

9.

CONTRADICTIONS AS EMPIRICAL INCOMPATIBILITIES

Bridging Psychology of Ethical Emotions with Normative Dogmatics

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1. EXONTICS

1.1. Exontic incompatibilities

From the point of view of radical empiricism¹ the so-called principle of non-contradiction is to be viewed as a twofold *hypothesis* that states:

1. the conjunctive impossibility of two phenomena, and
2. the disjunctive necessity of either the former or the latter.

Since these hypotheses are different from one another, owing to space limitations, I will devote this essay chiefly to hypothesis (1).

I call hypothesis (1) *hypothesis of incompatibility* or *hypothesis of conjunctive impossibility*. I shall use these terms as synonyms.

The prototypical case of a hypothetical incompatibility is the hypothesis that *nothing can at once exist and not exist* – (from now on: *not exist = inexist*). In order to understand the hypothetical nature of such a judgment it is necessary to understand what *existence* and *inexistence* are from the point of view of radical empiricism².

¹ Actually, I owe the whole philosophical approach adopted here, not only to radical empiricists such as David Hume and George Berkeley, but also to Nikolaj A. Vasil'ev (1912 and 1912-1913), Jan Łukasiewicz (1910) and – last but not at all least – L. Petrzycki (1909-1910, 1939, 1939 [2010]).

² By this term, I refer to Berkeley's and Hume's empiricism. James's empiricism is by far less radical than those empiricisms.

Radical empiricism distinguishes two kinds of existence:

1. existence proper, or internal existence, and
2. external existence.

External existence concerns a certain subset of the experiences – or ideas, if we use Berkeley’s terminology –, of the Subject ³.

The mentally healthy Subject – starting from his early childhood – realizes that there is a subset of his experiences that are *out of his control*:

[W]hatever power I may have over *my own* thoughts, I find the ideas actually perceived by Sense have not a [...] dependence on my will. When in broad daylight I open my eyes, it is not in my power to choose whether I shall see or no, or to determine what particular objects shall present themselves to my view; and so likewise as to the hearing and other senses; the ideas imprinted on them are not creatures of my will. ⁴

Berkeley uses this argument in order to demonstrate the truth of the hypothesis of the independent existence of God.

But, it is not easy to point to circumstances which would falsify (in Popper’s sense) the hypothesis of the independent existence of God. Instead, it is easy to point to circumstances which would falsify (1) the hypothesis of God’s (independent) inexistence and (2) the hypothesis of the independent existence of external reality. Thus, it is these two more easily falsifiable hypotheses that will be my point of departure. Needless to say that these two hypotheses suggest to turn to the other main supporter of radical empiricism: David Hume ⁵.

According to Hume, the Subject, in order to be able to predict and explain the subset of his experiences called *perceptions* (Berkeley’s *ideas of sense*) makes the hypothesis that, besides existence proper, there is also some sort of external existence:

Th[e] hypothesis [...] of the double existence of perceptions and objects [in my terminology: externally existing objects] [...] pleases our reason, in allowing, that our dependent perceptions are interrupted and different; and at the same time is agreeable to the imagination in attributing a continued existence to something else, which we call objects. This philosophical system, therefore, is the monstrous offspring of two principles, which are contrary to each other, which are both embraced by the mind, and which are mutually unable to destroy each other. The imagination tells us, that our resembling perceptions have a continued and uninterrupted existence, and are not annihilated by their absence. Reflection tells us, that even our resem-

³ I capitalize the term *Subject* in order to distinguish the meaning in the text from the meaning this term conveys when used to refer to the *subject* in a judgment.

⁴ G. Berkeley 1710, § 29. If not otherwise specified, here and everywhere in this essay, the italics is in the original. Sometimes – as in the case of the text accompanied by this footnote –, it replaces a spaced text in the original.

⁵ This is not the place to compare Berkeley’s hypothesis with Hume’s “fiction”. As regards the falsifiability (in Popper’s sense) of external realism see E. Fittipaldi 2012, pp. 75 ff.

bling perceptions are interrupted in their existence, and different from each other. The contradiction betwixt these opinions we elude by a new fiction, which is conformable to the hypotheses of both reflection and fancy, by ascribing these contrary qualities to different existences; the interruption to perceptions, and the continuance to objects. (Hume 1739-1740, § 1.4.2)

Prior to analyzing this passage, let me make a terminological change. I will use the term *exorealities* to refer to Hume's *objects*. This is necessary because, starting from Brentano⁶, the term *object* is used to mean "intentional object". With this terminological move we can more easily oppose exorealities to endorealities, the latter term being used to refer to whatever internal realities such as perceptions themselves, hallucinations, emotions, etc.

