Normative Hierarchies in Theory and Practice: the case of Constitutional Adjudication

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Thesis submitted for assessment with a view to obtaining the degree of Master in Comparative, European and International Laws (LL.M.)
of the European University Institute

Florence, September 2016

European University Institute
Department of Law

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Researcher declaration to accompany the submission of written work
Department of Law – LL.M. Programme

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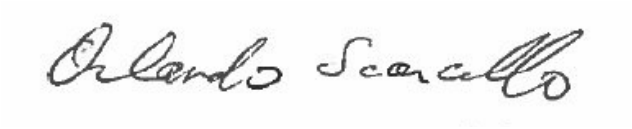

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Summary

The thesis discusses the concept of normative hierarchy in the context of the interlocking between legal systems. In section 1. criticism against hierarchical, positivist characterization of legal systems in pluralistic contexts are examined. It is argued that criticism depends on an inadequate and entangled concept of “normative hierarchy”. In section 2., after a quick sketch of the related issues of legal sources, validity, and applicability, an elucidation is proposed, discussing the classical distinction between formal, material, and axiological hierarchy. Relying on a speech acts philosophical vocabulary, an analysis of these instances of normative hierarchy is shaped. A more general distinction between normative hierarchies *stricto sensu* (material and axiological hierarchy) and *lato sensu* (formal hierarchy) is proposed and the idea that a merely scalar difference features material and axiological hierarchies is held. Relying on this conceptual apparatus, the concept of normative hierarchy *stricto sensu* is considered as belonging to the practice of legal reasoning and frequently at work also in pluralistic contexts. Criticism risen by scholars is limited to the concept of material hierarchy only. In order to support this thesis, in section 3. the proposed disentanglement is considered “in action”. Relying on the heuristic value of conditionals, a sketch of arguments in which different instances of the concept of normative hierarchy are employed to support one another’s is drawn. Finally, some of these abstract conditional arguments are examined in the context of constitutional argumentation. In particular, two cases from the Italian Constitutional Court case-law (decisions 1146/1988 and 10/2010) and the European Court of Justice’s *Kadi* case, are examined. As a result, the analysis will show that hierarchical reasoning is recurring also in the context of pluralism.

Table of contents

0. Introduction

The question enquired in this essay is the notion of normative hierarchy and its role in legal argumentation. The idea of "hierarchy" is widespread in legal theory. Probably, the most well-known picture of law as a hierarchical structure can be found in Kelsen. In his understanding of legal systems, Kelsen claims that each and every legal norm is part of a hierarchical structure of norms and authorities. E.g. the Basic Norm (N^1) authorizes the Constituent Assembly (A^1) to enact the (first) Constitution (N^2); the Constitution delegates the Parliament (A^2) to define primary laws (N^3) and those will be applied by judges or administrative authorities (A^3), and so on. We could call this description of how a legal system works the "pyramid" model.[1] This representation entails some ultimate criteria of validity in order to know whether or not a specific norm N^1 actually is part of the system. In Kelsen's understanding, we shall look at the "basic norm", Hart's "rule of recognition" has a similar function:[2] in both cases, the leading idea is that it is possible to assess whether a rule is valid and binding according to a certain *ultimate* criterion of validity. That *this* criterion is binding requires no further justification and cannot be challenged, since we are on the *top* of the pyramid.

In recent years, the idea that legal systems are intrinsically hierarchical has been challenged several times. Criticism seems to be mainly based on the idea that contemporary legal systems *interact* in non hierarchical ways. Authorities, especially judges, belonging to more than one legal system apply rules coming from different legal systems, identified by means of different ultimate criteria of validity. In case of conflict, they can apply rules coming from one system or another, but this will not affect the ultimate criterion of validity of the "defeated" system. For example, if a German judge applies EU law, even in case of conflict with German law, dis-application of German law is not going to affect the supreme German validity criteria. German law is *not* valid because it is a lower level of the EU pyramid, German law is grounded on its own validity criteria, such as French, Italian, Spanish, EU law, and so on. Therefore, according to criticism, we live in an era of pluralism and interaction, and the idea of normative hierarchy is no more a good description of how legal systems actually work.

1 Kelsen, 1945, 124 and 1967, 221-278 and in general chapter V. See also Bobbio, 1960, 184.
2 See Raz, 2009, 91; Waldron, 2009, 333 ff.

Instead, we should describe this many-sided context by means of an alternative vocabulary, employing concepts such as “heterarchy”, “interaction” or “net”.

In this work, I will try to show that although this narrative has some good points, it is misleading when arguing that contemporary legal systems cannot be explained in hierarchical way.

First of all, some of the leading works arguing for non hierarchical models will be examined. The reasons provided to reject hierarchical accounts of legal systems will be analysed.

Secondly, an account of what can be considered a better understanding of “normative hierarchy” will be provided. I will claim that “hierarchy” is an ambiguous predicate and that it shall be disentangled in order to be properly used. Relying on a well-known model, three meanings of “normative hierarchy” (the formal, the material, and the axiological one) will be specified. Moreover, these notions will be connected with some crucial concepts in legal theory: “validity” and “applicability”, “norm” and “source”.

Step three will be to propose further elucidation of the concept of normative hierarchy, adding some details to the previously accepted model and specifying three points that are usually neglected in the literature. Using the notions of “predication” and “presupposition” coming from speech acts theory, I will try to show that (1.) a deeper distinction shall be drawn between normative hierarchy *lato sensu* and *stricto sensu*, (2.) that only material and axiological hierarchy are normative hierarchies *stricto sensu*, (3.) that distinction between them is only a quantitative, not a qualitative one.

Within this theoretical framework, it will be then claimed that phenomena that non-hierarchical models try to explain, actually *are* hierarchical, according to this understanding. It will be claimed that non hierarchical models are wrong when they do not distinguish different meanings of normative hierarchy and that this defect should be amended. In particular, non hierarchical models lack the notion of axiological hierarchy, only *focus* on a special case of a broader category, and therefore point out misleading statements about the non hierarchical nature of legal systems.

Later, the concept of normative hierarchy, as disentangled, will be examined “in action”. Phenomena we are trying to explain are not such things as material objects, but argumentative practices. Therefore, definitions of “argumentation” and “argumentative role” will be provided and show how the discussed notions combine each other in legal reasoning.

In particular, focus will be on the notion of “axiological hierarchy”, the one that non-hierarchical models often neglect. A set of *type-arguments* involving axiological hierarchy will be provided, considering what happens in simple arguments in which axiological hierarchy belongs to the stated or unstated premises that justify other hierarchies. The basic *modus ponens* scheme will be employed.

Finally, once this typology has been set, a review of three cases in which constitutional courts employ this kind of argumentative schemes in their reasoning, often when dealing with relations between legal systems, will be provided. Cases 1146/1988 and 10/2010 by the Italian Constitutional Court and the *Kadi* case by the European Court of Justice will be considered.

This will show that the way in which we think about interaction between legal systems actually *is* hierarchical, despite criticism toward this notion coming from recent literature.

1. Normative Hierarchy and its Enemies

In this section a review of recent approaches denying the hierarchical nature of legal systems will be provided. I will try to show the reasons why prominent legal and constitutional theorists claim that legal systems can no more be described as being in hierarchical relations. A common, although simplified position, will be stressed.

In recent years, hierarchical view of legal systems has been questioned and new pictures proposed, such as the "net".[3] Criticism lies mainly on the difficulties that the pyramidal view faces in order to explain contemporary, complex legal systems.[4] Legal systems where different levels of sources interact, like in the case of the European Union, are good examples in this sense.[5]

Although different among each other, critiques towards the notion of "hierarchy" seem to consider it as an outdated conceptual tool, necessarily linked to the State monopoly in production of legal rules. In detail, criticism against pyramidal pictures of law seems to point out a specific claim: our idea of legal norms as belonging to a single structure of rules all part of a *single* legal order with a "basic" rule on top, is misleading. That is a "mythical" understanding of law, strictly linked to legal positivism, that took over the field after the French Revolution. Legal world before the Revolution was a deeply pluralistic one: the old *ius commune* from the Roman tradition, together with local customs, decisions from the Parliaments (that at the beginning were adjudication institutions, apart from England), corporative rules differently binding depending on different *status* positions, all of this represented a legal apparatus endowed with many sources.[6]

The landscape changed in late XVIII century: the whole legal production, at least in the civil law tradition, was reduced to primary law, and the *droit* collapsed on the *loi*. This meant a complete transfer of power from the various corporations, associations, local powers (landlords, judges, juristic opinions, and so on) to the central power of the Sovereign. Sovereign could be an illuminate monarch or a Parliament, but in both cases its rulings, and its rulings only, could be considered as sources of law. This oversimplification led to the idea that law is exclusively produced inside national States, by means of norms reducible to the will of the Sovereign. Judges and scholars were banished from their

3 E.g. Ost – van de Kerchove, 2002.
4 See Pino, 2011c.
5 See again Itzcovich, 2012, 377-382. See also Dickson, 2008.
6 For an historical view see Grossi, 2007.

previous role of sources: judges merely had to apply the content of previous law, to which they were subordinate, and no power at all was recognised to the opinions of legal scholars. With the later add of Constitutions as binding sources, the pyramid of authorities and norms described by Kelsen was completed. And, of course, the relations between authorities and norms were strictly hierarchical.

But now – criticism against the idea of hierarchy argues – this "mythical" and misleading view is over. A new era of pluralism in law is rising, showing how artificial the hierarchical positivist view was. Relations between rules and legal orders cannot be in any way reduced to the picture of the pyramid, where all law has *one* common, ultimate source on the top from which power derives. Here the picture of law as a "net" comes to substitute the old one: no more monist hierarchy and supremacy between authorities and norms, but only pluralistic dialogue and horizontal links.

Here we find some interesting examples of this theoretical attitude.

1.2. *Criticism against "hierarchical" explanations of legal systems*

A) MacCormick[7] considers relations between legal systems in Europe after the Maastricht Treaty. "This interlocking" he argues "poses a profound challenge to our understanding of law and legal system".[8] This happens because in the European context different authorities recognise EU norms' by means of different validity criteria. National authorities recognise them in the light of National constitutional rules empowering EU institutions, while EU authorities accept the very same conclusion (namely, the proposition "EU norms are valid law") in the light of the Treaties. In his pluralistic understanding of law, a legal system is a *species* of the *genus* "institutional normative order". Establishment and empowerment of authorities "constitutes" a new normative order by means of institutional acts. But of course, we can say that an act is institutional only in the light of certain rules that will tell us whether their execution was correct or not. To avoid *regressus ad infinitum* we need some ultimate empowering rules, that MacCormick considers to be conventional or customary.[9] A way to conceptualize European context is to say that each authority claims its own ultimate empowering rules, i.e. its own ultimate criteria of validity to be the "really" ultimate ones. Therefore, validity of "other" norms will depend on "internal" recognition. That is what authorities like

7 MacCormick, 1999. See also *Id*., 1993.
8 *Ivi*, 102.
9 *Ivi*, 102.

Constitutional Courts actually do when recognising EU law validity in the light of internal constitutional rules. In the end, they are modifying the "rule of recognition" adding a new criterion of validity, i.e. they are changing the "judicial practice of acknowledging a common rank of criteria of recognition, and treating as obligatory the judicial implementation of norms".[10] So, validity and supremacy of EU law is ensured by National Constitutions according to National Courts, and by the Treaties themselves according to EU Courts. But "supremacy" – MacCormick claims – is not "hierarchy": there is no need for National Parliaments to amend Constitutions so to subordinate them to EU law or for Constitutional Courts to interpret the Constitutions as if accession to the Union required complete subordination.[11] That is, there is no need to change the rule of recognition adding a criterion like: "whatever the EU institutions decide according to EU *iter legis* is law, no matter what the Constitution declares". "For that would amount to say that the EC-validity outranked the whole constitution among the criteria of validity" and that would be "a manifestly absurd and unacceptable interpretation".[12] Why? Because that would amount to say that Member States actually are sub-systems of the EU system. This would leave unexplained some widespread intuitions, namely that Members of the Council of Ministers are chosen according to National procedures and that Constitutional amendment for the Union still remains a Treaty revision-based procedure whose rules are decided by the Member States. It is rather the case, MacCormick argues, that each and every system is "supreme" in "its own context and over the relevant range of topics".[13] ECJ's power to interpret its own rules of competence is only an "interpretive, as distinct from a norm-creating, competence-competence". And the same is true for national authorities "in each system".

