

ARTICLES

SYSTEMATIZATION OF LAW: THE BRICS CONTEXT AND BEYOND

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The present paper deals with the theoretical question of how can be warranted unity of legal system in the perspective of building up a new legal order of the BRICS. The author draws on the contemporary theories considering various aspects of explanation and construction of law as of a logically united system. Among such aspects are logical unity of legal propositions, epistemological unity of the phenomena unified under the term 'law,' factual unity of societal regulation, axiological unity of a hierarchy of legal values, procedural unity of legal reasoning, synergetic unison. It is asserted that the idea of unity of law is not something conceptually monolithic and allows for different readings, none of which can claim to be exhaustive. The author suggests that the BRICS does not need follow the track of systematization of the legislation of the Member States and that creating agglomerations of legal texts from different legal orders of the Member States is an issue not for politician but rather for legal scholars who can construct and reconstruct legal texts, jointing and disjointing them in the view of practical needs of amelioration of legal technique.

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The new geopolitical union of the BRICS is in the process of formation, and along with economical and political integration this union also faces a possibility of integration of the legal systems of member countries. This integration can follow very different paths, from the creation of a supranational legal order (similar to that which is currently forming in the European Union, so-called European law) to the simple

harmonization of legal texts that is carried out in many contemporary international organisations. We cannot predict for sure, which path will be taken by the BRICS and, given this variability of developments, some general remarks shall be made about how law can be organized in such international pools as the BRICS.

Putatively, we have two paradigmatic variants of the organisation of law in regional unions which are represented, correspondingly, by the political and legal integration within the EU and by such economic communities as the ACEAN, the MERCOSUR or the Eurasian Economic Union. These two variants lead to different results with regard to the systematization of the law. In the first case, we have a new legal system whose relationship with the systems of the Member States suggests an analogy with the relations between the federal and regional law in federal states such as the USA or Brazil. This analogy is only reinforced due to the insistence of the EU structures that constantly remind the national states of the supremacy of European law, even if leaving a loophole for maintaining partial autonomy – margin of appreciation. Loose models of legal integration in economic unions, on the contrary, do not generally require any systematization of legal texts or instruments, and suggest, at best, only the harmonization of legislation of Member States without any pretension to build an integral and coherent body of legal acts and regulations.

The first model seems not to be apt for the BRICS from the perspective of the great cultural and political differences between the member-countries that, at least currently, are insurmountable.¹ The second model does not allow the realization of the ambitious goals of this geopolitical union that explicitly claims to be something more than an economical community. In this second aspect, it is sometimes claimed that the laws of the BRICS countries shall be systemized and that a new system of legal regulation needs to be established, partly supplanting the existing international (the WTO, etc.) and national regulations.² In the following lines, we will deal with the question which is posed in an abstract and in a purely theoretical way but nonetheless has practical implications as far as it concerns the discussions about further legal integration of the BRICS. Our enterprise here is based on the methodology elaborated by the two prominent Argentinean authors, Carlos Alchourrón and Eugenio Bulygin, which is also symbolic in the light of the possible adhesion of Argentina to the BRICS.

By systematicity of law one can understand the tendency, in legal reasoning and legal parlance, to describe law as a whole. This tendency seems to be omnipresent in legal thinking. The question of the congruence between this image of the wholeness of law and the degree of coherence of the social practices we call law is a special issue

¹ Michele Carducci & Anna S. Bruno, *The BRICS Countries As a Legal Dynamic Network and the Multilevel 'Hard' EU Regional Structure – a Comparative Survey*, 4(1) Int'l J. Pub. L. & Pol'y (2014), available at <<http://www.inderscienceonline.com/doi/pdf/10.1504/IJPLAP.2014.057882>> (accessed Aug. 5, 2015). doi:10.1504/IJPLAP.2014.057882

² William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56(1) Harv. Int'l L.J. (2015); Eduardo A. Baistrocchi, *The International Tax Regime and the BRIC World: Elements for a Theory*, 33(4) Oxford J. Legal Stud. (2013). doi:10.1093/ojls/gqt012

which can be considered from different standpoints (different truth theories). The naturalist inclination to see world and society as a whole played an important role in various philosophical doctrines (from antiquity to modernity and postmodern), and this inclination was, and still is, also one of the major incentives of legal thinking. For the purposes of this analysis, 'unity of law' will be referred to as coextensive with such terms as 'coherence,' 'systematicity,' or 'integrity' of law. At the same time, this term should be differentiated from the term 'order' which, according to Kelsen, denotes a chain of competences or a recursive description of the validity of law.³ The connection between the validity of law and its axiological unity was quite often drawn by legal philosophers (to recall Plato or Aquinas), but this connection is not necessary. A rule of law can be a valid norm only if it is a part of a valid legal order, but its validity is not affected in the case where a norm collides with other norms of this legal order.

