions that need to be answered and that seem to be overlooked by theories like that of Davidson. More specifically, I will treat the following three questions:

(a) If we take convention-T seriously, we must conclude that non-declarative sentences have no meaning. We can add convention-E for imperatives, and other conventions for interrogative, performative, and other classes of sentences. But then, the following problem arises: How can we distinguish the mood of one sentence from that of another? We know that the syntactic structure of a sentence is not always a sufficient means. It looks as if the theory of sense, without any further complement, cannot answer that question.

(b) Some authors (Strawson 1971, 170-189; Peacocke 1976) have expressed the following concern: Suppose we have a theory of the sense of sentences that can show all truth-consequences of those sentences. There may then still be something that needs to be *explained*, namely, how those sentences acquire that meaning and, therefore, lead to those truth-consequences. We are tempted to say that this is so because people *use* them in a certain way in verbal communication. That idea can be refined with the notion of *intentional activity*. Sentences have the truth-consequences they have because people use them with certain communicative intentions (cf. Platts 1979, 86 f.; Marmor 1992, 13-34).

It seems that this aspect too cannot be accounted for with a theory like that of Davidson.

(c) The third question I wish to refer to is that for a theory of truth like Davidson's there can be no propositions without a truth-value. Hugly and Sayward recently presented that argument as follows:

„Let ML be a metalanguage that contains L as a fragment. Then consider

　　　s is true in *L* if and only if s

(*s* is a designator of the sentence s and *L* designates L), and the following argument:

ASSUMPTION 1. If s lacks a truth-value in L (= neither it nor its negation is true in L), then s also lacks truth-value in ML.

ASSUMPTION 2. If s lacks a truth-value in L, then

　　　s is true in *L*

is false in ML.

ASSUMPTION 3. A biconditional is not true in ML if one side is false in ML and the other side lacks a truth-value in ML.

ASSUMPTION 4. A theory (a deductive closed set of sentences) is true only if each member of the set of its nonlogical sentences is true.

From these four assumptions plus Davidson's definition it follows that no true theory of truth for L can be couched in ML if L contains sentences without truth-values ... A stronger conclusion is derivable: no true theory of truth of the sort envisaged by Davidson for a language with truth-value gaps is possible." (Hugly and Sayward 1993, 551 f.)

This is a particularly serious conclusion since, as will be seen in the next chapter, my analysis of legal propositions presupposes that there are propositions without a truth-value. However, we can adopt a theory of sense that comes close to that of Davidson, and still account for propositions without a truth-value. As Hugly and Sayward (1993, 558) observe: „For *gappy* languages it is necessary to distinguish between being false and not being true." That is precisely what will be done in section 3 of the next chapter.

It will require some restrictions in our definiton of satisfaction and truth which I will not elaborate here,[8] but which must be accepted in order to develop the philosophical position about legal propositions presented in the next chapter.

For the time being, nothing more will be said about question *(c)*. Concerning questions *(a)* and *(b)*, I trust that a theory of the force of linguistic expressions, to which I will now turn, enables us to fill the gaps the theory of sense *à la* Davidson has left open (cf., however, Davidson's more recent reflexions in Davidson 1990).

3. The Theory of Force, and Prescriptions

The theory of the force of linguistic expressions allows us to complete our theory of meaning. The conception has been presented by Platts (1979, 67) in the following way:

„We therefore have as our final definition of 'Sentence *s* in language *L* means that *p*' the following:
There is a truth-theory θ for *L* such that:
(a) It is a theorem of θ that *s* is true if and only if *p*;[9] and
(b) the deliverances of that theory combine with an acceptable theory of force and with observed linguistic and non-linguistic behaviour to license the ascription of plausible propositional attitudes to speakers of *L*."

One of the objectives of the theory of force is to enable us to indicate the kind of speech-act performed on some occasion of utterance — assertion, question, command, etc. — and to show us how we can obtain a declarative sentence adequately linked to that speech-act (McDowell 1976, 42-66; Platts 1979, 58-63).