One could wonder how can possibly be true that *at the same time* National Constitutional Courts interpret their own Constitutions rules on relations with external legal orders, and therefore "interpret the interaction of EC law with higher level norms of validity in the given legal system",[14] *and* that "if the Community has to be a community of states interacting on equal terms, whatever answer is given to the question of the validity-ranking of EC law for one state system, the same will indeed have to hold good for every other".[15] But that "asymmetry question" would not be the point. The point is that

[10] *Ivi*, 115.
[11] *Ivi*, 116.
[12] *Ivi*, 116.
[13] *Ivi*, 117.
[14] *Ivi*, 118.
[15] *Ivi*, 116.

from the lack of one single validity criterion[16], i.e. the *systematic* dominance of a set of criteria over another, MacCormick derives the inadequacy of an explanation based on the concept of hierarchy:

> So relations between states *inter se* and between states and community are interactive rather than hierarchical. The legal systems of member-states and their common legal system of EC law are distinct but interacting systems of law, and hierarchical relationships of validity within criteria of validity proper to distinct systems do not add up to any sort of all-purpose superiority of one system over another.

The core idea seems to be that there is no reason to accept the alternative that a system is either superior or inferior to another depending on which system is able to prescribe the supreme validity criteria. It is still possible that the two systems "interact" if none is able to impose ultimate criteria, and this would not be a hierarchical scenario according to MacCormick.
It should be noticed that even if we accept the picture of two systems claiming at the same time authority on supreme validity criteria, it is hard to understand why this should not be a hierarchical scenario. Quoting Giudice and Culver[17] on this point:

> if the highest decision-making authorities are each claiming supremacy to interpret the relation between member-state law and European Community law, what MacCormick claims are interacting systems look more like two hierarchical systems talking past one another.

In other words, the fact that no criterion of validity is supreme, i.e. systematically superior to the others, does not mean that what MacCormick calls "interaction" is not a hierarchical phenomenon.

B) Nico Krisch expresses a similar position talking about the "open architecture" of the European Human Rights Law. Commenting the German case *Gorüglü*,[18] in which the German Constitutional

[16] Namely, the context of EC and Member States legal systems.
[17] Culver – Giudice, 2010, 70. For further criticism also see Loughlin, 2014, 14 – 19. See also Dickson, 2008, 12.
[18] Bundesverfassungsgericht, Judgment of 14 October 2004, 2 BvR 1481/04. English translation in http://www.bverfg.de/entschei dungen/rs20041014_2bvr148104en.html.

Court holds its internal judges not to apply the European Convention on Human Rights if incompatible with certain central elements of German law, Krisch claims that there is no gain in describing the relations between the ECHR and National law in terms either of different legal orders, or of "an integrated whole neatly organised according to rules of hierarchy and a clear distribution of tasks".[19] A correct understanding of current interactions between legal systems is the "pluralistic" model: "relationships of the constituent parts are governed not by legal rules but primarily by politics, often judicial politics; where we find heterarchy, not hierarchy".[20] Krisch underlines the lack of ultimate rules of validity too. He is particularly careful in showing also the major weaknesses of this idea: Krisch rightly points out that lacking some agreed ultimate criteria of validity, every authority will consider its own criteria to be supreme. *Gorüglü* is a perfect example under this point of view. Therefore, Krisch underlines the rise of "judicial politics" deriving from legal pluralism and explains how conflictual the competition between leading authorities (especially courts) can be. Krisch lastly argues that although this risk did not become real, at least in the context of the European Human Rights Law, the theoretical possibility shall be considered.
In a similar vein as MacCormick, although with a different lexicon, he talks about "heterarchy" as a correct understanding of a context in which several "ultimate" criteria of validity coexists (or no ultimate criterion exists).[21]

C) Also Neil Walker,[22] trying to define *constitutional* pluralism, argues that with the advent of the EU, "constitutional claims" are made by the Union independently from the concomitant claims by the Member States, so that the relations between legal orders are "horizontal" and "heterarchical" rather than "hierarchical".[23] Again, the main idea is that when two or more ultimate criteria of validity are risen by different authorities on the same "validity sphere" (on the same people, in the same time and space), a "vertical" hierarchical conceptualization becomes misleading. It is better to say that several independent normative pretences act together.

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19 Krisch, 2008, 184.
20 *Ivi*, 185.
21 *Ivi*. See also 215-216.
22 Walker, 2002, 27.
23 On Walker's essay see also Loughlin, 2014, 19-21.

D) Criticism proposed by Culver and Giudice[24] is slightly different and more subtle. As seen above commenting MacCormick, they are perfectly aware that describing a scenario in which several authorities claim to be entitled to identify and interpret supreme validity criteria as a non hierarchical one is odd. They argue more radically that the idea that institutions in society must always be structured in hierarchical fashion is misleading. Existence and content of legal systems – in their example, EU law – depends on the "horizontal practice" of several institutions. Interaction, as they define it, "emerges when institutions mutually refer to the same set of laws and recognize each other's spheres of power". So that "institutions can divide normative power within a single legal order despite a lack of convergence on some norms or agreement on a hierarchy of norms". Therefore, it may be the case that some institutions, even some supreme institutions such as constitutional courts, disagree on some central matters, like ultimate validity criteria, but this would only show that there is disagreement *between institutions*. No single legal authority, no matter how important it is (Parliament, Government, Constitutional Court) can shape the "borders" of a legal system *alone*. As long as there is a certain "horizontal" agreement in practice between authorities, there is unity in legal system.

Summing up, relations between institutions can sometimes be conflictual, such as in the cases described by MacCormick, Walker, and Krisch. It would be correct to describe it as a hierarchical scenario in which they fight each other to hold supremacy on who is deciding which validity criterion shall be supreme. Nevertheless, according to Culver and Giudice, a single authority can never determine alone the borders of a legal system. If a large amount of authorities apply the same norms and recognize each other applications as legitimate, there is interaction, not hierarchy.

> Once legality is seen to depend upon non-hierarchical practices of institutions interacting with each other across old state boundaries, talk of separate legal systems seems only more and more distracting.

[24] Culver – Giudice, 2010.

E) The strongest claim against “hierarchical” theories of law is probably risen by Ost and van de Kerchove[25]. Differently from scholars already examined, Ost and van Kerchove seem to rise a claim about legal systems in general, not only to question a certain understanding of relations between them. They start describing the so called “pyramid model”, i.e. what they consider to be the “dominant” understanding of law. The pyramidal concept of law is featured by means of three adjectives: hierarchical (*hiérarchique*), linear (*linéaire*) and treelike (*arborescente*).[26] A legal system is (a.) “hierarchical” in the sense that each and every legal authority or legal norm is in mutual superior – inferior relations with other authorities or norms. It is (b.) “linear” in the sense that those are “one way” relations, so that if authority A^1 is superior to authority A^2, or norm N^1 is superior to N^2, it will always be superior. There is no way, in the context of a certain legal system, this relation can ever be inverted. Finally, a legal system is (c.) “treelike” in the sense that climbing the pyramid, step by step, we will arrive on top and find an ultimate and exclusive source for every norm that is part of the system.

According to Ost and Kerchove, this understanding is grounded on Kelsen's pure theory and is the leading concept of law among scholars and lawyers in general. But it also is a misleading idea. Ost and Kerchove argue that a set of legal phenomena can hardly be reduced to the pyramidal, Kelsenian model. Some weaknesses are rooted in the Kelsenian model from the beginning, others are changes in contemporary legal systems that make the pyramidal model an outdated and nowadays useless picture of legal systems.[27]

Among legal phenomena that the Kelsenian approach cannot explain we find (a) direct application of International law by national institutions, (b) modifications of primary rules on *iter legis* by means of primary laws, so that a rule can actually change its own validity ground, (c) rules that are not enacted according to a certain institutional procedure and competence (case law, general principles of law, customary law), (d) authorities that are sometimes empowered by norms belonging to levels that are not the ones that “created” the authority itself, (e) that law-applying institutions, mainly judges, are the ones that actually decide the relevant interpretation of every single norm, so that describing them as “inferior” to the applied rules is misleading.

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25 See *supra*, Ost, van de Kerchove, 2002. For comments and criticism, see Pfersmann, 2003.
26 *Ivi*, 44.
27 *Ivi*, 45.

As a result, a legal system is not hierarchical or not completely hierarchical, because together with subordination of a rule to another, we can find "cooperation"; it is not linear, because depending on context a norm can be superior or inferior to another in a certain legal system; it is not treelike because several ultimate sources of law can exist together.[28] Summing up, Ost and Kerchove seem to reject the characterization of legal systems as a pyramid since it would entail that somewhere in the system there is a "top" of the pyramid (what we usually call the basic law or the rule of recognition). As an alternative, they propose a "net" model where no rule is ultimate or fundamental (the "point of closure" of the system), but several rules can act as ultimate grounds of legal validity depending on context.[29]

F) Finally, Maduro[30] prefers to stress a normative point: the fact that there is no ultimate validity criterion systematically prevailing over the others is a value for itself. The question of final authority *shall* remain open and "heterarchy" is axiologically superior to hierarchy as a conceptual explanation. That is, the fact that in the context of several constitutional claims (claim for power to judge over ultimate criteria of validity) no single institution is capable to take over the field is something to be considered as axiologically preferable to a monist scenario in which *one* single authority has the last word.

I will not try to discuss claims like Maduro's on the value of leaving open the question of ultimate authority and hierarchy. It was quickly shaped only to the extent it shows the difference between describing a legal phenomenon in terms of hierarchy and *wishing* a non-hierarchical scenario. In the rest of the work, it will be the descriptive power of hierarchical and non-hierarchical pictures that will be scrutinized and compared.

As for the descriptive side of "heterarchical" approaches, all of them, despite differences, seem to share two remarks: (1) legal authorities can be empowered by different sets of validity criteria, all of them claiming to be supreme. The concept of legal system as a single chain of norms and authorities with *one single* criterion empowering authorities on the top was a theoretical stretch. This picture,

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28 *Ivi*, 50.

29 The whole alternative "net" model proposed by Ost and Kerchove will not be discussed here, since what is relevant to the scope of this essay is only their criticism against "hierarchy" (*pars destruens*). It is worth noting, anyway, that the alternative vocabulary proposed is often metaphorical. For similar criticism see again Pfersmann, 2003, 733.

30 Maduro, 2007, 13.

based on the Kelsenian idea of hierarchy, is wrong and misleading, at least looking at contemporary legal systems. (2) We shall finally abandon this inadequate explanation and accept a picture in which plural authorities have their own empowerment, not dependent on others (i.e. have separate validity criteria on their shoulders) and time after time employ different sets of validity criteria in their own deliberations (law-making) and judgements (law-applying). Therefore, no set of validity criteria is firmly superior to the others both in empowering authorities and in guiding decisions.

These approaches may be right in underling a certain attitude to consider different authorities as having autonomous sources of power and legitimacy: these authors duly capture a peculiar kind of uncertainty towards ultimate criteria of validity,[31] a stunningly relevant issue of contemporary legal systems. Nevertheless, even if this understanding is correct, still the claim that "relations between legal orders are not hierarchical" is incorrect. Culver and Giudice explain that, if several institutions are claiming together supreme authority, it would be hard to explain it as a non hierarchical picture. But, as long as in their applications of law authorities usually recognize each other activities as legitimate, there is no need for hierarchical order between institutions and disagreement on ultimate criteria of validity is irrelevant.