In any case, the idea of the unity of law is not something conceptually monolithic and allows for different readings. In the history of legal and social philosophy, it used to convey various thoughts and inspirations: the logical unity of legal propositions,⁴ the epistemological unity of the phenomena unified under the term 'law,'⁵ the factual unity of societal regulation,⁶ the axiological unity of a hierarchy of legal values,⁷ the procedural unity of legal reasoning,⁸ synergetic unison, etc. Law as an institutionalized entity does not necessarily appear as a monolithic unity but might be better thought of as complex interweaving layers of social and intellectual realities and practices. A fundamental problem lies in how to identify unifying elements that would make it possible to speak of a legal order or of a legal system. The classical reply according to which they are delimited by the state or by another source of validity of legal rules (anything is a part of the system if it stems from the will of state, from the precepts of practical reason, and so on) turns out to be circular, as legal is defined through legal. Considering that state and law in certain doctrines like that of Kelsen can be thought of as interdefinable, and this is true also for non-positivist doctrine where law is finally defined through natural, reasonable, just law.

³ Another criterion (of 'momentary' legal systems and 'non-momentary' legal order) was proposed by Alchourrón-Bulygin (see, e.g., Eugenio Bulygin, *Time and Validity*, in: 2 Deontic Logic, Computational Linguistics and Legal Information Systems 65 (Antonio A. Martino, ed.) (Elsevier Science Ltd. 1982)).

⁴ Carlos E. Alchourrón & Eugenio Bulygin, *Normative Systems* (Springer 1971); *The Logic of Legal Requirements: Essays on Defeasibility* (Jordi F. Beltrán & Giovanni B. Ratti, eds.) (Oxford University Press 2012).

⁵ See, e.g., Gunter Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23(5) *Law & Soc'y Rev.* (1989), available at <http://papers.ssrn.com/abstract_id=896502> (accessed Aug. 5, 2015).

⁶ See, e.g., Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *Hastings L.J.* 805 (1987), available at <<http://www.soc.ucsb.edu/ct/pages/JWM/Syllabi/Bourdieu/ForceofLaw.pdf>> (accessed Aug. 5, 2015).

⁷ See, e.g., Edward J. Furton, *Restoring the Hierarchy of Values to Thomistic Natural Law*, in: 39(1) *Am. J. Juris.* (1994), available at <<http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1195&context=ajj>> (accessed Aug. 5, 2015).

⁸ Julius Stone, *Legal System and Lawyers' Reasonings* (Stanford University Press 1964).

The argument of coherence (system or community are defined by coherence of regulation, discourse, law-enforcement, etc.) is also circular, as coherence itself should be redefined. Epistemic, constitutive and other types of coherence can be based on different criteria, which can eventually conflict with one another. There can be nothing unexpected if the epistemic coherence of the system can be confronted with the narrative coherence (MacCormick), and so on. In any case, 'coherence' is just a softer version of 'unity' and does not change anything analytically when dealing with the question 'What is law as a whole?' The term of systematicity is not successful as even its proponent, Jeremy Waldron characterizes it as 'a barbaric term' which finally 'refers to the fact that an operation performed on one member of the set will have an impact on other members too, and on their relations with one another.'⁹ In this light, one had better use the term of interdependence and rather avoid ambiguity when explaining the integrity of law: referring to the famous example of Jerome Frank, there can be an impact of what the judge ate for breakfast on what he adjudicated later in the morning, but a breakfast, a judge's stomach and judicial decisions should hardly be described as parts of the same system.

As a starting point for the analysis, we can accept the hypothesis that a mass of legal norms (sentences, propositions, principles . . .) is not united or coordinated *per se*. In order to conceive it as if it were united, coordinated, balanced, one has to postulate an organism (a being, a mechanism . . .) capable of making a system out of this mass. It can be the notorious will of state, nature or any other supreme being which cannot be thought of in the terms of positive science. Seemingly, law does not appear as a function of someone's will – it can, in certain regards, be true for particular (general or individual) norms but not for all the norms (propositions, principles and other elements) which constitute a legal order, as far as no legal order consists of only one actor capable of producing, by his will, all the norms and especially all the sequences from these norms. It can be argued that law is a function of the wills of several actors; this argumentation sounds better but is not suitable to justify coherence, as a multitude of particular wills does not constitute unity, a system . . .