The other objective I will look at is the analysis of intentions in a theory of meaning or, more precisely, in the theory of the force of linguistic expressions. I will analyze mainly the notion of *relevance* and its relationships with the theory of meaning, as well as the previously sketched notion of a normative system.

a) The illocutionary force of prescriptions

As is commonly known, in contemporary philosophy, we are indebted to Austin (1962) and Searle (1969) for having insisted on the fact that language not only serves for transporting information about the world, and for having emphasized the *action*-component

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[8] In order to do this, besides the symbols of our languages and the sequences that satisfy them, we need something like Lewis's (1983, 193-197) notion of *indices*, i. e., factors on which the extensions of our symbols can depend. In that way, we can account for propositions without truth-value, e. g., propositions referring to inexistent entities. As Lewis (1983, 196) observes: „A name may not denote anything at a given possible world. 'Pegasus', for instance, denotes nothing at our world, so its intension may be taken as undefined at any index having our world as its world coordinate. A sentence that suffers from failure of presupposition is often thought to lack a truth-value. If we adopt this treatment of presupposition, sentences susceptible to lack truth-value should have intensions that are undefined at some indices." Cf. an analogous solution in Hugly/Sayward 1993, 558 f.

[9] This formulation must be slightly modified if we want to account for propositions without truth-value. Cf. the previous footnote.

implied in language.[10] In their work, they insist on the difference between the propositional content of an utterance and its illocutionary force. Only an adequate theory of force seems to enable us to distinguish whether on uttering some linguistic expression we are *asserting* something, *commanding* something, *asking* something, etc.

Searle (1979) even listed twelve dimensions on which we can distinguish different kinds of illocutionary acts. Here, I am not interested in a complete taxonomy of such acts. Therefore, I will refer only to one of the differences pointed out by Searle, which I think is especially important for distinguishing declarative utterances from prescriptive or imperative utterances. I am referring to what for Searle — based on Anscombe (1957) — are differences in the direction of the match between words and the world:

„Some illocutions have as part of their illocutionary point to get the words (more strictly, their propositional content) to match the world, others to get the world to match the words. Assertions are in the former category, promises and requests are in the latter ... Suppose a man goes to the supermarket with a shopping list given him by his wife on which are written the words 'beans, butter, bacon, and bread'. Suppose as he goes around with his shopping cart selecting these items, he is followed by a detective who writes down everything he takes. As they emerge from the store both shopper and detective will have identical lists. But the function of the two lists will be quite different. In the case of the shopper's list, the purpose of the list is, so to speak, to get the world to match the words; the man is supposed to make his actions fit the list. In the case of the detective, the purpose of the list is to make the words match the world; the man is supposed to make the list fit the actions of the shopper." (Searle 1979, 3 f.)

Searle adds that in case of a mistake the detective can correct it by changing his list, whereas a mistake by the shopper cannot be corrected by changing the list: He would have to go back to the supermarket and change the products. Thus, it is the illocutionary force which determines how the propositional content relates to the world.

Declarative utterances have a word-to-world *direction of fit*, prescriptive or imperative utterances have a world-to-word *direction of fit*. Thus, we can say that a *proposition* — the meaning of a declarative sentence — is the set of possible worlds which make it *true*, and truth is a word-to-world relation. In contrast, a *norm* — the meaning of a prescriptive sentence — is the set of possible worlds that make if *effective*, and efficacy is a world-to-word relation.

Suppose now that, in a way similar to that of Searle, through the illocutionary force of utterances we can distinguish whether we have a declarative or a prescriptive utterance. The theory of force must then still provide us with an element that enables us to relate that sentence p with another sentence p' of the object-language. That is, we need a function f which for every sentence in our language enables us to say that $f(p) = p'$. In the case of indicative sentences, the function is simple: it is the identity function $f(p) = p$. But when p is not a declarative sentence, the function will be more complex. Now, for the case of prescriptions we have the notion of a *corresponding d-formula* for *i-formulae* as well as for *m-formulae*. Using the ideas presented before — and now only a language of propositional logic — we can say that

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[10] Obviously, this topic also plays a central role in the work of the second Wittgenstein (1953).