The Subject, in order to be able to predict and explain *a subclass of his own endorealities* (so-called *perceptions*) makes the hypothesis (Hume uses the term *fiction*) that something other than these endorealities causes them, and that that something is "there" even when he is not experiencing it.

Think of the Subject's experience of a chair in front of himself. The Subject's hypothesizing its external existence amounts to the Subject's predicting that, whenever he decides to open his eyes and/or to touch it, he will have visions or haptic experiences shaped *like a chair*, other things being equal. The same holds for the Subject's hypothesizing the existence of his house even when he is not there. This hypothesizing amounts to the Subject's hypothesizing that whenever he will come back home he will have *visions* of his "house" that closely resemble the *visions* he used to have when he left it.

Thus a hypothesis of *double existence* emerges within the Subject. His point of departure is existence proper, or internal existence, which pertains exclusively to internal experiences (*endorealities*). Internal experiences are capable of continued existence (think of stomach ache or of memories). On this model, the Subject hypothesizes that there exist external realities that partake of this capability of continued existence, and so are able to exist even when he is not perceiving or thinking of them. The Subject develops this hypothesis because he observes that, as much as he may open and close his eyes in utterly unpredictable and sudden ways, whenever he opens them, he has again and again *the predictable vision* of, say, some chair.

From the cluster of the endorealities called *chair* the Subject develops the concept of *external existence* of the chair. Externally existent is what the Subject hypothesizes to cause in him predictable clusters of endorealities (so-called perceptions), *in a way that is independent of his will* (or that requires *bodily* actions⁷).

⁶ As will become apparent below, I shall combine some ideas stemming from Brentano with Petrażycki's theory of law. That such a cross-fertilization is possible and necessary has been shown by Elena V. Timoshina in her writings (e.g., 2012, pp. 177-203).

⁷ On the way the baby differentiates his body from the rest the world as well as on the fact that he learns to use his own body in order have certain experiences, see, among

Even clearer than the concept of external existence is the concept of *external inexistence*. Externally inexistent, according to the Subject, is typically something imagined by the Subject and that the Subject expects he will *not* be able to see, to hear, to smell, to touch or to taste, other things being equal.

If *existence* is understood as the predicate the Subject uses for ideas he develops out of consistent clusters of endorealities in order to predict new endorealities, there is no reason to rule out the possibility of *exinexistences*.

Exinexistence can be understood as the predicate for ideas resulting from quite unpredictable clusters of perceptions, which, despite their unpredictability, let some sort of long-lasting Gestalt emerge within the Subject.

Think of a chair that I can consistently see, but never feel, as whenever I try to touch it, it vanishes into thin air. Or think of a table that I can consistently perceive with all my five senses, but *not at any moment*, such that there seems to be no way for me – not even a probabilistic one – to predict when I will experience it again. Finally, think of the case where my sensorial experiences should depend on my will or on my internal realities (psychosis). That such clusters⁸ of perceptions are impossible is but a hypothesis. Actually, technology is now able to provide such clusters, but they are no true examples as, in the last end, they can be explained in the terms of existences.

It should be remarked that, even though the Subject develops the hypotheses of external existences and inexistences *solipsistically*, namely, in order to predict and explain *his own* perceptions – *including the perceptions concerning other individuals* –, as soon as the Subject develops also the hypothesis that also other Subjects exist, this latter hypothesis starts playing an important role also when it comes to explaining and predicting the Subject's own clusters of perceptions. Thus the Subject starts to believe that *what exists does exist for everybody*. But this is as well a hypothesis. Nothing rules out *a priori* the possibility that the perceptions of Subject₁ are utterly incompatible with the perceptions of Subject₂, such

many possible ones, the following passage by Sigmund Freud: “An infant at the breast does not as yet distinguish his ego from the external world as the source of the sensations flowing in upon him. He gradually learns to do so, in response to various promptings. He must be very strongly impressed by the fact that some sources of excitation, which he will later recognize as his own bodily organs, can provide him with sensations at any moment, whereas other sources evade him from time to time – among them what he desires most of all, his mother's breast – and only reappear as a result of his screaming for help. In this way there is for the first time set over against the ego an ‘object’, in the form of something which exists ‘outside’ and which is only forced to appear by a special action” (1930: chap. 1).