Another approach is that of the unity of cognition, or of epistemic coherence. This approach faces the same obstacles as the unity of will. If there is no such being capable of objective perception and thus of construction of legal reality as a whole, then we have a multitude of rational beings, each of which perceives law independently. We cannot exclude that these beings can reach conventions, to agree on how to perceive law and to explain it. This is what lawyers are, in fact, doing in each legal order. But none of them can pretend to look at law from the point of view of God's Eye (if referring to the idea of Hillary Putnam that we are unable to survey the world from the vantage point of an all-knowing supreme being).¹⁰ Even if we imagine a being able to construct a consistent and faultless system of law, this system will represent the unity of his cognition, but not of law. Anyhow, few would argue that law is a matter only of

⁹ Jeremy Waldron, 'Transcendental Nonsense' and System in the Law, 100 Colum. L. Rev. 16, 19 (fn. 14), available at <<http://emoglen.law.columbia.edu/persp/waldron-cohen.pdf>> (accessed Aug. 5, 2015).

¹⁰ Hilary Putnam, Reason, Truth and History 41 ff. (Cambridge University Press 1981).

cognition: in this way or another, legal rules are imposed by human (superhuman, in natural-law doctrines) will on other human wills, so that a coherent explanation of law through cognition cannot be reduced only to analysis of pure reason and inevitably leads to practical reason combining both will and reason. In this perspective, the idea of law as a mental unity (integrity of practical reason) can be considered in the same vein as the arguments about the unity of law as a function of will.

One can try to find the sources of the presumed unity in certain characteristics which are common to all legislative rules and norms and which can be discovered also in the principles, values, and ideas implicitly present in law (such as human rights, equity, and so on). It could be justice, as in the traditional natural-law philosophy, or societal cohesion, or discursive unity of legal argumentation. To describe this dimension of law, lawyers sometimes use the term 'system' and speak of the 'systematicity' of law. It is suggested by some authors (Dworkin, Fuller, Alexy and others) that possible defects in law (inconsistent, redundant, ambiguous norms, gaps in law) do not refute the systematicity of law, as there are policies or principles deductible from the idea of law (to wit: some kind of objective ethical values underpinning the legal regulation). Particularly for Dworkin, it meant that there are no gaps in law which is an entire block of moral reasoning which a judge is entitled to rely on when deciding a case – this block being labelled as the empire of law.¹¹ Thus, law is backed by the social practice of law as a whole, which constitutes the original being interpreted in the best light.¹² This presumption implies that law is based on the common good, on the will of a divinity, or on other transcendental sources of its integrity; that law is a 'system' corresponds to the thesis of unity of the Universe (law as a part of the world order retranslates all the properties of this world order, including systematicity) which was referred to by Plato and other ancient thinkers to substantiate unity of law. In the last resort, various arguments about 'one right answer', 'correctness', 'moral coherence' are interconnected with this 'systematic' view of law.¹³

Without any doubt, most legal actors (judges, lawyers, lawmakers, etc.) believe in the unity of law – otherwise their attempts to fill in the gaps in law, to introduce new norms, to eliminate inconsistencies from law would be devoid of sense. At the same time, positivists, generally, consider law as a field of experience, as a variety of diverse practices loosely arranged by certain societal authorities. As a means of

¹¹ Ronald Dworkin, *Law's Empire* (Harvard University Press 1986), available at <<http://www.filosoficas.unam.mx/~cruzparc/empire.pdf>> (accessed Aug. 5, 2015).

¹² *Id.* at 87–88. In the same vein, one can cite his idea of 'law as integrity' which is designed to 'instruct judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified . . .' (*id.* at 225).

¹³ Remarkably, MacCormick stresses that coherence in law is a function of the unity of principles: the coherence of a set of legal norms consists in the fact that they are the realization of some common values or the fulfilling of some common principles (Neil MacCormick, *Coherence in Legal Justification*, in *Theory of Legal Science: Proceedings of the Conference on Legal Theory and Philosophy of Science*, Lund, Sweden, December 11–14, 1983 (= 176 Synthese Library) 235 (Alexander Peczenik et al., eds.) (D. Reidel Pub. Co. 1984)). A similar point was made also by Raz (Joseph Raz, *The Relevance of Coherence*, in: Joseph Raz, *Ethics in Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994) doi:10.1093/acprof:oso/9780198260691.003.0013).