I agree with criticism risen by Culver – Giudice towards the idea that "interaction" or "heterarchy" are not hierarchical explanations of legal phenomena. A scenario in which several authorities maintain to be supreme can perfectly be explained as a hierarchical one. But they are wrong when arguing that if authorities recognize each other as legitimate, then their practices are not hierarchical anymore. This idea depends, it will be argued, on a limited understanding of the concept of "normative hierarchy". All considered authors seem to think about hierarchy as a concept that explains relations between legal norms or between authorities. That is why so much pressure is put on the problem of ultimate validity criteria: these criteria will tell us what norms are prevailing (hierarchy of norms) and what institution actually holds supreme power (hierarchy of authorities). *This* picture is seen no more as a correct understanding of how legal systems work, although different authors disagree in part on the reason why it is not a good explanation. Therefore "hierarchical" pictures of law become inadequate and shall be excluded from our theoretical vocabulary.

I will argue that these statements are misleading. Criticism I would like to rise against the idea of refusing a hierarchical view is deeper than simply stressing that a plurality of claims about ultimate

[31] Dolcetti – Ratti, 2011, 310.

criteria of validity is still a fight to establish hierarchy. I will argue that the concept of "normative hierarchy" is wider than it is argued and that it is constantly at work in legal argumentation. Many other legal phenomena are hierarchical, even if there is no "ranking" of legal norms or authorities at stake. Without this concept, our understanding of law would even be poorer and incomplete, and to substitute a vocabulary employing the concept of hierarchy with another which does not would not be a theoretical gain.

I will argue that the concept of "normative hierarchy" shall be clarified in order to preserve its explanatory power. Firstly, (1). it has to be analytically disentangled, since it is frequently used in ambiguous ways, and this ambiguity is the main reason for our perception of "hierarchy" as an outdated concept. A common error of the former approaches is to consider "hierarchy" only as a relation between norms or between authorities. It will be shown that a correct understanding of the concept of normative hierarchy shows us that "hierarchy" is also relevant to describe (a.) interpretive and argumentative criteria and (b) value judgements; secondly, (2). it is necessary to distinguish between hierarchy *stricto sensu* and *lato sensu*, and show that the concept of normative hierarchy *stricto sensu* is at stake in described scenarios; (3.) its nature of argumentative tool has to be duly understood, i.e. it must be clear that its explanatory power mainly depends on the fact that hierarchy has a role in legal argumentation. That is, a deep insight of phenomena involving the use of hierarchy can be achieved only if we understand its role (*rectius*, the role of its different theoretical instances) in premises or consequences of legal arguments.

Therefore, clarifying the *argumentative role* of the *different instances* of hierarchy is the main theoretical purpose of this essay.

One last *caveat*: this is not only a matter of stipulative definitions. The fact that the concept of "hierarchy" here employed is wider than others, and therefore that here we call "hierarchical" some relations that others would not, is not only a "matter of words". Normative hierarchies entail power relations in deciding the superior-inferior connection and the fact that we do not have an adequate concept of "hierarchy" would affect our understanding of many legal phenomena. It can make us blind towards assessments of power that should be understood and duly taken into considerations. I will scrutinize a set of cases from constitutional adjudication in order to show how many interpretive phenomena we risk to misunderstand without a "wide" enough concept of "normative hierarchy".

2. Rethinking Normative Hierarchy: Some Basic Tools

Before we consider directly the concept of hierarchy, it will be useful to introduce a set of distinctions, namely to clarify some basic definitions of the concepts of "source" and "validity". Their deep conceptual connection with "hierarchy" makes a previous understanding of them essential in order to fully develop the enquiry on hierarchy. I will start from "source" and then consider "validity" and "hierarchy".

2.1. *Sources*

The first one is the concept of "legal source". From Kelsen onward,[32] "legal source" is an ambiguous notion, since it can stand for several objects or processes. Following the current debate on this topic, I will provide a taxonomy[33] on the concept of "legal source" distinguishing three meanings: source as a legal text, as a procedure, and as an authority.

2.1.1. *Sources as legal texts*

Firstly, "source" can be used to denote a certain *legal text* (or *legal act*), a document that will be used as the basis for interpretation and application of law.[34] E.g. to know how primary laws are enacted in Italy, I will read articles from 71 to 74 of the Italian Constitution. In this sense, Constitutions, primary laws, administrative acts, judicial decisions, are all sources.

Note immediately that a text is not a "norm": once a legal text has been enacted, it will be necessary to interpret it in order to know its meaning (the norm properly speaking).[35] This interpretive process can be more or less complex and more or less visible but will always be present. E.g. if a national law (the *source*) states that "who drives faster than 60 km/h will be fined", the legally relevant meaning (the *norm*) will be "60 km/h is the speed limit". But on the other side, consider article 59 of the Italian Constitution: it states that the President of the Republic can nominate five perpetual senators. Does it

[32] Kelsen, 1967, 232. See also Wroblewski, 1992, 239.
[33] For this taxonomy see Guastini, 1994, 217-219. See also Schecaira, 2015, 16.
[34] See Wroblewski, 1992, 85.
[35] Schecaira, 2015, 17.

mean that *each* President can nominate five senators (President A nominates five, the same does President B, and President C, and so on) or that the President, *as an institution*, can nominate five senators, so that in each and every composition of the Senate at most five senators are nominated by the President?[36] Using Hartian lexicon, while the first one is an "easy case", the second is probably an "hard" one,[37] but in both cases a certain interpretive process is necessary in order to get a norm from a legal act. I will not enter further into this topic but the distinction between *legal texts* as such (documents) and *norms* (their meanings) will be accepted.[38]

2.1.2. *Sources as procedures*

The second meaning of "source" is *procedure*. So, if we say that an administrative act is a legal source, we only mean that a specific set of facts has been performed in a certain way and order. A request for an administrative authorization has been sent, with specific formal requirement, a certain public office scrutinized it, technical opinions are requested to experts, and so on until the last act of the procedure. After all this procedure has been performed by the competent authority in the established way, we have a legal act. In this sense, the procedure is the reason (the source) for the text to exist as a legal act.

The most important conceptual consequence is the distinction between *type-sources* and *token-sources*.[39] To say that, for example, legislation is a source means that a certain *kind* of procedure is considered able to produce legal texts. We talk about primary laws, administrative acts, decisions and so on, as *types*. To say that a *specific* statute is a legal source means that a *single* act deriving from that procedure will be considered as "legal" (token-source). Type-sources are identified through standard sets of facts considered as relevant for each and every member of that type. That is, a type-source is the class of all the acts adopted by means of the standard facts performed by the competent authority in a specific order (procedure).

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36 The same example is used by Canale –Tuzet, 2007, 33.
37 Hart, 1994, 129.
38 See also Pino, 2014, 199-200.
39 Schecaira, 2015, 16, prefers to talk about different "levels of generality", although he makes a similar point.

2.1.3. *Sources as authorities*

The third meaning of “source” is *authority*. We commonly say that the Parliament or the Local Legislatives are sources of law. This third meaning is the most ambiguous one: it is true, for example, that the Parliament is a source of normative acts. But according to several Constitutions it is source of different type-sources: constitutional amendments, primary laws, legislative delegation to the Government, internal Parliamentary regulations, and so on. Therefore, one should pay attention in using “source” in this sense.

In the rest of the work “source” will be referred to the first meaning, while “procedure” and “authority” will be preferred for the other two meanings. This entails a definition of “source” as a set of materials that lawyers, judges, attorneys, and practitioners in general, employ in legal practice.[40] Of course this kind of definition may seem unsound if we consider those norms whose application in law seems disconnected from texts' interpretation, like in the case of general principles of law or customary law. The most appropriate answer is probably that the concept of “source” is an open one: it denotes a set of motives that influence judicial practice, but the strength that sources have is different depending on the specific kind of source.[41] Relying on Ross, sources have different “degree of objectification”, i.e. they “present to the judge an already formulated rule”[42] with different degrees of precision. Legislation is “completely objectivated”, while customary law and case law are only in part objectivated and “reason” (fairness, justice, reasonableness, general principles) is “free”.[43] As long as modern legal systems develop, anyway, the centre of the stage – so to say – is more and more occupied by legislation and, in general, by written texts, while non-written sources, in particular non-authoritative written sources, are pushed to the borders of the net. This happens both for “ethical” reasons (making law clear, ensuring lawmakers’ accountability, restricting the margin of appreciation of law-applying institutions, etc.) and for “functional” reasons (written law ensure the possibility of

40 A similar point in Raz, 2009, 48.

41 A distinct, but similar topic is the difference between must-sources, should- sources, and may-sources, described by Peczenick, 1989, 319-321; alternatively, see Green's distinction between binding and permitted sources (Green, 2009, 19). These taxonomies identify different degrees of bindingness of sources, i.e. how much the fact that a certain source has been considered in interpretation can affect legal decisions. The point made by Ross is slightly different and refers to the degree of “precision” of a source, i.e. how detailed and “settled” it is.

42 Ross, 1974, 78.

43 On general principles see Aarnio, 1984, 398.

knowing law in highly complex legal systems).[44] Thus, the justification of employing "source" to denote written law lies in the fact that written law is the paradigmatic case of what we consider to be law in contemporary legal systems.[45]

2.2. *Validity and Applicability*

"Validity" is a central concept in legal theory and scholars invested a large amount of intellectual energy in order to clarify it. Here it only has a peripheral role, since it is strictly related, but not equal to, the enquired concept of normative hierarchy. Together with "validity" the concept of "applicability" will be discussed here for reasons of symmetry that will become clear later. Both validity and applicability are *relational* concepts. A rule is considered to be valid due to a certain relation with another rule, and the same is true for applicability. Following one of the main disentanglements of the notion of legal validity,[46] two concepts of validity will be identified, formal and material validity.[47]

2.2.1. *Formal validity*

A rule is considered to be formally valid if, and only if, all the norms of change[48] have been correctly considered and applied. That is, all rules about competence[49] and procedure have been identified and respected.[50] E.g. a statute is formally valid if, and only if, the correct authority, e.g. the Parliament, enacted it following the correct procedure (absolute or relative majority, secret or public vote casting, etc).This is the concept of "validity" usually employed by Kelsen.[51]

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44 Kramer, 2007, 113-118.

45 On the role of written materials in shaping legal norms see again Aarnio, 1984.

46 Of course alternative taxonomies are possible. For example, Wroblewski, 1992, uses "systemic validity" to denote both formal and material validity and adds the concepts of "factive validity" (the concrete practical application of law) and "axiological validity" (similar to what is here called "applicability"). The twofold distinction between formal and material validity – nevertheless – probably fits the extent and the scope of this enquiry better than others.

47 See Guastini, 1994, 212 and Pino, 2014, 207-208.

48 Hart, 1994, 95-96.

49 Here I will use "rules on competence" as "rules conferring powers".

50 Note that, in order to do so, first of all we need to interpret rules on identification and interpretation in order to know which rules count as rules of change. Therefore, an interpretive stage is required behind sources. Which criteria have to be followed to identify and interpret rules of change is to be determined according to other rules. Remaining inside Hartian lexicon, a rule of recognition is thus required. See Pino, 2011b, 288-293.

51 See Kelsen, 1945, 113.

Conceptually this relation involves three elements: a set of rules of change, namely rules on competence and procedure, a set of facts, and the final act produced.