⁸ I prefer the term *cluster*, as *bundle* conveys the idea of some sort of consistency, which idea, in turn, might be conducive to the misconception that exinexistences are impossible.

that Subject₁ sees a lot of apples on some table, while Subject₂ – on that very same table – sees none, and any attempt to explain either the experience of Subject₁ or the experience of Subject₂ in the terms of an illusion or a hallucination proves unsuccessful.

From now on I shall call the hypothesis that external existence and external inexistence are incompatible *hypothesis of exontic incompatibility*.

1.2. “Prohibitions” of exontic contradictions

The hypothesis of exontic incompatibility may be linguistically expressed with couples of linguistic predicates, such as P_1 and P_2 , *with the prohibition to connect them to the same subject*. When such linguistic predicates are introduced, what we get is some *linguistic prohibition of contradiction*. For example, if we decide never to predicate conjunctively the same noun with the verbs *to exist* and *to inexist*, what we get is a linguistic prohibition that parallels the *hypothesis of exontic incompatibility*.

From now on, in such contexts, I will drop the adjective *linguistic*, since in all the languages I am acquainted with (with the exception of Polish) the term for “contradiction” etymologically stems from some term meaning “to say” or “to talk”.

It should be remarked that quite often P_2 is linguistically built by creating a special *sign* and then putting it before P , after P , etc. Thus we may have $\neg P$, $P\neg$, etc. This usage often conveys the wrong idea that there is something *within* – or *inherent to* – P that rules out the possibility that S is at once P , on the one hand, and $\neg P$, $P\neg$, etc., on the other. This may be one of the reasons why the possibility of exinexistences is so often ruled out.

2. DEONTICS

2.1. Hypotheses of deontic-psychological incompatibilities

A typical case of deontic conjunctive impossibility seems to be the case where the very same action is at once obligatory and prohibited (deontic contrariety, as distinguished from deontic contradiction):

The mother commands to the son: “Go to church on Sunday”; the father commands to the son: “Don’t go to church on Sunday”.⁹

In this case we have an *Unvereinbarkeit der Befolgung* (incompatibility of compliance), to use Kelsen’s terminology (ibid.).

⁹ H. Kelsen 1979, § 57.11, p. 176.

From the point of view of the psychological theory of law, the existence within the child of both “norms” (“norms” brought about by the commands issued by the father and the mother, respectively) amounts to the child’s stable disposition to *experience guilt* both in the case he attends the mass and in the case he does not attend the mass. *In the first case the child feels guilty with his father, in the second case he feels guilty with his mother.*

It seems that for that poor child there is no way out. He has two ethical emotions that are incompatible with one another.

Now, as we know from § 1.1., the fact that there is no way out for the child is a corollary of the hypothesis of exontic incompatibility.

However, there’s no *a priori* ruling out that on a very same Sunday morning the mother may perceive his child at the church with her, while the father may perceive his child at home with him – neither being crazy.

It is only *a posteriori* – viz., empirically – that we know that this is impossible.

In order to escape the unpleasant experience of guilt in either case the child may develop some sort of *deontic-psychological incompatibility*.

The hypotheses that certain Subjects *may* develop such deontic-psychological incompatibilities has been first proposed, to my knowledge, by Leon Petrażycki:

According to the attributive [...] and conflict-producing nature of the legal psyche, to bestow upon several individuals rights-of-authority [*prava vlasti*] over the very same subordinates would be conducive to more or less sharp [...] conflicts, were different superiors to command different, sometimes clearly opposite [*protivopoložnyj*] things, and at the same time to exact that their commands be carried out. As a consequence of this [...], in the legal psyche there is a peculiar tendency to such an adaptation of the corresponding convictions as well as of the current experiences (the consciousness of the obligation to obey, of the right to obedience of the part of the other, etc.) that in certain cases, especially in the case of mutually *contradicting* [*protivorečáščie*, emphasis added] provisions on the part of different authorities the concrete duty of obedience is experienced not as to two or more people issuing commands, but as to one of them; and exactly in the same way the legal consciousness of the commanders has such a content that *usually* [*obyknovenno*] puts aside the contemporary claim of more than one individual to the submission to commands that are different in content; in this way conflicts are prevented.¹⁰

This is a full-blown psychosociological hypothesis¹¹.

