Bulygin ESSAYS IN LEGAL PHILOSOPHY

Essays in Legal Philosophy

EUGENIO BULYGIN

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OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
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First Edition published in 2015

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2014958030

ISBN 978–0–19–872936–5

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

ESSAYS IN LEGAL PHILOSOPHY

Preface

Legal constructivism, a development traceable to the mid-point of the nineteenth century, wrought a transformation in the academic study of law in Central Europe. The key figures in this development, the *Romanisten* Georg Friedrich Puchta (1798–1846) and Rudolf von Jhering (1818–92), imposed on the law a conceptual scheme reflecting the *Pandektistik* (the method of the *Pandekten* or digests). In private law, it was Jhering who offered the most trenchant statement of legal constructivism. The law appears in two forms, namely, 'as the legal institute, the legal concept, and as legal norms, legal principles'. The latter—'the imperatival, the directly practical form of the command or prohibition'—provides the raw material that is re-formed or *constructed* as the elements of legal institutes or 'juridical bodies' with their own distinct properties. Jhering, with an eye to 'rendering the law scientific' (*die Verwissenschaftlichung des Rechts*), went so far as to set out 'laws of construction'. The key figure in initiating this development in public law was Karl Friedrich von Gerber (1823–91). Although not himself a *Romanist*, Gerber transferred the conceptual scheme of the *Pandektistik* lock, stock, and barrel to public law. As he put it, he was transferring to public law 'something wholly formal, the legal construction'. The impact was profound, with Paul Laband (1838–1918), Georg Jellinek (1851–1911), and Hans Kelsen (1881–1973) following Gerber's lead.

Challenges were posed initially by the later Jhering's 'Damascus *Erlebnis*' and the beginnings of sociological jurisprudence, then by the Free Law Movement, and, in recent years, by the ever greater role accorded to case law. Nevertheless, legal constructivism as an approach to the law is evident in European legal science to the present day. The same is true of the Latin American jurisdictions, which also belong to the civil law tradition. Certainly the number of collaborative efforts between jurists from the civil law countries and their Anglo-American counterparts has grown. Good examples include *Institutionalized Reason. The Jurisprudence of Robert Alexy*, edited by Matthias Klatt, and *The Logic of Legal Requirements. Essays on Defeasibility*, edited by Jordi Ferrer Beltrán and Giovanni Battista Ratti (both books published by the Oxford University Press in 2012). Still, most contemporary work in legal theory and legal philosophy reflects more or less clearly one tradition or the other.

Eugenio Bulygin is the happy exception. On the one hand, he is a distinguished representative of legal science and legal theory as they are known on the European continent—no accident, given the role of the civil law tradition in his home country, Argentina. On the other hand, he has engaged over the past half-century virtually all of the major figures in legal philosophy in the English-speaking countries, including H. L. A. Hart, Joseph Raz, and Ronald Dworkin. In a word, Bulygin is at home in both worlds. He offers a fresh perspective not only in his own highly original contributions to the field but also in hard-headed rejoinders to leading

legal philosophers. We, the editors of the present volume, are of one mind in thinking that a selection of Bulygin's papers, including several written together with his close friend and colleague Carlos E. Alchourrón (1931–96), represents a significant contribution to the field.

The papers presented in the volume, selected in close consultation with Professor Bulygin, are set out chronologically, with three exceptions. At the beginning of the volume, the Bulygin–Kelsen–Bulygin exchange counts as the first exception. Certain arguments in Bulygin's paper of 1965, the initial chapter in the volume, were addressed by Hans Kelsen in a paper of 1967, which was not published until 2003. Bulygin's reply to Kelsen, also published in 2003, follows Kelsen's paper in the volume. A second exception to our chronology is Bulygin's paper on 'Permissory Norms and Legal Systems', which appeared initially in 1984 as a joint production by Alchourrón and Bulygin. In 1986, Bulygin published a separate paper on permissory norms, and then, in 2012, he reworked a fair bit of the material from both papers, supplementing it substantially. We felt that 2012 was the correct date for the paper reproduced here, and it appears as the penultimate contribution to the volume. The third exception is the paper 'Von Wright on Deontic Logic and the Philosophy of Law', written by Alchourrón and Bulygin. It was published in 1989, although work on the paper had been completed in 1973. We are treating 1973 as the correct date for our chronology.