Rules of change are actually meta-rules *lato sensu*. A rule is a meta-rule if its "object", i.e. the fact that is ruled, is another rule. E.g. a rule prescribing what is the correct interpretation of another rule is a meta-rule *stricto sensu*, since what is ruled is precisely another rule. But rules on competence and procedure are meta-rules only in a broader sense, since their object is not another rule, but a certain behaviour that "causes" a new rule, i.e. the production of new law by the competent authority. They govern norm-producing behaviours *as such*. More specifically, formal validity is a relation between *legal texts* and *rules.* Therefore, what is formal validity? It is the absence of infringements on procedure or competence in enacting a legal text. If one of these rules has been violated, the legal act is formally invalid.[52] Consequently note that infringements on procedures or competence affect the act as a whole. In other words, since formal validity is ascribed to a legal text as a whole, it is the entire act that is valid or invalid. This will only have indirect consequences on legal norms deriving from that source, since usually an invalid act will be no more considered as a text valuable to be examined in order to know what is the law on a certain topic. Nevertheless, this point shall not to be overvalued: there are cases in which a formally invalid rule can still have a role in legal argumentation. E.g. a legal act of a certain kind, e.g. an administrative act of a specific type A, although formally invalid, can still be used by lawyers and law-applying institutions if enacted following the formal rules that, even if unfit in relation with type A, are capable to justify the production of type B. This amounts to say that formal infringement entails invalidity, but formal invalidity itself is not always sufficient condition for a rule not to be applied. Therefore, according to the definition of "validity" here accepted, it is not true that an "invalid norm" is necessarily an oxymoron, nor that a valid norm has necessarily to be applied.[53]

Another interesting point to underline is the distinction between the various "weights" of texts that will count as legal: the Constitution or a contract are fully binding, but an academic article or *obiter dicta* in judicial decisions are sources in a weaker way.[54] In other words, a text can be employed as a

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52 See again Guastini, 1994, 219.

53 It shall be remembered that important legal theorists would disagree on that. E.g. see Peczenick 1989, 216-217, "an idea of a valid norm that ought not to be observed is like a 'married bachelor' or a 'square circle', that is, inconsistent and self-destroying". Kelsen (1945, 115-117) too seems to consider inconsistent the view that a certain legal order can be made of something different from a set of valid norms, plus a norm whose validity is presupposed.

54 Schecaira, 2015, 24.

source for legal norms, but the reasons why this happens can be various. The fact that a text was enacted following certain procedures by the competent authorities (formal validity) is of course a reason to consider it a legal source. But texts that are not enacted by legal authorities can easily count as sources of norms, or of interpretive and argumentative methodologies in legal reasoning, while texts that are enacted in a formally valid way can sometimes be considered as unable to express norms. For the first case think about the role of scholars' opinions in legal systems – civil law systems, for example – that do not recognize any binding force to these texts. On the other side, it can happen that legal texts regularly enacted are considered unable to express any legal rule by interprets. The case of Preambles to Constitutions, ordinary law, regulations, and so on is a clear example of this kind of practice.

A formally valid text is thus a source of legal rules, but this does not amount to say that the *only* source of legal norms is a legally valid text. The point of rules on procedure or competence is to give us a legal *reason* to employ those texts as materials to get rules. Therefore, it is probably more accurate to say that formally valid texts are *legal* sources of law, instead of saying that they are sources of law *tout court*. Moreover, depending on the role of non-legal sources, i.e. of sources whose use is not grounded on a secondary rule on competence or procedure, they may also not to be the most important sources in a given legal system.

This also helps us to point out another theoretical problem, relevant both for the currently analysed notion of formal validity and for the following problem of material validity. The different concepts of validity are sometimes[55] distinguished in two main groups: normative[56] and descriptive concepts of validity. According to the former, the concept of validity itself *entails* the fact that valid texts (or, as we will see for material validity, valid rules) *shall* be applied by legal institutions and obeyed by citizens: using Kelsenian lexicon, validity and binding force are coextensive notions.[57] According to the latter, validity only entails that a text (or a rule) is consistent with “superior” rules, but this does not amount to say anything about the fact that it shall have binding force or not. Considering the distinction here recalled between different degrees of bindingness of a source, the notion of validity here accepted is a “weakly normative” concept of validity: that a text or a rule are valid only means

[55] Bulygin, 2007, 56-62.

[56] See the already quoted work by Peczenik and Kelsen, but also Raz, 1979, Sartor, 2008, 219; Celano, 1999.

[57] On the identification between validity and bindingness in Kelsen. For criticism against Kelsenian position, see Ross, 1961.

that there are good normative reasons to think that *prima facie* they will provide reasons for actions,[58] in Razian words, but this *does not entail* in any way that it will provide reasons that will be employed both by norm-applying institutions and by citizens. A valid rule will only count as a rule to be considered in legal reasoning, sometimes to be accepted, some others to be defeated. The same is true for a legal source: it only is a legal text that we can expect will provide us some legal rules. But there could always be other reasons that will make it unable to be actually employed as a source of legal reasons (Preambles' example).[59]

2.2.2. *Material validity*

A rule is considered materially valid if, and only if, it must be, and actually is, consistent with another norm or a set of norms. That is, a rule is materially valid if the meaning of a certain legal text, or part of it, is consistent with the meaning of other texts. Thus, while formal validity is a relation between texts and rules, material validity is a relation between rules. For example, if the rule R^1 states "You shall not deceive" and R^2 states "You shall not lie" we could say that R^2 is valid since it is consistent with R^1.[60]

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[58] Raz, 2009, 66.

[59] Criticism has been risen against this approach to validity. Sartor, 2008, 219-221, for example, rises two claims. (a.) this concept of validity is countered by common-sense, which considers valid rules to be simply binding, not only *prima facie* binding. To defend this point the legal reasoner example is provided : likely, a legal reasoner would rather present a non binding rule as non legal one (non valid) instead of calling it valid and then not applying it. (b.) According to the second objection, it is impossible to find criteria to separate a judgement about a rule's validity from judgements about a rule's bindingness. Both objections can be rejected considering that in legal practice, many rules (or sources) that according to common sense *are* valid, still are not considered as a binding guide for action (citizens) or law-application (institutions). Consider the Preambles case or consider balancing, a reasoning in which two rules are considered to be valid, but only one is binding. Of course this point presupposes a "monist" concept of norms, in which the rule/principle distinction is only a matter of degree. A "dualist" position on this topic (e.g. Alexy, 2000) could answer that balancing is not a confrontation between two rules and that the only rule at stake is the result of balancing, therefore a valid rule, so that balancing example is not a counterexample of the claim that there cannot be valid, but not binding, rules. This point cannot be fully developed here, but I believe that there are strong reasons to consider the rule/principles dichotomy as a matter of degree and that, therefore, principle balancing *is* a confrontation between two rules, although featured by a very high level of generality and abstractness. Therefore, the principle "losing" in balance actually is a valid, but not binding rule. Objection (b.) can be countered too this way. Pratictioners are perfectly capable to judge whether a certain procedure has been duly followed (formal validity) or whether a rule is consistent with superior rules (material validity), *and then* find reasons not to consider it binding. E.g. because the source, although valid, expresses no normative meaning (Preambles case). Legal practice shows that it is possible to judge the two (validity and bindingness) separately. Therefore, I think that criticism against this concept of validity – although duly considered – can be overcome.

[60] Note that both formal and material validity can be sufficient condition of invalidity. See Guastini, 1994, 213.

Obviously the problem now is: why should we consider R^2 consistent with R^1 and not the other way around? Here it is clear that validity relations are *hierarchical* relations: R^2 must be adequate to R^1, not the opposite, since there is a certain asymmetry deriving from the different "relevance" of the two rules. This point will be treated in 2.3.

Also remember that even if material validity is a relation between rules, it can also be the case that *all* possible meanings of a legal text are considered inconsistent with a rule R^2, so that the text *itself* can be declared invalid. Note that "all possible meanings" refers to all meanings that the interpret considers possible. For example, suppose that the Italian Parliament states that a certain economic treatment is due to the King of Italy. Since Italy is a Republic, this text will be for sure considered invalid. But now suppose that the very same act was approved in 1916, when the country was a Kingdom, and is reviewed by the Constitutional Court *today*, in 2016. The interpret (the Court) could consider the act "valid" interpreting the word "King" as a *species* of the *genus* "Head of State", so that there actually is an *analogon* in contemporary Italy, the President of the Republic, and maybe save the statute by means of *a simili* argument.[61] This shows that material validity is deeply interpretation-dependant and that what is the meaning of a legal text (a norm) depends on the set of interpretive criteria and procedures that are considered appropriate in specific legal contexts.[62]

Exactly as a formally invalid rule can still be applied, a materially invalid one could still be applied. Suppose, for example, a legal order in which only the Supreme Court can declare material invalidity of a rule. As long as the Supreme Court has not decided on that yet, we shall admit that other law-applying institutions have to apply an invalid rule. The only way to avoid this consequence would be to stipulate – as Kelsen[63] does – that it is the decision of the Court to *cause* the invalidity, and not the other way around, namely that invalidity is the *reason* why the rule is declared invalid.

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61 This is exactly what happens when a Constitutional Court saves an act deciding that it is constitutional *if* interpreted in a certain way (*interpretive decisions*) or if a certain point is *added* (*additional decisions*) or *changed* (*replacement decisions)*.

62 Pino, 2014, 208.

63 Kelsen, 1967, 276-278.

2.2.3. *Applicability*

A rule is applicable if, and only if, its use in normative reasoning is justified.[64] Thus, applicability is the relation between an applicable rule and the founding reasons that justify its use.

More specifically, for a rule to be applied means:

1. to be used in legal reasoning as a premise for decision. E.g. All murders shall be punished / X is a murder / X shall be punished;
2. to be used to justify another premise. E.g.:
   First level: freedom of press shall overcome privacy only if there is a specific public interest / there is a specific interest/ freedom of press shall prevail.
   Second level: legal sources on freedom of press only hallow necessary details to be published / necessary details only shall be published.[65]

Applicability is different from application. A rule can be applied or not, used or not, in normative reasoning: that is a matter of fact.[66] But applicability is a *dispositional* predicate, it regards the *suitability* to be applied. Thus "applicability" is a normative predicate, while "application" is a factual one. Therefore, there shall be *normative reasons* (rules) for a rule to be applied.[67] The reason for a rule to be applied is a criterion of applicability.
A typical example is balance between two principles, *both* valid and legal, in order to find the "right answer" to the case, i.e. which one will be actually applied in the specific case. For example, privacy

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64 *Amplius* Pino, 2011a. Great credit shall be reserved to Pino's analysis in this paragraph. A detailed analysis of the concept of justification can also be found in Wroblewski, 1992, 216 ff.

65 A description of different levels of legal justification in Wróblewsky, 1992, 211 and MacCormick, 1978, chapters II and III.

66 For application see Wroblewski, 1992, 221.

67 Here the enquiry is limited to the so called "external" applicability, i.e. the relation between a rule R^1 and the rule R^2 that authorizes its use in legal reasoning. The so called "internal" applicability refers to the set of all properties and relations that characterize a specific *fact* that justifies the use of a rule. E.g. a rule that punishes murderers can be properly used, i.e. it is internally applicable, if, and only if, somebody caused somebody's death, and did it consciously or negligently. The very same rule is externally applicable if, and only if, there are normative reasons that justify its use as a legal norm, e.g. it is part of the criminal code, the criminal code was approved in the way prescribed by the Constitution, and so on. For the distinction between internal and external applicability see Navarro – Moreso, 2005, 203.

and freedom of press are constitutional rights in many countries, but in many decisions only one can be applied. After balancing, therefore, one will be applicable in the specific case (and likely applied) while the other, although still valid, will not have an immediate application. Of course in other cases the solution could be the opposite.

Another example: if two statutes are conflicting, the judge will use the latest one (*lex posterior*) or the superior one (*lex superior*) or the more specific one (*lex specialis*), depending on the available criteria to solve antinomies.

The result of balance or criteria to solve the antinomies are of course *legal* (normative) criteria, and since they provide us reasons to decide which one is the "correct" answer, which one we should use, they are applicability criteria too. Note that applicability criteria can be normative but *non legal*. Suppose again that freedom of press and privacy concur to solve a case. It may turn out that there is no *legal* reason to prefer one, but the judge considers freedom of press as "winning" for moral reasons. Of course, this would still be a *normative* reason, since morality provides guide for action, but it would belong to a different set of rules than law. This shows that legal applicability criteria can be combined in several ways and their order will depend on meta-criteria (second order criteria) that will hardly be provided *exclusively* by the law. In the end applicability depends on a set of standards that only in part can be controlled by the law. Other criteria and their order will derive from morality, interests of the interpret, "legal culture",[68] political needs, and so on.