¹⁰ L. Petrażycki 1909-1910, § 12, p. 208.

¹¹ Thus, this hypothesis of deontic-psychological incompatibility is some sort of deontic counterpart of Aristotle’s hypothesis of exontic-psychological incompatibility: “φανερὸν ὅτι ἀδύνατον ἅμα ὑπολαμβάνειν τὸν αὐτὸν εἶναι καὶ μὴ εἶναι τὸ αὐτό” (*Metaphysica*, Γ 3.1005b29-30, emphasis added; cf. also J. Łukasiewicz 1910, chap. 1). But there is a difference. Aristotle holds that his hypothesis holds true for everybody, while Petrażycki maintains that his hypothesis holds true for *most* individuals.

If the child of Kelsen's example develops such a psychical incompatibility, he may have to endure practically unpleasant consequences on the part of *one* of his parents, but he will experience *guilt* solely in the case of non-fulfillment of the (positive or negative) command of *the other one*. For example, if he develops the conviction that his father's commands are more binding than his mother's, then, in the case he should not attend the mass and so be punished by his mother, he will not experience undergoing that punishment as an expiation¹². He might even experience his mother's "punishment" as a pure act of violence, or else construct it as an act of injustice.

2.2. Axioms (dogmata) of deontic-dogmatic incompatibility

The Subject *may* decide to create his own ethical *Formalwissenschaft* (formal science) consisting of his freely chosen *letzte Wertaxiome* (ultimate value axioms – I use Max Weber's 1917 term). In this case he *may* decide that certain couples of deontic predicates should not be both predicated of the same behavior, and this *completely irrespective of his actual ethical emotions*.

Such couples *may*, for example, be:

1. prohibited and obligatory,
2. permitted and prohibited,
3. right and duty¹³.

Since in this case we are dealing with a *Formalwissenschaft*, and *Formalwissenschaften* are a subset of *Idealwissenschaften* (sciences concerned with purely mental objects), these axioms do not perform the function of making it possible for the Subject to predict or explain his own endorealities.

A possible function of *Formalwissenschaften* is to call the attention of the Subject *on inconsistencies* of the Subject himself with the consequences of some of his axioms.

Imagine that the child has adopted these two axioms:

1. No behavior of mine shall be ever at once obligatory and prohibited.
2. Should some behavior of mine be at once obligatory and prohibited as a consequence of two commands, one issued by my father, one issued by my mother, I will obey my mother.

¹² On the concept of expiation in a Petrażyckian-Piagetian perspective see E. Fitipaldi 2012, pp. 182 f.

¹³ I am not implying either that this list is complete or that these couples of predicates are incompatible in any axiomatic (dogmatic) system. Nothing rules out that in some dogmatic system, for example, the very same action is at once the object of a right and of an obligation.

Imagine that the child observes within himself that, despite his having adopted axiom₁ and axiom₂, he feels guilty with his father for attending the mass.

This means that that child has not yet developed a deontic-psychological incompatibility. Nonetheless, his being able to observe this inconsistency within himself may cause him, in the long run, to develop such a psychological incompatibility. This is but one of the possible ways an ethical dogmatics, understood as a *Formalwissenschaft*, can be used¹⁴.

3. AXIOTICS¹⁵

3.1. Hypotheses of axiomatic-psychological incompatibilities

In § 2.1. we have discussed the case where *two* incompatible commands can be psychologically in force or binding within the very same Subject. A seemingly completely different problem is whether the *very same* normative fact or the *very same* command can be at once psychologically binding, in force, in effect (*geltend, obowiazujący, vigente*), and non-binding, not-in-force, not-in-effect (*nicht-geltend, nieobowiazujący, vigente*) within the very same Subject. (I shall use as synonyms, on the one hand, *binding, in force, in effect*, and, on the other hand, *non-binding, not-in-force, not-in-effect*.)