An appendix to the volume appears in two parts. Appendix I is a translation of Bulygin's paper, 'Mi visión de la filosofía del derecho', first published in the Spanish journal *DOXA* in 2010. Appendix II is an autobiographical sketch, based on queries put to Professor Bulygin in an effort to fill out his own brief statement on his life.

The development of Argentine legal philosophy is addressed by Manuel Atienza in *La filosofía del derecho argentina actual* (Buenos Aires: Depalma, 1984), as well as in a collection of essays entitled *Argentinische Rechtstheorie und Rechtsphilosophie heute*, edited by Eugenio Bulygin and Ernesto Garzón Valdés (Berlin: Duncker & Humblot, 1987). Regrettably, there is no up-to-date study of the greater field, which would cover the work not only of Alchourrón and Bulygin but also that of Ricardo Caracciolo, Genaro R. Carrió, Ricardo Guibourg, Carlos Santiago Nino, Maria Cristina Redondo, Jorge L. Rodríguez, Hugo Zuleta, and others.

For all of the editors of this selection of Eugenio Bulygin's writings, it has been a pleasure and a privilege to have worked on the project. Many generous people have helped us in countless ways. We should like to thank, in particular, Risto Hilpinen (Miami) for very kindly agreeing to write one of the introductory articles. We also wish to thank Carsten Bäcker (Kiel), Gustavo A. Beade (Buenos Aires), Uta Bindreiter (Lund), Alejandro Daniel Calzetta (Buenos Aires, now Genoa), Pierluigi Chiassoni (Genoa), Luís Duarte d'Almeida (Edinburgh), Pamela F. Finnigan (St Louis, now Denver), Riccardo Guastini (Genoa), Ruben Hartwig (Kiel), Christoph Kallmeyer (Kiel), Carsten Kremer (Frankfurt), Bonnie Litschewski Paulson (Kiel and St Louis), Kathie C. Molyneaux (St Louis), Alejandro Nava Tovar (Mexico City), Giovanni Battista Ratti (Genoa), Alessio Sardo (Genoa), Michael Sherberg

(St Louis), Kevin Toh (San Francisco), María Viana (Sydney), Gesine Voesch (Kiel), and Katharina Will (Kiel, now Berlin). Finally, we thank Natasha Flemming (Oxford), Rashmi Yashwant Bhate, and Barath Rajasekaran (both Chennai, India) for their unflagging, genial support throughout the adventure of publication.

The editors: Carlos Bernal (Sydney),
Carla Huerta (Mexico City),
Tecla Mazzarese (Brescia),
José Juan Moreso (Barcelona),
Pablo E. Navarro (Córdoba in Argentina),
and Stanley L. Paulson (Kiel and St Louis)

Kiel, October 2014

Acknowledgements

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Table of Abbreviations

Alchourrón and Bulygin, *ALD*	Carlos E. Alchourrón and Eugenio Bulygin, *Análisis lógico y derecho* (Madrid: Centro de Estudios Constitucionales, 1991)
Alchourrón and Bulygin, *NS*	Carlos E. Alchourrón and Eugenio Bulygin, *Normative Systems* (Vienna and New York: Springer, 1971)
ALD	See Alchourrón and Bulygin, *ALD*.
ARSP	*Archiv für Rechts- und Sozialphilosophie*
ARSP Beiheft	*Archiv für Rechts- und Sozialphilosophie*, supplementary volume
Hare, *LM*	Richard M. Hare, *The Language of Morals* (Oxford: Clarendon Press, 1952)
Hart, *CL*, 1st edn., 3rd edn.	H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961). The 2nd edition (Oxford: Clarendon Press, 1992), with a Postscript, ed. Joseph Raz and Penelope Bullock, was published with a new pagination, which was followed in the 3rd edition (Oxford: Clarendon Press, 2012), with an introduction and bibliography of secondary work by Leslie Green.
Hart, *EJP*	H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983)
Hart, 'Separation'	H.L.A. Hart, 'Positivism and the Separation of Law and Morals', *Harvard Law Review*, 71 (1957/8), 593–629, in Hart, *EJP*, 49–87
HKW 2	*Hans Kelsen Werke*, ed. Matthias Jestaedt, vol. 2 (Tübingen: Mohr Siebeck, 2008), a reprinting of *HP*, with copious notes and index
Jørgensen, 'IL'	Jørgen Jørgensen, 'Imperatives and Logic', *Erkenntnis*, 7 (1937/8), 288–96
Kelsen, *ASL*	Hans Kelsen, *Allgemeine Staatslehre* (Berlin: Springer, 1925) (this text and *GTLS* are different)
Kelsen, *GTLS*	Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Cambridge, Mass.: Harvard University Press, 1945)
Kelsen, *GTN*	Hans Kelsen, *General Theory of Norms* (first publ. 1979), trans. Michael Hartney (Oxford: Clarendon Press, 1991)
Kelsen, *HP*	Hans Kelsen, *Hauptprobleme der Staatsrechtslehre* (Tübingen: J.C.B. Mohr, 1911), in *HKW 2*
Kelsen, *LT*	Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans. of Kelsen's *RR 1* by Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 1992)
Kelsen, *PTL*	Hans Kelsen, *The Pure Theory of Law*, trans. of Kelsen's *RR 2* by Max Knight (Berkeley, Cal.: University of California Press, 1967)