The interaction between applicability criteria entails a last distinction to be introduced. Applicability criteria can be *prima facie* or ultimate.[69] A norm can be *prima facie* applicable, but we could later discover that there are reasons not to apply it, e.g. because another rule is more specific (*lex specialis* criterion), or – the other way around – a rule that was not going to be applied is actually applicable, e.g. after argument by analogy.[70]

Lastly, strictly speaking only rules can be applied, since application and applicability refer to inferential use of rules in legal reasoning (see *infra*, 3). Nevertheless, also a source could be indirectly

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[68] Here legal culture denotes a set of both descriptive claims on what the law is and normative ones on how it should be made. These claims shape the way legal actors (judges, lawyers, public servants, etc.) identify sources, interpret and decide cases, chose methodologies for interpretation and argumentation. If a set of statements of this kind is operative in a certain context for a sufficiently long period of time, then we have a legal culture. In a similar vein see Glenn, 2008, 435, who talks about "normative information" to describe what he calls "legal tradition" and Pino, 2011b. See also Wroblewski, 1992, 211 on non legal justification of legal arguments.

[69] Again Pino, 2011a.

[70] MacCormick, 1978, 137.

applied if it is used as the source of norms that will be applied in turn. Usually, a legal source is *prima facie* applicable if it is formally valid, but there still could be reasons not to apply it. For example, although formally valid, part of several legal sources are not considered applicable: consider, for example, preambles to Constitutions or the very same distinction between *ratio decidendi* and *obiter dicta*. The other way around, although formally invalid, some texts are used as applicable sources (see *supra*, 2.2.1).

The three concepts here introduced (formal and material validity, applicability) will be of the greatest importance in the rest of the essay. In particular, they will be necessary to disentangle the concept of normative hierarchy and to show similarities and differences among the various instances of that concept. This is the reason for their analysis in this part of the work.

2.3. *Hierarchy*

As previously stated, the concept of "hierarchy" is an ambiguous one, since it can stand for different possible relations. Its clarification is the key to understand whether claims like the ones we found in MacCormick, Walker, Krisch, Ost and Kerchove, Culver and Giudice (namely that it is not possible to describe a context endowed with more than one claim for ultimate validity in hierarchical way) are correct or not.

In order to clarify it, a threefold taxonomy is proposed here.[71] In this section, this explicative taxonomy will only be exposed. Later, in section 2.4, mutual relations between the different concept of normative hierarchy will be shaped, in order to deepen our knowledge.

[71] Guastini, 1994, 217-219. Guastini uses a slightly different vocabulary ("power hierarchy" for "formal hierarchy" and "source hierarchy" for "material hierarchy"). Furthermore, he adds a fourth type of hierarchy, i.e. "logical hierarchy". "Logical hierarchy" is the relation between rules (whose object is behaviour) and meta-rules *stricto sensu* (whose object is another rule). Therefore, a meta-rule is logically superior to a rule if the former governs the latter's meaning. E.g. a rule (R^1) identifying the binding meaning of a legal text (R^2) is logically superior to R^2. I will not discuss this type here. See also Pino, 2011c.

2.3.1. *Formal hierarchy*

Formal hierarchy is a relation between rules and legal acts. If a legal text T^1 has to be approved following a certain procedure by a competent authority, both provided by a rule of change R^1, then there is a formal hierarchy between the rule R^1 and text T^1. Typical examples are the relation between constitutional rules on *iter legis* and the enacted statutes or procedural rules on how a court shall decide cases. Thus, we have formal hierarchy between rules of change and the object of change.

Formal hierarchy is deeply linked to the concept of formal validity. The same rule R^1 that makes a legal text T^1 formally valid is formally superior to T^1. Therefore, we can identify a conceptual relation between formal validity and hierarchy: formal validity is full respect of all superior rules established to enact, change, or abolish rules (rules of change); formal hierarchy is the relation between rules of change and legal texts enacted. As previously stated (2.2.1), rules of change are meta-rules *lato sensu*, since their object is another rule, and *in this sense* by definition they are on a "superior", secondary level.

Lastly, note that in defining validity we need hierarchy in the *definiens*, while we can define formal hierarchy without the concept of validity.

2.3.2. *Material hierarchy*

Material hierarchy is a relation between (at least) two rules. If a rule R^1 *must* be consistent with another rule R^2 (or a set of rules), or it will be voided, then the latter is superior to the former. Typical examples are the relations between ordinary law and the Constitution or between administrative rulings and ordinary law. Material hierarchy requires a third rule R^3 establishing the relation. Suppose, in fact, that R^1 prohibits labour strikes, while R^2 considers strike as a right. Why should one prefer the former or the latter lacking a third element as hierarchical criterion?

This R^3 criterion can be manifold. One way is to state *expressis verbis* that one rule is superior to another. E.g. art. 360 n. 4 of Italian Code of Civil Procedure states that judicial decisions can be appellate if they violate primary laws. But different methods can be adopted too. For example, there is no clear statement of constitutional supremacy over ordinary law in the Italian Constitution. Nevertheless, one argument to establish constitutional supremacy is to reason this way: since

constitutional change is more complex than ordinary laws' change, we shall consider the Constitution as a superior source. Moreover, as a third method, one could say that a certain source is intuitively supreme and to deprive it of its supremacy would be absurd, irrational or impossible (*argumentum ab absurdo*). This reasoning is familiar to the readers of the famous *Madison v. Marbury* decision.[72] Similar arguments can be found in the *Conseil Constitutionnel*[73] and *Corte Costituzionale*[74] case law:[75] in both cases there is no stated rule identifying hierarchy, it is the interpret that establishes it. This shows us how much material hierarchies are interpret-dependant and, in order to clarify it better, we will examine in detail on one of these cases later.

Material hierarchy is linked to the concept of material validity. The same rule R^1 that makes a rule R^2 materially valid is materially superior to R^2. Therefore, we can identify a conceptual relation between material validity and hierarchy: material validity is full respect of all materially superior rules established by the R^3 rule, no matter what is their content; material hierarchy is the consistency relation between superior and inferior rules. Note that here too if we define validity we need hierarchy in the *definiens*, but the opposite is not true. Thus, seems like that the whole concept of hierarchy is independent from validity.

According to some authors,[76] material validity requires institutional remedies to identify and remove the inferior invalid rule, and this would be a conceptual relation, not simply an empirical one. Each and every R^3 rule stating the superiority of R^2 over R^1 would at the same time identify an institutional mechanism to delete the inferior one. The conceptual explanation is the following: material invalidity is the result of hierarchical relations, thus the inferior norm should be invalid. But invalidity entails removal of the inconsistent rule from the whole legal order and this is possible only *after* an authoritative decision by an institution. The distinction between material invalidity and other normative hierarchies is a crucial issue. We will scrutinize it more in detail later (see 2.4.1).

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72 "The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people to limit a power in its own nature illimitable" , 5 U.S. 137, 177 (1803).

73 See *Décision* 71-44 DC, famous for conferring the value of supreme law to the Constitution Preamble by means of the single adverb *notamment* ("Vu la Constitution, et *notamment* son préambule").

74 See *Sentenza* 1146/1988.

75 On this issue see Troper, 2005.

76 Pino, 2008, 277.

Therefore, the complete definition of material hierarchy becomes: material hierarchy is a consistency relation between superior and inferior rules where the latter are voided through institutional mechanisms, if inconsistent with the former. Consequently, a relation between rules has effects on a source. A rule itself cannot be voided, but it is possible to void the legal act from which the rule derived. That is the reason why material hierarchy is the concept we use to explain the intuitive idea of hierarchy of sources. Statutes, for example, are "inferior" to the Constitution because primary acts are voided if inconsistent with the constitution. That is the relation between type-sources defined by means of rules on *iter legis*, i.e. rules establishing a formal hierarchy, but rules on formal hierarchy are relevant only to the extent they *define* a certain kind of legal act.[77] Hierarchy between sources themselves is established by the rule R^3 according to which a certain source, e.g. primary law, is systematically voided if inconsistent with another source, e.g. the Constitution.

2.3.3. *Axiological hierarchy*

Axiological hierarchy is a relation between (at least) two rules. If a rule R^1 must be preferred to R^2 according to certain criteria, then there is an axiological hierarchy between R^1 and R^2. There is a *value judgment* that makes R^1 or R^2 superior, case by case or in general. So, R^1 is considered more important than R^2, or more adapt to the institutional or constitutional environment, ethically meaningful, coherent with the legal tradition or history of a certain legal system and so on.

Of course, the same relation can occur between sets of rules, identified through different kind of criteria. For example, a catalogue of rights could easily be considered "more important" than other norms, considering the content of the former, although there is no expressed supremacy. Alternatively, consider the relation between general principles of criminal law – e.g. *nullum crimen sine lege*, balance between crime and punishment, and so on – and the single crimes identified by the criminal code (rules): interprets will likely consider the general principles as "superior" to "common" articles of the code, although the source is the same. Another typical example of axiological hierarchy is principle balancing. Suppose again that in a concrete case a judge balances two constitutional rights, such as freedom of press and privacy. Usually it will not be possible to apply the classical criteria to

[77] That is, instead, the concept employed by Kelsen when describing hierarchy of sources, see Kelsen, 1967, chapter V.

solve antinomies (*lex superior, lex posterius* and *lex specialis*).[78] The interpret will decide which norm best "fits" the decision and apply it. That is, he or she will establish which norm deserves priority in the specific case. The other norm will not be considered invalid, such as in the case of material validity, but will be set aside and dis-applied. That is, it will be considered not suitable in the concrete case, but abstractly applicable in other cases.

In other words, it is the specific legal culture that decides what is going to be preferred axiologically, in a way that is independent from the material or formal hierarchies involved.

Axiological hierarchy is deeply linked to the concept of applicability. The axiologically preferred rule is *by definition* applicable and *likely* it will also be applied. When an axiological hierarchy is established, an applicability criterion is therefore identified. Recalling the distinction between *prima facie* and ultimate applicability, it should be clear that an axiological hierarchy can only establish a *prima facie* applicability criterion, but it shall not be deemed in any way to ensure application of the axiologically superior rule.

Since applicability criteria can both become part of positive law and remain in legal culture, also axiological hierarchies can be "seen" in both.[79] For example, interpretive directives[80] like the one that forbids to use argument by analogy in criminal law may become an article of the criminal code itself, but it is easily predictable that if it does not, interprets will develop a similar rule as part of the correct "methodology" in order to interpret criminal law. This applicability criterion ("do not apply a criminal law rule to similar cases") depends on a certain axiological preference (hierarchy) for certainty and predictability in criminal matters, which is widespread in specific legal cultures: it entails significant legal consequences (that somebody will or will not be charged and punished), although is is not always part of positive law.

In sum, axiological preferences have a central role in legal practice, but their action is "deep" and hidden, right on the border of what we consider positive law. By the way, here becomes clear why applicability has been treated together with validity: in general, in the proposed model it is the *analogon* for axiological hierarchy of formal and material validity for formal and material hierarchy.

On the other hand, axiological hierarchy is more weakly linked to the concept of application. While applicability is a disposition, application is matter of fact: it stands for the *fact* that a certain rule has

[78] On criteria to solve antinomies see Bobbio, 1998.
[79] Again Pino, 2011a.
[80] Ross, 1974, 75-76; Wroblewski, 1992, 89.

actually been used in normative reasoning.[81] Thus application and axiological hierarchy are independent concepts. If a rule is applied there is evidence of an axiological hierarchy between suitable rules but there is no necessity for this to be true. Maybe there was just one rule considered applicable. It is only a probabilistic, empirical relation, not a conceptual one.