To begin the discussion let us read two passages taken from an author – Hans Kelsen – who treats quite differently deontic incompatibilities, on the one hand, and axiomatic ones, on the other:

Since two mutually conflicting norms can be both in force [...], the statements on the being-in-force [*Geltung*] of both norms do not confront us with a contradiction, and so not even in the case where one norm sets forth a given behavior as obligatory [*als gesollt*] and the other norm sets forth the abstention from that behavior as obligatory. The sentences stating the being-in-force of both norms – “A ought to be the case” [*A soll sein*] and “Non-A ought to be the case” [*Non-A soll sein*] – do not confront us with a contradictory opposition. This is so because, since both [norms] are in force, both [sentences] are true.¹⁶

One should distinguish the statements on the being-in-force of two norms – one norm setting forth a given behavior as obligatory [*als gesollt*], the other one setting forth the not-being-obligatory [*das Nicht-gesollt-Sein*]

¹⁴ It may also occur that such a *Formalwissenschaft* causes the Subject to get angry with himself for his inability to *measure up to his own ethical dogmatics*.

¹⁵ The term *axiomatic* is Amedeo G. Conte’s (see, e.g., 2006). On this concept, see also P. Di Lucia 2007.

¹⁶ H. Kelsen 1979, § 57.12, p. 177.

of that behavior – from the statements on the being-in-force of two conflicting norms. The [case of one norm setting forth a given behavior as obligatory (*als gesollt*) and the other one setting forth the not-being-obligatory (*das Nicht-gesollt-Sein*) of that behavior] is the case [made up] of[:] one norm[, on the one hand,] and another norm[, on the other hand,] which repeals, abrogates the being-in-force of that [first] norm. If the first norm sets forth the obligatoriness [*das Sollen*] of a certain behavior, then the other one – the abrogating norm – does not set forth the obligatoriness of the *not*-behaving in that way, but rather the *not-being-obligatory* of the behaving in that way. If the second one is in force, then the first one cannot be in force. This is so because the first norm's being-in-force has been repealed by the second norm. The consequence is that two statements, the first one stating the being-in-force of the first of these two norms, the other one stating the being-in-force of the second norm, are in a logical contradiction. This is so because only one of these statements can be true.¹⁷

Hans Kelsen treats differently the following oppositions

1. *A soll sein* (A is obligatory) vs. *Non-A soll sein* (Non-A is obligatory).
 2. *A ist gesollt* (A is obligatory) vs. *A ist nicht gesollt* (A is not obligatory).
- Why this difference?

It seems that, according to Kelsen, if the legislator decides to use such hocus-pocus words as '*hereby repealed*', '*abgeschafft*', '*abrogato*', the normative fact¹⁸ to which these hocus-pocus words are addressed becomes inexistent. Moreover, according to Kelsen, after the repeal, also the repealing statute ceases to exist:

Abrogation concerns the being-in-force of a norm, not the act of setting it forth. It is only a norm that can be repealed, not the act of setting it forth. Unlike other [kinds of] norms, the abrogating norm does not refer to a behavior, it cannot be complied with and applied. Therefore, it cannot be violated. When it has performed its function – viz., when the norm to which it refers has lost its being-in-force –, the abrogating norm loses its being-in-force *in respect to the norm the being-in-force of which it has repealed*. Therefore, its being-in-force in respect to the norm whose being-in-force it has already repealed cannot be repealed either. It is not capable of being repealed – in respect to the norm which it has repealed. The attempt to repeal the being-in-force of a norm abrogating another norm – [namely, to repeal that abrogating norm] in respect to the abrogated norm – by means of a purely abrogating norm would be ineffective. The norm whose being-in-force was repealed by the first abrogating norm would not come into force again.¹⁹

According to Kelsen, provided that the legislator cannot undo the valid²⁰ passing of a statute (the *Akt ihrer Setzung*), what the legislator can do is to “destroy” its bindingness through repeal. Once repeal has performed its

¹⁷ H. Kelsen 1979, § 57.13, p. 178.

¹⁸ I use a Petrażyckian terminology to clear up these issues.

¹⁹ H. Kelsen 1979, § 27.2, p. 85.