Kelsen, *RR 1*	Hans Kelsen, *Reine Rechtslehre*, 1st edn. (Leipzig and Vienna: Franz Deuticke, 1934)
Kelsen, *RR 2*	Hans Kelsen, *Reine Rechtslehre*, 2nd edn. (Vienna: Franz Deuticke, 1960)
N.F.	Neue Folge (new series)
NN	*Normativity and Norms. Critical Perspectives on Kelsenian Themes*, ed. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 1998)
ÖZöR	*Österreichische Zeitschrift für öffentliches Recht*
Raz, *AL*	Joseph Raz, *The Authority of Law*, 2nd edn. (Oxford: OUP, 2009) (The 2nd edition contains 'PPT', which is not contained in the 1st edition.)
Raz, 'BN'	Joseph Raz, 'Kelsen's Theory of the Basic Norm', *American Journal of Jurisprudence*, 19 (1974), 94–111, in *AL*, 122–45, in *NN*, 47–67
Raz, *CLS*	Joseph Raz, *The Concept of a Legal System*, 2nd edn. (Oxford: Clarendon Press, 1980)
Raz, 'PPT'	Joseph Raz, 'The Purity of the Pure Theory', *Revue Internationale de Philosophie*, 35 (1981), 441–59, in *AL*, 293–312, in *NN*, 237–52
Raz, *PRN*	Joseph Raz, *Practical Reason and Norms* (London: Hutchinson, 1975), 3rd printing (Oxford: OUP, 1999)
RJBA	*Revista Jurídica de Buenos Aires*
Ross, *DN*	Alf Ross, *Directives and Norms* (London: Routledge & Kegan Paul, 1968)
Ross, 'IL'	Alf Ross, 'Imperatives and Logic', *Theoria*, 7 (1941), 53–71
Ross, *LJ*	Alf Ross, *On Law and Justice*, trans. Margaret Dutton (London: Stevens & Sons, 1958)
Ross, 'Validity'	Alf Ross, 'Validity and the Conflict between Legal Positivism and Natural Law', *RJBA* (1961), 4, 46–93 (bilingual printing), in *NN*, 147–63
von Wright, 'DL'	Georg Henrik von Wright, 'Deontic Logic', *Mind*, 60 (1951), 1–15, in von Wright, *Logical Studies* (London: Routledge & Kegan Paul, 1957), 58–74
von Wright, *NA*	Georg Henrik von Wright, *Norm and Action* (London: Routledge & Kegan Paul, 1963)
WS 1, WS 2	*Die Wiener rechtstheoretische Schule*, ed. Hans Klecatsky et al. (Vienna: Europa Verlag, 1968), vol. 1 (1–1201), vol. 2 (1203–2409), a selection of papers by Hans Kelsen, Adolf Julius Merkl, and Alfred Verdross

Contents

Introduction I

Normative Systems and Legal Positivism

Eugenio Bulygin and the Philosophy of Law*

Pablo E. Navarro

1. Introduction

Analytical legal philosophy refers to *conceptual* studies about law and legal theory. Unlike other approaches—for example, historical or sociological approaches—analytical studies deal primarily with three types of problem: (i) the characteristic features of judicial reasoning, (ii) the reconstruction of legal concepts, and (iii) the explanation of the systematic nature of law.[1] If such a characterization of analytical legal philosophy is accepted, it is then easy to conclude that Eugenio Bulygin counts as one of the most distinguished writers in contemporary analytical legal philosophy. In a half-century of academic writing he has developed—in part alone, in part together with Carlos E. Alchourrón[2]—a rich conception of law that is well represented in this book. As examples of this analytical persuasion, we present studies on:

- Interpretation and judicial reasoning (chapters 4 and 15)
- Validity and efficacy of law (chapters 1, 3, 10, and 17)
- The concept of a legal system (chapters 7, 13, and 21)
- Legal positivism and legal statements (chapters 6, 8, 11, and 20)
- Completeness and coherence of legal systems (chapters 17 and 22)
- The nature of legal norms (chapters 9, 10, 16, and 21)
- Deontic logic (chapters 5, 9, and 12)

* [*Editors' note*: Pablo Navarro's paper was written as an introduction to the present volume. It has not previously appeared in any form.]

[1] I have drawn this characterization of analytical legal philosophy from Joseph Raz, 'The Institutional Nature of Law', in Raz, *AL*, 103–21, at 103. [*Editors' note*: For this and other abbreviations, see the Table of Abbreviations.]

[2] See e.g. Alchourrón and Bulygin, *NS*, and Alchourrón and Bulygin, *ALD*.

There emerges from this impressive collection a complex variety of strategies for dealing with classical problems of legal philosophy: the normativity of law, the truth-value of legal statements, the systematic nature of law, and so forth. Bulygin's contributions to legal theory have not gone unnoticed, and he has defended his conception in several controversies with some of the most important contemporary authors on legal theory and deontic logic. For example, he exchanged views with Hans Kelsen on validity and effectiveness of law,[3] on deontic logic with Georg Henrik von Wright and Ota Weinberger,[4] on the nature of legal theory with Joseph Raz,[5] on the relation between law and morality with Robert Alexy,[6] and so on.

Analytic philosophy—primarily the writings of von Wright, Alfred Tarski, Rudolf Carnap, Peter Geach, Arthur Norman Prior, and others—has been the major source of Bulygin's philosophical inspiration. He has complemented his analytical conception of legal philosophy with a rather sceptical view regarding ethics and political philosophy. Given this perspective, Bulygin has developed a philosophy of law based on the premiss that law is solely positive law, and he, consequently, has emphatically rejected natural law doctrines.

The study of the logical aspects of legal science (or legal dogmatics) has been one of Bulygin's main interests as a legal philosopher from the beginning. In *Normative Systems*, Alchourrón and Bulygin show that only certain activities taken up by legal dogmatics can be regarded as scientific studies (that is, as a systematization of normative bases). Other activities are to be regarded, by and large, as empirical or normative, for example, interpretation, the elaboration of general principles, the reformulation of normative bases, legal doctrines that purport to solve legal indeterminacies, and so on. Undoubtedly, such activities are an essential part of legal fields of enquiry, but they cannot be justified as scientific knowledge. Along with his interest in the scientific aspects of the study of law, Bulygin's work reflects a firm belief that legal theory must incorporate sophisticated conceptual tools developed in other analytical domains—for example, deontic logic, the philosophy of language, and so on. In particular, he had great confidence in the value of applying

[3] See Bulygin, 'The Concept of Efficacy', in this volume, ch. 1. In 1965, Bulygin criticized Kelsen's reconstruction of efficacy, and that paper, 'Der Begriff der Wirksamkeit', appears here for the first time in an English translation. Kelsen replied in a paper of his own, written presumably in 1967, and it appears here as ch. 2. Bulygin's reply to Kelsen is reproduced here as ch. 3. These two papers also appear here for the first time in English translation. [*Editors' note*: For bibliographical references, see the asterisk footnote at the beginning of each of these three chapters.]

[4] There have been many exchanges between Bulygin and von Wright. See e.g. Alchourrón and Bulygin, 'Von Wright on Deontic Logic and the Philosophy of Law', in this volume, ch. 5. In the volume in which this paper first appeared, von Wright's reply is found at 872–7 [*editors' note*: see the bibliographical reference at the beginning of ch. 5 in this volume]. Alchourrón and Bulygin have debated with Weinberger on the nature of norms and deontic logic. See e.g. Alchourrón and Bulygin, 'The Expressive Conception of Norms', in this volume, ch. 9, and see Ota Weinberger, 'The Expressive Conception of Norms. An Impasse for the Logic of Norms', in *NN*, at 411–32.