Last, but not least, the distinction between formal, material, and axiological hierarchy, together with the concept of legal validity previously analysed, hallows us to provide a definition of "validity criteria". A validity criterion is (a.) a rule on competence or procedure, defining which kind of facts shall occur for a legal act to exist[82] or (b.) a rule establishing that in case of antinomy between two rules one shall be voided by the competent authority.

Of course, several interactions with the concept of applicability criteria are possible. Depending on context, a certain criterion will count as a criterion of material validity or as a criterion of applicability. This will depend on the fact that a certain institution has been empowered in order to void the inconsistent rule or not. For example, the criterion "primary law must be consistent with the Constitution" can count as a validity criterion if it is the reason why a court declares statutory law void or as an applicability criteria if the court saves the *very same statute* through the consistent interpretation technique.[83] That a rule is a validity or an applicability criterion depends on the legal culture. Nevertheless, it shall be noted that in both cases a certain kind of hierarchy is preserved by means of this criterion. In the example, in both cases constitutional supremacy is the axiological reason that justifies the interpretive criterion: in the voiding case, it is a material hierarchy that justifies voiding the statute, while in the case of consistent interpretation an axiological hierarchy merely entails application of the consistent interpretation of the rule at stake. The fact that the very same rule can count as a validity or an applicability criterion suggests that a sort of deep resemblance marks out material and axiological hierarchies.

In paragraph 2.4. this point will be stressed in order to deepen the proposed explanation of the concept of normative hierarchy and clarify which kind of legal phenomena can be rightly considered as "hierarchical".

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[81] The concept of application is sometimes referred to single norms, sometimes to the legal system as a whole, see Kelsen, 1945, 29-30. Here the former concept is relevant.

[82] On the nature of formal validity criteria as "sort of definition" criteria see Guastini, 1994, 223-224.

[83] Example from Pino, 2011a, 835.

2.4. *Reshaping the Concept of Normative Hierarchy*

2.4.1. *Predication*

The aim of this paragraph is to deepen the proposed model on the concept of normative hierarchy. The disentanglement shaped in 2.3. is explicative, since it shows that the concept of normative hierarchy is employed to denote different legal phenomena and that these should remain conceptually distinct. Nevertheless, it probably requires some additional remarks, since the model does not explain what kind of relations link the different concepts of normative hierarchy. In other words, it does not clarify why we are entitled to consider all of them as different instances of a common concept.

In order to reach the required explanation, a philosophical vocabulary deriving from the speech acts theory,[84] and to a minor extent from Brandom's inferentialism,[85] will be employed. According to speech acts theory language is a ruled practice, a kind of behaviour ruled by specific norms.[86] Speaking a language means to accomplish certain acts (like asserting, ordering, promising, explaining, and so on) according to certain linguistic rules. Speech acts are functional units of linguistic communication: to decide whether something counts as an act of speech we do not consider its physical features (the use of paper or ink, of smoke signals, etc.), but the role it has in communication (whether for example, certain smoke signals are employed to communicate us the arrival of the enemy army). Therefore, according to speech acts theory, language is part of a more general theory of action, since to communicate is to behave in a certain way. Every single speech act actually is the execution of three single acts: (1) the expression of morphemes and sentences (*enunciative act*), (2) reference to individual terms and predication of general terms (*propositional act*), (3) and execution of a specific linguistic action (*illocutionary act*).[87] For example, the statement "the apple is green" is made of certain words that have sounds and are written in a certain way and constitute a sentence if combined in a certain order (enunciative act), but in another sense it is used to refer to a single object, i.e. an apple, and to predicate a property about it, namely being green (propositional act) and in a third sense

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84 For classical works on speech acts theory see Austin, 1962 and Searle, 1969. On Searlean speech act theory in general see Lepore – van Gulik, 1993. For an account of the relations between legal theory and speech acts theory, see Amselek, 1988.

85 On inferentialism see Brandom, 1994 and *Id*., 2000.

86 See Searle, 1969, chapter 1, 1.4.

87 *Ivi*, 2.1.

we are *asserting* that the apple is green (illocutive act). But *asking* "Is the apple green?", although having a very similar structure and the very same reference and predication, would have a completely different illocutive function, expressing the act of asking instead of stating.

This quick sketch of the very main points of speech acts theory is quite useful in order to conceptualize the problem of what does it mean to ascribe a certain hierarchical position to a legal norm.

Ascribing hierarchy is the predicative component of a propositional act.[88] In particular, it means to establish a predicative relation between two norms. Stating that "there is a hierarchy between N^1 and N^2" is only a derivative way of saying that "N^1 is superior to N^2". Here I follow Searle[89] in considering universal nouns as "greeness, fatherhood, hierarchy" as derivative elements coming from predicates such as "being green, being parent, being superior", and so on. Similarly, "normative hierarchy" derives from the predicate "being normatively superior to".

Moreover, predicates like "being green" are *properties,* i.e. they are ascribed to single objects and inform us that a particular object is part of a specific set, e.g. the class of green objects. I can say that "the apple is green" or that "the book is green" or that "the apple and the book are green", but in any case the sentence "x is green" (Gx) has a meaning only if a single term replaces "x". But the same is not true for "hierarchy": when we say that "x is superior to y" we need *two* single terms, instead of one, i.e. we have a *relation*. "Hierarchy" is more similar to "fatherhood" than to "greeness" since "x is father of y" requires two singular terms.[90] Therefore, according to our linguistic intuitions "hierarchy" is a relation. Depending on the kind of normative hierarchy we are dealing with, they will be relations of power conferral (formal hierarchy) or relations of consistency (material and axiological hierarchy). It is worth noting that material and axiological hierarchy belong to the same kind of relation (consistency between norms).

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88 *Ivi*, 5.6. For a detailed distinction between singular terms and predicates, see Brandom, 2000, paragraphs 1 and 2.

89 Searle, 1969, 5.5.

90 We could of course find other kinds of predication with more than two singular terms required, such as in the case of "being between". E.g. Rome is between Florence and Naples. Here too it would be correct to talk about a relation. Technically speaking, relations are pluriadic predicates, while properties are monoadic ones. Anyway, the explanation of "hierarchy" only requires a diadic predicate.

Another theoretical gain in conceptualizing “hierarchy” as a predicate is the following: speech acts theory provides a set of rules on how to correctly ascribe predicates.[91] Briefly, four rules are provided:

1. Predication has to occur in a statement or a set of statements that can be execution of a speech act;
2. Predication requires reference to single terms;
3. Predication can only be ascribed to types of objects that can be true or false of the predicate P;
4. Ascribing a predicate means to “rise” the problem of truth of P towards the object x;

Rules 1 and 4 are corollary of the general claim that predication is part of a propositional act, that is in turn part of a speech act. Statements have to be structured in a way that makes them viable to be the execution of a speech act (they have to be syntactically consistent with the rules of a certain language, clearly stated, in ordinary conditions of emission and reception, and so on) and they have to ascribe predication according to a certain illocutive force (e.g. one can *state* that “the apple is green”, or *ask* it, or *swear* it, etc). Rules 1 and 4, lastly, require predication to “happen” in the execution of a speech act endowed with a certain illocutive force. That is, when describing a rule as materially or axiologically superior to another or when describing a rule as formally superior to a source, we are executing a certain act. Now, of course ascribing a normative hierarchy can occur together with different illocutive acts. E.g. “the procedure to enact administrative rulings is X” can both be an *order* by the legislator and a *statement* by a scholar. The speech act we are going to focus on is argumentation. We will scrutinize this point in the following paragraph.

According to rule 3, on the other hand, predication can occur only between general terms P and singular terms that can be meaningfully predicated of the object x. Following Searle's example, one can say that an object is green if, and only if, it is a coloured or colourable object. So, it will be possible to say that a book is green, but no number can ever be green.[92]

Lastly, according to rule 2 object x has to be correctly identified in order to make predication successful. E.g. we have to know what is the specific apple that is green in order to state that it

[91] See Searle, 1969, 5.7. More precisely, Searle derives those rules from a previously established set of necessary and sufficient conditions defining “predication”. To the extent this work requires a speech act background, anyway, it will be sufficient to simply work on the norms ruling the act of predication.

[92] Here we are of course focusing on paradigmatic uses of language, not on metaphorical and parasitic ones.

actually is green, or at least we shall provide a defined description precise enough to make it recognisable (e.g. the quasi-spherical object that is on the table, near to the chair, and so on).
Rule 3 prescribes that a predicate is ascribed only to certain *kind* of single terms. In the case of "normative hierarchy", rule 3 marks the difference between formal hierarchy on one side and material and axiological on the other: the former expresses relations between rules of change and certain empirical facts, while the latter relation can only occur between rules.
Rule 2 is the one that gives us a deeper understanding of the issue: ascribing hierarchy requires the object to be clearly identified. While it is somehow easy to know the facts that fulfil rules on competence and procedure in formal hierarchies, correct reference or definite description of the kind of "objects" that occur in material and axiological hierarchies, i.e. norms, is far from being clear. Norms are meanings and in order to be correctly identified they require interpretation of legal sources. For this reason, as we will see later, every normative hierarchy logically requires previous interpretation and, therefore, it is function of interpreters' different opinions.

Let us first have a recap on predication. According to a speech acts analysis of predication, "normative hierarchy" is a general term deriving from the predicate "being (normatively) superior to". Since it requires two singular terms, it actually is a relation, therefore it is used in language to "connect" objects. Of course the relation will be different depending on (1.) the type of hierarchy (formal, material, or axiological) and (2.) on the illocutive force (it can be used to ask about the relation, to order and thus constitute it, to describe it, and so on). This entails that:

1. Stating that a certain normative hierarchical relation exists logically entails a previous interpretive process in order to correctly refer to singular terms. Each and every sentence of the kind "X is normatively superior to Y" is thus function of a previous interpretation.

2. "Hierarchy" is therefore only ascribable to certain kinds of objects, namely sources and norms for formal hierarchy and norms for material and axiological hierarchies. That the object whom we are ascribing superiority actually belongs to the correct type is a *presupposition* for hierarchy to be correctly predicated. This is the very central point of the proposed disentanglement of "normative

hierarchy". The notion of presupposition in law is borrowed from Wroblewski.[93] A certain expression X presupposes Y if, and only if, accepting Y is necessary and sufficient condition of a certain meaning of X in a specific discourse.[94] E.g. "A body is coloured" presupposes "a body has an extension",[95] that means that it is possible, i.e. correct according to the rules that govern the description of a body, to say that something is coloured if something has an extension. Otherwise the question about the possibility to ascribe "coloured" to "p" (Cp) cannot be meaningfully addressed.

Similarly, if R^1 prescribes that p is obligatory (Op) and the contradictory rule R^2 prescribes that it is not obligatory that p (¬Op), and R^1 is inferior to R^2, assessing "Op" is out of the set of acceptable "solutions". That is, the meaning of "normative hierarchy", its inferential role, is simply to tell us how to use certain expressions in speech acts: the function of saying that R^2 is superior to R^1 is to rule out the possibility of "meaningfully"[96] stating that R^1, if inconsistent with R^2, in a specific context (e.g. in the context of judicial decision in a certain legal order). For example, if R^2 ("you shall not lie") is superior to R^1 ("you shall lie"), the possibility of stating that "you shall lie" is out of context. Of course, clashes between two rules can be much more nuanced. Consider, for example, the hypothesis of "you shall not deceive" being the content of R^2: in this case, it would be much less clear that "you shall lie" is out of context, because it is easier to think about cases in which "to lie" could be excused, and therefore it would no more be conflicting with "to deceive". But all of this only amounts to say that antinomy between R^1 and R^2 is a matter of interpretation, opened to debate. Once the antinomy is established, the function of ascribing a certain relation of normative hierarchy remains to clarify that R^1 presupposes R^2 in order to be correctly stated.[97]

The kind of relation that connects two rules in a hierarchical relationship is thus a relation of presupposition. Another way to state this point is the following: judges, lawyers, scholars, all accept that in order to state a certain rule or prescribe it they should respect "superior" rules. This

[93] Wroblewski, 1985, 284.