²⁰ I use *valid* in E. Pattaro's sense (2005).

destructive function both the repealing and the repealed statutes cease to exist. According to Kelsen – unlike, say, William Blackstone²¹ –, a corollary is that, if a statute that repeals another is itself repealed afterwards, the first statute is *not* thereby revived.

Against these arguments it could be simply argued that Kelsen is artificially distinguishing deontic incompatibilities from axiomatic ones.

At the end of the day, in both cases we are facing a conflict between two different legislators:

1. In the case of deontic conflicts, legislator₂ wants somebody to behave in way empirically incompatible with the way legislator₁ wants him to behave.
2. In the case of axiomatic conflicts, legislator₂ wants to erase from the psyche of somebody the bindingness (authority, prestige, force, etc.) of some normative fact issued by legislator₁.

Now, from a psychological point of view, nothing rules out the possibility that the same Subject experiences the same normative fact as binding and non-binding. Thus the psychological problems raised by axiomatic incompatibilities parallel the problems raised by deontic ones.

Take Hans Kelsen's very example discussed in § 2.1.

Does the situation for that poor child change that much if his father, instead of prohibiting his going to the church, just “repeals” his mother's command? Indeed, the only difference between these two situations seems to be that in the case of certain deontic incompatibilities it is empirically impossible for the Subject to abide, at once, by two commands (e.g., a positive and a negative command – a prohibition – concerning the same behavior) whereas in the case of our example of axiomatic conflict there seems to be a way out. Actually, if the child attends the mass he is not violating his father's repealing command, as: *repealing the command to attend the mass does not amount to prohibiting attending the mass*. Generally speaking, repeal is *usually* meant to bring about psychological adiaphorosity. But this does not rule out the possibility that repealing commands (or normative facts) unleash *inner conflicts*. In our example, the child might experience an *inner conflict* between his wish to go to the playground (a wish now unleashed and legitimized by his father's repeal²²) and his anticipation of guilt with his mother for not attending the mass²³. From the point of view of the psychological theory of law, this inner conflict amounts to the mother's command being at once binding and non-binding within the child's psyche.

²¹ “If a statute, that repeals another, is itself repealed afterwards, the first statute is hereby revived, without any formal words for that purpose” (W. Blackstone 1765-1769, intr., sec. 3, § 3.8).

²² On the difference between *wish* and *sense of entitlement* from a psychoanalytic perspective, see Horney [1950] 1991, p. 42.

²³ I discussed this issue in E. Fittipaldi 2012, pp. 187 ff.

This kind of *axiomatic incompatibilities* are corollaries of hypotheses of *exotic incompatibilities* (and related deontic incompatibilities). Nothing prevents us from imagining a world where the child can *at once* attend the mass and be at the playground, just as nothing prevents us from imagining a world where the judge can at once convict and not to convict the same individual, or a world where the convict at once serves and not-serves his sentence²⁴.

Thus far we have discussed the case where some authority tries to undo the psychological effects produced by the normative fact (or command) enacted (or issued) by another authority.

Now I will spend a few words as regards the possibility that the very same normative fact *issued by the very same authority* is experienced as being at once binding and non-binding. This may occur when *the very same authority* first issues a norm-establishing (*normoustanovitel'nyj*) normative fact NF₁ and then issues a norm-annihilating (*normouničožitel'nyj*) normative fact NF₂ *expressly* aimed at removing the bindingness of NF₁²⁵. What happens if the Subject has no conviction altogether concerning whether that authority has to comply with some horizontal *stare decisis* or whether it has the power to overrule, repeal, its previously issued normative facts? In such cases the Subject might experience NF₁ as at once binding and non-binding.

From a sociological point of view, nothing prevents some authority from trying to change the psyches of other officials or all the citizens as regards its power to annihilate the bindingness of certain normative facts of its.

Consider the Practice Statement issued by the House of Lords in 1966:

Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore, to modify their present practice and, while treating formal decisions of this house as normally *binding* [emphasis added], to depart from a previous decision when it appears right to do so.

In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlement of property, and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

This announcement is not intended to affect the use of precedent elsewhere than in this House. [3 All ER 77]

²⁴ On this very last example, let me recall the following words by Carlo Cattaneo: "The ideal model of a punishment would be a punishment that to the multitude appears with all the horrors of a hell, despite its securing in the secret of reality a paradise to its undergoer" (C. Cattaneo 1846, p. 129).