[5] See the discussion on the possibility of a theory of law in Joseph Raz, Robert Alexy, and Eugenio Bulygin, *Una discusión sobre la teoría del derecho* (Barcelona: Marcial Pons, 2007).

[6] Robert Alexy and Eugenio Bulygin have debated several times on the relations between law and morality. The most important papers from these exchanges are available in a Spanish edition. See Robert Alexy and Eugenio Bulygin, *La pretensión de corrección del derecho* (Bogotá: Universidad del Externado, 2001).

logical analysis to legal discourse. Thus, in the introduction to *Normative Systems*, Bulygin and Alchourrón write:

> The divorce between deontic logic and legal science has had extremely unfortunate effects for the latter. Jurists have not only paid very little attention to the formal investigation of the normative concepts which they use in their disciplines; they have contrived to remain unaffected by the great revival in foundational studies which in the past hundred years has revolutionized the methodology of both formal and empirical sciences... It is true that legal science cannot readily be classified as an empirical science; much less readily can it be classified as a formal one... But this does not preclude the possibility of transferring to the study of law part of the knowledge gained and some of the methods used in the foundational studies of other, more developed, sciences.[7]

It would make little sense to attempt to summarize the contributions to legal philosophy made by Bulygin. It might well be of some interest, however, to offer an analysis of ideas of Bulygin's that mark crucial steps in our understanding of law and legal theory. In the following pages I will focus on four issues: logic and normative systems, validity and applicability of legal norms, the truth-conditions of legal statements, and the problem of legal gaps. Although they bear significant relations to each other, I will make no effort to spell these out. Rather, I will simply provide a sketch of Bulygin's approach to law and legal theory. I briefly indicate the aspects of alternative approaches, thereby providing the context required to follow the development of Bulygin's legal philosophy.

2. Logic and Normative Systems

It is often claimed that a legal norm, to be valid, must be a member of a certain normative system; legal norms cannot exist in isolation from each other. In the middle of the twentieth century, the most important legal philosophers (for example, Kelsen and Hart) developed arguments in which they sought to explain the systematic nature of law. Still, in a paper published in 1968, Hart points out:

> there is a good deal of unfinished business for analytical jurisprudence still to tackle, and this unfinished business includes a still much needed clarification of the meaning of the common assertion that laws belong to or constitute a system of laws.[8]

A couple of years after the publication of Hart's paper, analytical studies devoted to the concept of the legal system received a great impetus from two books: *A Theory of a Legal System* by Joseph Raz[9] and *Normative Systems* by Carlos E. Alchourrón and Eugenio Bulygin.[10] Both approaches rejected an old philosophical tradition that had explained the nature of law based on the idea of the *legal norm*. According to the tradition, certain specific features of legal norms (for example, the

[7] Alchourrón and Bulygin, *NS*, 2–3

[8] H. L. A. Hart, 'Kelsen's Doctrine of the Unity of Law', in Hart, *EJP*, 309–42, at 310, in *NN*, 553–81, at 554.

[9] Raz, *CLS*.

[10] Alchourrón and Bulygin, *NS*.

institutionalized nature of legal sanctions) counted as the key to understanding law. Only after clarifying the nature of legal norms did the traditional approach take up the idea of a legal system and its differences from other normative systems—for example, systems of moral norms. Thus, legal systems could only be a set of *legal* norms just as a moral system could only be regarded as a set of *moral* norms.

The traditional view gave rise to many problems. For example, its proponents insisted that every law is a norm. Here Alchourrón and Bulygin assert that '[t]o speak of a normative system (or order) as a set of norms seems to imply that all the sentences composing this system are normative sentences (norms)'.[11] As is clear in the case of legal systems, however, many normative sentences (*laws*) do not establish obligations, prohibitions, or permissions, and it therefore became necessary to regard them as 'legally irrelevant' or as merely fragments of a complete norm. A similar idea had already been stressed by Raz:

> According to Bentham, Austin, Hart, and... according to Kelsen as well, the most important consideration in the individuation of law is to guarantee that every law is a norm. Thereby they make the principles of individuation, and the concept of a law which they define, the only key to the explanation of the normativity of law.[12]