[94] *Ibidem*.

[95] A similar example in Brandom, 2000, 18.

[96] Of course it still makes sense to claim R^1 in a strictly semantic sense. E.g. if "you shall lie" is the losing norm, it still makes sense to claim it in the general context of a certain language, it still has a meaning in English. Or it may still have a "pragmatic" meaning in other language games, e.g. it may still work as a political claim. But it is ruled out the possibility to apply it correctly as a reason for compliance in legal reasoning, i.e. in arguments made by lawyers, judges, law professors, etc.

[97] A similar point is made by Kelsen, 1945, 161-162, but Kelsen talks about "negation of its existence by juristic cognition", talking about the inferior and inconsistent rule, which seems to entail a quasi-essentialist concept of norm. Here, since the theoretical framework accepted is a "linguistic" one, in which norms are only meanings, it is rather preferable to simply talk about possibility and correctness of employ in speech acts.

presupposition depends – of course – on the widespread belief, *rectius* on the widely accepted rule of legal argumentation,[98] according to which those rules endowed with great relevance, depending on their enacting authority or on their meaning itself,[99] shall prevail. Thus, the kind of presupposition here at stake does not depend on any general semantic property, but only on pragmatic rules typical of legal argumentative practices.

Note that, if we accept Searle's account of predication, there is no reason to suppose that ascribing normative hierarchy means *only* to rule out the possibility *to prescribe* a certain rule. To predicate a general term (H) of a single terms (x) simply "rises the question" of x being part of the class H. But this does not mean necessarily that we are *prescribing* that, for example, since "you shall not deceive" is a superior rule R^2, then "you shall lie" is an invalid rule R^1, i.e. that we cannot *order* that "you shall lie". The illocutive force is not at stake, since the same presupposition would be relevant also to rule out the possibility to *ask* whether you shall lie or to *describe* "you shall lie" as a currently justified rule.[100]

The conceptualization of normative hierarchy as a matter of presupposition in speech acts also amounts to say that *there is no structural distinction between material and axiological hierarchy*, because the kind of relation (hierarchy as presupposition) drawn here can describe both. Both are relations between rules (same object) and both stand for consistency/inconsistency relations. Nor the distinction can be drawn considering their function, because in both material and axiological hierarchy the function of predicating that R^1 is superior to R^2 is to make "meaningless" to state that R^2 (if inconsistent with the former). Therefore, material and axiological hierarchy denote the same kind of relation.

But then, why to put so much pressure on a threefold taxonomy? Because the difference can be drawn at the level of the *intensity* of protection required by a certain axiological hierarchy in a specific legal

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98 Using a lexicon coming from Hartian tradition, it could be pointed out that the distinction between belief about supremacy of axiologically superior rules is a matter of "external" and "internal" of view: among lawyers, this supremacy is not just a "belief", i.e. the idea that something will actually happen, but a *rule.* In other words, lawyers are ready to accept that deviation from the rule "a norm shall be consistent with superior rules" are mistakes. Thus, they deserve justified blame and asks for correction. For the internal point of view see Hart, 1961, chapter 4.

99 Dependence of norms' relevance on authority or on intrinsic value of a rule are the paradigmatic cases of the two "families" of justifications on why rules shall be followed. Kelsen, 1945 expresses the same concept dividing between static and dynamic foundations of norms. A norm shall be followed either because it can be derived from the meaning of another rule (e.g. "you shall not deceive" implies "you shall not lie"), so called "static foundation", or because it is enacted by an empowered authority, "dynamic foundation". Others prefer to talk about "form and substance", e.g. Atiyah – Summers, 1987.

100 On the difference between description and prescription of rules see Kelsen, 1945, 163. Similarly Bulygin, 1982.

culture. In other words, if we want to be sure that a R^2 inconsistent with R^1 will not be used as a reason to decide a case – because the kind of value that R^1 "preserves" is particularly relevant – we will establish a certain authority A^1 that will rule out R^2 *for every* possible case. If we want to ensure systematically that R^2 will not be considered as a possible reason applied by law-applying institutions, then we will empower an institution in order to deprive R^2's source of its role of legal source, so that no future applications of R^2 will occur: this is what we call "voiding". A mere axiological hierarchy would not grant us a similar result, since dis-application of R^2 *could* systematically occur, but that would not depend on an order by a certain authority (the voiding act) and thus on the sense of inappropriate behaviour typically felt when an authority is ignored. Therefore, although this could happen, it would be – so to say – "a grace of fate". Thus, continuous dis-application and voiding of a rule could be difficult to be distinguished empirically, but they are perfectly different conceptually. The structure of reasoning and their function is the same, but the instruments employed to reach the same goal are different. This is why it still makes sense to distinguish between material and axiological hierarchy, and this is why material hierarchies have an absolutely central role in our practices, because they ensure an *institutional support* in order to preserve axiologies.

Also note that, since voiding entails institution of an authority which holds a certain power to review, then a formal hierarchy – according to the proposed vocabulary – will occur between the voiding act and the procedure to enact it. This means that the concept of material hierarchy, in order to be explained, requires to employ both the concept of axiological hierarchy and the concept of formal hierarchy.

A last consequence deriving from the claim that there is only a quantitative distinction between material and axiological hierarchy, is that also the coextensive notions of material validity and applicability are only scalar variables. In other words, in both cases we can predicate validity/applicability of a rule if, and only if, it is consistent with superior rules according to a certain criterion that identifies the latter (validity/applicability criterion). If this consistency is "verified", then we assume that the valid/applicable rule can be employed in legal reasoning, although there is no certainty that this will happen. The kind of "verification" we employ to assess whether a rule is materially valid or applicable, is exactly the same for both and the result will be what could be called

"iterability".[101] An applicable/materially valid rule is a rule that "passed an exam" and therefore deserves another step in legal argumentation, deserves to be iterated.

Again, this does not mean that predicating validity or applicability entails predicating binding force: they are *both* dispositional predicates, therefore they just denote a *presumption* of application, that could be won by other reasons. For example, if two legal principles are both materially valid, this does not mean that they will be both employed in the decision of certain case. Through principle balancing we will decide which one will be applied and which one will not. But by predicating material validity of both we are forced to a *surplus* of argumentation (balancing in this case) in order to justify why only one will be applied.[102] Therefore, no identification of validity with binding force is at stake here (hard normative view on validity), but only a concept of validity and applicability as "presumptions" of bindingness (soft normative view on validity).[103] In other words, by ascribing material validity to a rule R^1, i.e. by predicating its consistency with a superior rule R^2, we are simply claiming (a) its applicability in legal reasoning and (b) requiring a *surplus* of argumentation to win the presumption of application.

The difference between the inferential consequences of predicating material validity or mere applicability can be seen when the rule fails its "exam": the former case entails voiding, the latter only entails dis-application. But still validity is a particular kind of applicability: a materially valid rule is a rule whose applicability is based on particularly "strong" reasons, similarly a materially invalid rule is a rule whose application is ensured employing powerful tools (voiding). Thus, the difference mainly lies in the different consequences of the "inferential node".[104] Similarly to the "passed consistency test", in the "failed test" case too if a rule is declared materially invalid, this does *not* mean that it will be always dis-applied: there may be some very marginal cases in which it would still be appropriate to apply an invalid norm. For example, an invalid norm could still be applied to unresolved criminal cases because of the *favor rei* principle. But this would need a *surplus* of argumentation too, required

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[101] The idea that propositions ascribing validity to norms are just "iterated" norms, echoes of the norms themselves, is a Kelsenian idea, see Kelsen, 1945, 163. *Amplius* on this point see Celano, 1999.

[102] The claim here advanced is quite close to Schauer's "presumptive positivism", see Schauer, 1991, 203-204: "my use of 'presumptive' refers generally to the force such that the rule is to be applied unless particularly exigent reasons can be supplied for not applying it […] is only a way of describing a degree of string but overridable degree priority within a normative universe in which conflicting norms might produce mutually exclusive results".

[103] See *supra*, 2.2.1.

[104] For a similar approach, although with a slightly different lexicon see Ross, 1957. On conceptualization of concepts employed by lawyers specifically as inferential nodes see Sartor 2007 and Id. 2008. On concepts as roles in reasoning (inferential roles) see Brandom, 2000, 47-49.

to override the powerful reason in favour of norm dis-application represented by the authoritative voiding act. Of course, this result will be harder to accomplish than to simply re-apply a merely dis-applied rule.

According to the proposed analysis, the criterion to distinguish a material hierarchy from axiological hierarchy seems to lie in the content of the R^3 rule which establishes the relation: if, and only if, it prescribes, explicitly or implicitly, a voiding mechanism, and therefore systematic, reinforced dis-application, then the prescribed relation is a material hierarchy; otherwise, it is simply an axiological one.

An alternative criterion has to be scrutinized. It could be said that what marks the difference between axiological and material hierarchy is a peculiar *reason* employed to justify the specific normative hierarchy. So, given two rules R^1 and R^2, the former is materially superior to the latter if, and only if, the reason that justifies its superiority is that R^1 derives from a source whose type is superior to the type-source of R^2. So, if R^1 derives from primary law and R^2 from and administrative ruling, R^1 is (materially) superior because a certain criterion orders in a hierarchical fashion some classes of acts identified by means of formal requirements (competence/procedure), and according to this criterion primary laws ranks higher than administrative rulings. In all every cases, in which justifications different from this one are risen (e.g. because R^1 is consistent with morality and R^2 is not), we should talk about an axiological hierarchy.

This alternative, apparently viable, still exposes a relevant weakness. Suppose a constitutional rule R^1 safeguarding privacy and a primary law rule R^2 ensuring freedom of press and then suppose a voiding mechanism to favour the superior constitutional rule: that would clearly be a case of material hierarchy. On the other hand, imagine the very same situation *without* a rule R^3 establishing a voiding mechanism, but imagine that, despite this lack, thank to a conventional rule the constitution still enjoys priority over primary law. According to the proposed criterion, in both cases it is the same reason, namely that a certain rule prevails because of a specific “pedigree”, that features the hierarchical relation. There is no way to distinguish the two cases, since both have to be classified as material hierarchies. This example shows us that the pedigree criterion cannot disentangle hierarchical relations that lawyers would commonly consider as different. Therefore, the voiding mechanism

criterion seems to be preferable to distinguish the special case of material hierarchy into the general category of normative hierarchies.

In sum, a hierarchical relation between two rules is *stricto sensu* an axiological relation. It will depend on an applicability criterion and will likely have relevance in legal practice. It will be used to endorse or to rule out employability of the inferior rule as a reason in legal argumentation. When a particularly significant value is at stake a normative hierarchy can be reinforced through the institution of a specific authority, in order to void inferior and inconsistent rules, i.e. to ensure their systematic dis-application. Material hierarchy is, therefore, only a specific case (*species*) of a general concept (*genus*). Reinforcement of an axiological hierarchy can be oriented to safeguard the particular institutional role of a certain authority. So, if our concern is to protect the role of the Parliament as a democratically chosen institution, we will establish authorities that will strike down acts produced by other institutions (say, public administrations), no matter what is their content. This is what we call "hierarchy of sources".

The fact that two sources (or two parts of the same source) will be interpreted so that two rules are inconsistent too, will depend on the legal culture and on the interpretive techniques approved in that culture: systematic interpretation, for example, will make those conflicts less likely, while other techniques, say literal interpretation, will not. Which kind of interpretive method will prevail among pratictioners and law-applying institution will depend too on normative, axiological hierarchies.

Formal hierarchy, on the other side, is a normative hierarchy only *lato sensu*, since it does not occur between two rules, but only between rules and legal texts (that will likely be sources for legal rules, in turn).