²⁵ I am using Petrzycki's concepts and terminology (1909-1910, § 23, p. 329).

In this case the House of Lords was trying to change the officials' and people's psyche by substituting the conviction of horizontal *stare decisis* with the conviction that the House of Lords has the power to overrule its own precedents.

But that some Subject develops a corresponding change of conviction is but a hypothesis. Moreover, nothing rules out that some Subject might start to experience at once the very same normative fact as binding and non-binding. If such a momentous constitutional change, as the one made by the House of Lords, had not been accepted, nothing would have prevented a certain precedent of that court from being experienced at once as binding and non-binding: non-binding because of its having been overruled by the House of Lords, binding because of the lack in the English constitutional system of any provision bestowing upon the House of Lords the power so to do.

To show that the very same normative fact may be at once psychologically binding and non-binding, let me make a further example.

The Italian constitution (1948) does not contain a provision like the following one contained in the Concluding and Transitional Provisions of the Russian constitution:

The laws and other legal acts in force [*dejstvujučie*] in the territory of the Russian Federation prior to the coming into force [*sila*] of this Constitution shall be applied in that part which does not contradict [*ne protivorečičij*] the Constitution of the Russian Federation.

The Italian constitution fails, not only to contain such a provision, but also to expressly state that there is no way to enact statutes *other than* the one set forth in the Italian constitution itself.

Now, the “current” Italian civil and penal codes, as well as the code of civil procedure, were enacted prior to 1948.

To my knowledge, hardly any Italian jurist contends that these codes are currently not in force. Nonetheless, should someday an Italian jurist propose to enact a provision like the one contained in the Russian constitution, this very proposal could be understood as a symptom of that jurist's *discomfort* with the “bindingness” of those codes (as well as of other many statutes experienced as “binding” despite their having been enacted prior to 1948). Such an “discomfort”, according to me, would be enough to argue that within that jurist those codes are somewhat in between bindingness and non-bindingness.

3.2. Axioms (dogmata) of axiomatic-dogmatic incompatibility

Just as in the case of axioms of deontic incompatibility, nothing prevents the Subject from adopting some axiom of axiomatic incompatibility, along with some axiom concerning which axiomatic value – A_1 or A_2 – to select

for some norm-creating normative fact in the case of a *conflict* originating from the historical existence of some norm-destructing normative fact concerning the former.

Also in this case – just as in the case discussed in § 2.2. – we are dealing with a *Formalwissenschaft*. Therefore such couples of predicates as A_1 (i.e., *binding, vigente, geltend, obowiazujący*) and A_2 (i.e., *non-binding, non-vigente, nicht-geltend, nieobowiazujący*) are not to be understood as *describing* some psychic attitude of the Subject towards a certain normative fact.

The axiom of axiomatic incompatibility parallels the hypothesis of exontic incompatibility:

1. the hypothesis of exontic incompatibility rules out the possibility for some object to be at once externally existent and inexistent, while
2. the axiom of axiomatic incompatibility rules out the possibility for some normative fact to be at once binding and non-binding.

But there is a huge difference.

Axioms concern the Subject, while hypotheses concern external realities. The Subject, usually, can freely choose his axioms, whereas he must accept such hypotheses as the one ruling out exinexistences, if he is not to look like a psychopath.

Nonetheless, also in the case of axiomatics – much as in the case discussed above in § 2.2. – adopting certain axioms may play a crucial role in the maturation of the Subject ²⁶.

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²⁶ This is not the uniquely possible reason, of course. Another one may be what Max Weber called *reim logische Bedürfnisse der Rechtslehre* (1972, § 2.7.4; 1968, p. 789). This may explain the insertion in the Russian constitution of the provision discussed above in § 3.1. But Max Weber ignored the possibility of multivalued logics. My impression is that in the case of such a provision as the one introduced in the Russian constitution we are not facing Max Weber's *Konsequenzmacherei* ("blind desire for logical consistency"), but rather an attempt to avoid that *tertium datur* between bindingness and non-bindingness. Be this as it may, this phenomenon – along as with many other ones as the reception of the concept of *Rechtsgeschäft* (*sdelka*) in the Russian civil code – is to be sociologically explained in Max Weber's terms, namely by the way jurists are trained in Russia.

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