Raz's book on legal systems as well as the book by Alchourrón and Bulygin invert the conceptual priority established by the tradition. According to the new perspective, a norm is a legal norm to the extent that it belongs to a *legal* system. Thus, the main differences between law and other normative systems cannot be found at the level of norms, but rather in the specific characteristics that we predicate of legal systems—for example, coercion and institutionalization. This idea seems to be widely accepted in contemporary legal philosophy. For example, John Gardner writes:

> [W]e should tackle the grandiose question 'What is law', in the first instance, by asking 'What is a legal system?' rather than 'What is a law?' Most of Austin's and Kelsen's major errors were attributable, ultimately, to their failure to see that laws cannot adequately be distinguished from non-laws until legal systems have been distinguished from non-legal systems.[13]

Although both Raz's and Alchourrón and Bulygin's books share a wide philosophical horizon, their studies develop different models of the legal systems that are deeply entrenched in our legal culture. Raz's theory of legal systems might be called 'the institutional model' in so far as it is mainly an approach to the nature of law that attributes a special role to legal authorities in the explanation of the existence, identity, and structure of legal systems. By contrast, Alchourrón and Bulygin's theory—especially as developed in *Normative Systems*—is a 'deductive model' to the extent that it assumes that the content of legal systems includes their logical consequences.

[11] Alchourrón and Bulygin, *NS*, 58. [12] Raz, *CLS*, 169.

[13] John Gardner, 'The Legality of Law', *Associations*, 7 (2003), 89–101, at 91. See also John Gardner, 'The Legality of Law', *Ratio Juris*, 17 (2004), 168–81, at 169 (a longer statement of the same point).

A brief comparison of the two models is useful in coming to an understanding of their respective objectives and main differences.

A. The Institutional Model

In his book, Raz points out that a theory of legal system is actually required by an adequate definition of 'a law', and he underscores the point that 'the existing theories of legal system are unsuccessful in part because they fail to realize this fact'[14]. His criticism is based on two ideas. On the one hand, legal systems contain elements (*laws*) that are not legal *norms* and, on the other, it is not possible to explain the nature of legal norms without taking into account their systematic relations. In this respect, legal systems are more than merely a set of norms, but a theory of legal systems is a part of a general theory of norms.[15] Raz stresses the difference between laws and norms in the following terms:

> 'A law' will be used to designate the basic units into which a legal system is divided, and a 'legal norm' [will designate] a law directing the behaviour of human beings by imposing duties, or conferring powers.[16]

In Raz's approach we find two innovations regarding the traditional theories. On the one hand, the basic units of law are not legal norms but a heterogeneous class of entities: *laws*. This fact does not mean that norms have no special relevance in the analysis of law. On the contrary, Raz explicitly defends the idea that every legal system contains norms and that every other law belonging to a legal system is internally related to norms. Moreover, these laws are relevant only to the extent that they affect the existence and application of legal norms.[17] On the other hand, the structure of a legal system has to be analysed not only in light of the relations between norms but also in the broader context of connections between laws.[18] The *internal* relations between laws determine the *operative* structure of a legal system. For this reason we can say that 'the operative structure of a legal system is based on its punitive and regulative relations',[19] and the proper analysis of this normative structure is necessary for understanding three different things: (i) the organization of legal material from some basic units—that is, the relations between *laws*; (ii) the operative structure of legal systems—that is, the way in which law regulates behaviour; and (iii) the basic characteristics of law—that is, its normative, coactive, and institutionalized nature.

According to Raz, the dynamic nature of law makes it necessary that one distinguish between momentary and non-momentary legal systems. Whereas momentary legal systems are sets of norms that meet the criteria for legal validity at a particular moment, non-momentary legal systems are sequences of momentary legal systems. The normative chain formed by a norm N_1 and another, higher norm N_2, which authorizes the creation of N_1, is a relation of legal validity. This relation determines the *genetic structure* of a non-momentary legal system.[20]

[14] Raz, *CLS*, 2. [15] Raz, *CLS*, 44. [16] Raz, *CLS*, 75. [17] Raz, *CLS*, 169.
[18] Raz, *CLS*, 170. [19] Raz, *CLS*, 185. [20] Raz, *CLS*, 184–5.