adjustment to ever changing political conditions, these practices are contingent and likely to be transient and inconsistent. A lawyer's job is to subject these practices to systematic organization within the framework of rationally ordered, unified normative knowledge.¹⁴ In this regard, one could suggest, along with Kripke, that our interpretations are correct inasmuch as they agree with the interpretations given by other members of this interpretative community (lawyers and their doctrine in this case).¹⁵ This motive was, in a certain sense, central for Kelsen who believed that a science of law constructs law as its own object. Hart's conception, along with some important sociological elements, translates the same idea: the task of legal philosophy is to organize its object (law) around some pivotal axes (rules of recognition, change, adjudication, etc.). Nonetheless, it is possible to reconcile the empirical reality of intellectual attitudes with the factual diversity and heterogeneity of this reality. As Alchourrón and Bulygin wisely suggest: 'There is nothing paradoxical about a consistent description of an inconsistent normative system.'¹⁶

There are at least two insights that must be preserved and articulated among the various approaches to law. The first is that law is an intentional entity, or, to put it differently, an intellectual artefact. The second is this: the social and institutional aspects of law resist a purely mental account of it. A satisfying picture of the nature of law cannot drop either of the two.

We are no longer to attribute to law another meaning of the term 'system' which usually refers to something which is consistent, full, gapless, and irredundant. As follows from Gödel's first theorem, any consistent effective formal system is incomplete. Adopting this point of view, there is nothing contradictory about thinking of a set of norms as of a 'system,' stripping this term of the properties usually attributed to it (such as completeness, consistency . . .).¹⁷ We then have a 'system(s) of law' which is (are) only relatively integrated and identified.¹⁸ This could be a point of tangency where legal theory and logic can effectively work together. This approach seems to be quite reconcilable with the basic idea of 'Normative Systems' by Bulygin-Alchourrón – the idea that all the normative sets can be imagined as independent entities which are united solely by (more or less) logical reasoning by judges, law-enforcement officers and law professors, and that there can be as many such normative systems as

¹⁴ As, e.g., stressed Peczenik who claimed that the main goal of the activity of legal scholars ('legal dogmatics') is to establish and justify the unity of a legal system (Alexander Peczenik, *Law, Morality, Coherence and Truth*, 7(2) Ratio Juris (1994) doi:10.1111/j.1467-9337.1994.tb00174.x).

¹⁵ Saul A. Kripke, *Naming and Necessity* (Harvard University Press 1982).

¹⁶ Alchourrón & Bulygin, *supra* n. 4, at 123.

¹⁷ Eugenio Bulygin, *On Legal Interpretation*, in 4 Rechtssystem und praktische Vernunft / Legal System and Practical Reason: Verhandlungen des XV. Weltkongresses für Rechts- und Sozialphilosophie (IVR), Göttingen, 18. bis 24. August 1991 (= 53 Archiv für Rechts- und Sozialphilosophie – Beihefte (ARSP-B)) (Hans-Joachim Koch & Ulfrid Neumann, eds.) 11, 20–22 (Franz Steiner Verlag 1993).

¹⁸ Joseph Raz, *The Identity of Legal Systems*, in Joseph Raz, *The Authority of Law: Essays on Law and Morality* 78 (Clarendon Press 1979). doi:10.1093/acprof:oso/9780198253457.003.0005

there are actors reasoning about the law and systematizing legal propositions (and consequently, the norms contained in these propositions).¹⁹

Our purpose here is not to find a definite solution to the philosophical question about the unity of law but rather to stress the necessity to escape the principal intellectual lures which apparently give an easy reply, but instead bring ambiguity into the strictly formalist account of the law lawyers used to refer to, and still do. At the same time, we can believe in the systematicity of law and still be aware that the unity / integrity of the law is only a product of our intellect, of our beliefs and paradigms. Other approaches to the unity issue lead to naturalism, which implies that law somehow mirrors the structure of reality (be it conceived of as physical, social, psychological, or metaphysical). What matters here is that this belief is rational and not based on an irrational faith in a pre-established harmony of law and its fictive congruence with reality. That is why we can assert that the BRICS does not need to follow the path of the systematization of the legislation of the Member States, and that creating agglomerations of legal texts from the different legal orders of the Member States is an issue not for politicians but rather for legal scholars who can construct and reconstruct legal texts, jointing and disjoining them in view of the practical needs of amelioration of legal technique.

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¹⁹ See also Joseph Raz, *From Normativity to Responsibility* (Oxford University Press 2011). doi:10.1093/acprof:oso/9780199693818.001.0001

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