2.4.2. *The Concept Reshaped*

How can this disentanglement help us in answering the question about contexts in which several validity criteria claim to be supreme? As we previously saw (*supra* 1.1 – 1.2), a widespread idea in legal thinking is that those contexts are not hierarchical: concepts like "heterarchy" or "net" are employed to substitute the idea of normative hierarchy there. But the reason why this claim is risen is that the considered authors have in their minds the picture of "hierarchy of sources", i.e. what we

called here “material hierarchy” as the paradigmatic case of legal hierarchy. Since a hierarchical ordering of sources needs material validity criteria to be established, the lack of agreement on what is going to count as the supreme criterion of validity creates the illusion that a hierarchical understanding is no more a good conceptualization. But this is a misleading claim. As we saw, the reign of normative hierarchy extends far behind the strict domain of hierarchy of sources. Normative hierarchy belongs to the vocabulary of legal reasoning, and the whole legal argumentation is deeply hierarchical.

So, it is not only that, even lacking some agreed supreme criteria of validity, claims for supremacy still are claims for hierarchy, as Culver and Giudice rightly point out. More radically, the point is that non-hierarchical understanding depends on a limited concept of “normative hierarchy” that only considers cases in which systematic supremacy is ensured by means of voiding procedures. As scrutinized in previous section, this is only a *species* of the wider *genus* of normative hierarchy: the so called hierarchy of sources is only a particularly relevant case of hierarchy between norms. Lack of ultimate validity criteria only means that there is no established hierarchy of sources, but does not mean that practices, especially judicial ones, are not hierarchical. Legal reasoning in heterarchical contexts is still featured by a whole series of deeply hierarchical operations, despite lack of a fixed, unique hierarchy of sources: choosing the “correct” interpretive methodology, interpreting sources consistently with others, ordering non-authoritative institutions considering their “suasion”, are all hierarchical operations.[105] All of them entail comparison and ordering of at least two rules, no matter whether “legal” or non legal ones, and perfectly fit the definition of normative hierarchy. This also applies to the hypothesis of large “horizontal” agreement recognised by Culver and Giudice (see *supra*, 1.2.): widespread agreement among lawyers and law-applying institutions depends on equal or at least compatible[106] judgements about axiological hierarchies. This shared agreements on how to order values, norms, interpretive methodologies, and so on, can of course be called “interaction” if we want, but still lies on a deeply hierarchical reasoning, conceptually necessary to reach the agreed ordering. Therefore, authors claiming that contemporary legal systems are not hierarchical anymore are right only as far as material hierarchy is concerned, but wrong when arguing that contemporary legal systems are not hierarchical in general. Once we disentangled the notion of normative hierarchy

[105] A similar view on the evaluative (axiological) character of these interpretive operations in Pino, 2014, 204-205.

[106] Judgements could be equal, but still have quite different grounds, ready to be revealed if we try to scrutinize the reasons of agreement. See Sunstein, 2007.

and considered the deep analogy between the notions of material and axiological hierarchy, this kind of claim becomes implausible.

3. Normative Hierarchies in Legal Practice

Once an adequate disentanglement of the concept of normative hierarchy has been reached, it is possible to move one step ahead. Considering the notion of normative hierarchy, it was possible to clarify that a relevant number of legal arguments actually are hierarchical and that as a concept, its application goes behind the relatively restricted reign of hierarchy of legal sources.

In this section this intuition will be deepened. In particular, considering the speech acts vocabulary already employed, it will be possible to identify some type-arguments employing the notion of normative hierarchy in legal reasoning. Enquiring the concept of hierarchy in its argumentative applications will make it less abstract and it will be clearer how frequently it is employed by lawyers and judges in particular.

The section will be divided as follows: in 3.1. the notions of “argumentative role” and “argumentative structure” will be quickly defined, as part of a speech act approach to the problem of normative hierarchy. In 3.2. various combinations of the threefold meaning of “normative hierarchy” will be considered. In other words, we will try to scrutinize how one instance of the concept of normative hierarchy can justify another and what consequences derive from it. This model shaped *in abstracto* will be employed *in concreto* in 3.3., where a group of three cases coming from the case-law of the Italian *Consulta* and the European Court of Justice will be discussed. We will try to show that many judicial arguments actually are hierarchical in ways that do not seem to be hierarchical *prima facie*. This is interesting because it shows how hierarchical reasoning is at stake when courts try to establish and reassess powers, competences, and rules' applicability in the context of judicial reasoning.

3.1. *The Concept of Argumentative Role*

Here the concept of argumentative role will be sketched in order to make clearer the nature of the model proposed in section 3.2.

First of all, we have to answer two questions: (a.) what is an argumentative role? and (b.) why should it be a good conceptualization for “hierarchy”?

Here a philosophical vocabulary coming from inferentialism and again from speech acts theory will be employed.

The assumptions that law is a mainly linguistic practice, that its paradigmatic case is argumentation, and that in order to understand a concept such as "normative hierarchy" we must consider its use in argumentation, are made.[107] The function of a concept in argumentation is what here we call "argumentative role".[108]

I will focus on the last two parts of speech acts in order to provide a good theoretical explanation of "hierarchy", propositional and illocutive acts.

What kind of act is argumentation? Generally speaking, argumentation is the speech act in which reasons[109] are provided in order to create agreement on a disagreed or at least questionable issue. The function of argumentation, therefore, is to convince other people about the truth of a certain statement whose truth is not granted. Of course, the possibility of disagreement about the conclusion of the argument is therefore presupposed in argumentation. E.g. if I think that *Manhattan* is a great movie I can provide reasons for this statement to be true (that the filming and music were perfect, that Diane Keaton acted stunningly, and so on). But of course certain concepts involved in the argument will be supposed to simply be out of contest, e.g. the concept of *what is* a film is excluded from discussion when arguing about whether a film is good or not. This does not mean that the concept in exam is necessarily "true" (true in every possible world, so to say), nor that the shared concept of "film" is *in fact* perfectly clear to everybody or uniform, but only that to the extent an argument is about the quality of a movie, the concept of "movie" is not questionable. Of course there could be discussions on what is a movie, and in that case it could be questioned too, but in *that* argument other premises would be presupposed to be true. Therefore, an argument is a speech act in which reasons are provided for a certain conclusion to be considered true. The premises themselves will have to be justified, but only until a certain level of justification, after which "the chain of grounds simply has an end".[110]

Thus, a statement whose *goal* is to create agreement on a questionable proposition is a reason for that to be true. Some reasons that justify a certain conclusion have other reasons on their back, second

[107] For a general view on argumentation in legal practice see Feteris - Kloosterhuis, 2009 and La Torre, 2002.

[108] Brandom, 2000, 10-12.

[109] It should be noticed that the concept of justification here employed deals with the reconstruction of the reasons grounding utterances (context of explanation), not with the actual psychological behaviour (context of discovery), For one of the *loci classici* on this topic see Popper, 1959, 30. For the special role of giving reasons in shaping the content of concepts see Brandom, 2000, 12-15.

[110] Quote form Wittgenstein 1953, §326, see also *Id.*, 1958, 148, and 1969, §§ 110, 357-359.

order reasons so to say. Reasons can thus be subordinate to prove other reasons to be true or be directly devoted to justify a certain conclusion.[111] In any case, relations between reasons represent the so called *argumentative structure*. The place a statement fulfils in an argumentative structure is exactly the *argumentative role* of a statement. Here the point is to explain what is the argumentative role of statements ascribing normative hierarchies in legal argumentation.

The smallest unity of argumentation is called *argument*, and it can mainly be defined as the set of premises employed to justify a certain conclusion and the conclusion itself.[112] This conclusion can be the questioned point or another reason functional to prove the questioned point.

The vertical order of premises justifying a certain conclusion is the explicit form of an argument.[113] For example, consider this famous and very simple structure:

Premise 1: *Every man is mortal*
Premise 2: *Socrates is a man*
Conclusion: *Socrates is mortal*

We could find reasons that justify the statement "every man is mortal", for example the empirical point that until now every man has died someday. That would be a second order reason. It would then be possible to add the new premise above premise one. The structure "premises (1, 2, 3 ... n) + conclusion" is the explicit form of an argument, no matter how complex it can be or how difficult can

[111] On this point see Bearldsay, 1950, and on the distinction between "convergent reasons", i.e. independent reasons for the same conclusion, and "serial reasons", i.e. a chain of inferences in which a reason is at the same time the conclusion of an argument and the premise of another.

[112] This point is not universally shared. Some authors (e.g. Govier, 1987, chapter IV) claim that a single definition of argument is misleading and strictly linked to a formalistic concept of reasoning coming from classical logic. For example, they claim that a definition of arguments as the class of premises of an inference plus the inferred conclusion, cannot provide an account of those arguments in which counter-arguments are examined. This discussion cannot be developed further here. Anyway, in this work a classical definition is accepted, as formulated by Groarke (1999). Groarke claims that arguments always are deductive inferences in which the same value of truth of premises is transferred to the conclusion. *Rectius*, Groarke's deductivism claims that arguments *can* always be reconstructed as deductive inferences. This can both happen making explicit some implicit premises and – in extreme cases – employing the general form "if P (premises) then C (conclusion)". The latter cases will ensure the "logical minimum" of an argument. In many cases this will be quite unsatisfactory, since perspicuous representation of arguments usually aims a "pragmatic optimum", i.e. to make premises explicit in the way that shows the unstated premises that most likely were employed to reach the conclusion. But still, the possibility to employ the "logical minimum" scheme grants that the definition of argument as premises plus conclusion is workable and that cases in which this seems to be unlikely only depends on difficulties in making some unstated premise explicit.

[113] *Amplius* on this topics see Freeley – Steinberg, 2009, chapter 8.

be to structure it. But very frequently arguments are not explicit. They can be redundant, figured, rhetoric, obscure, endowed with words of vague reference or ambiguous meaning.

I will try to make the argumentative structure explicit and to show if and how normative hierarchy is employed in constitutional reasoning. How the predication of hierarchy is used to justify other statements or is itself justified in reasoning, and what kind of consequences this argument has depending on the different relation ascribed. E.g. if formal hierarchy is the consequence of an argument, the result will be a certain statement on the allocation of power to a certain authority, but if formal hierarchy is employed in the premises, then an allocation of power is the reason for a certain consequence (e.g. a source is formally valid).

Concrete examples will be provided later. Now note another point: what is at stake here is mainly to explain the structure of arguments, not to state whether they are correct or not. An argument is a good argument depending both on the truth of its premises and on the validity[114] of the inference. Of course there will be cases in which it will be noted whether (1) the premises are true or not and (2) the inference is valid or not, (3) the whole set of arguments is valid or not (e.g. whether two contradictory statements are both affirmed), but this must be considered as a secondary aim of the work. The main point will be to enquire *how* the predication of hierarchy is actually used in the light of a model (e.g. the threefold hierarchy taxonomy proposed) and what consequences this entails, in particular on the idea that current legal orders are cooperative and non hierarchical.

3.2. *Interactions*

Here we will try to descend from abstraction of theory to concrete application. In 3.3. we will try to analyse a set of three cases in the light of the theoretical framework previously shaped. Although not immediate, the judicial reasoning employed – as we will see – is deeply hierarchical. This will contribute to support the claim that hierarchical reasoning is widely diffused in legal practice.

Before that, an intermediate step in our analysis will be to consider mutual interactions between the three concepts of normative hierarchy previously described. In particular, a *modus ponens* scheme (if

[114] Here “validity” is used in a broad sense. Of course argumentative validity is very different from legal validity examined in the first part of this work, but also in the context of argumentation it shall be pointed out that technically speaking only *deductive* arguments are valid or invalid, while *inductive* arguments are strong or weak. Here I use “valid” to denote both. See Freeley – Steinberg, 2009, chapter 9.

p then q/ p / then q) will be employed and fulfilled with the three kinds of normative hierarchies. This way we will get a set of type-arguments, arguments *in abstracto*, in which the various kinds of normative hierarchies are employed as grounds to support one another's. Particular emphasis and attention should be paid to cases in which axiological hierarchy lies in the antecedent of the first premise, since these are more difficult to recognise as hierarchical, although frequently employed in reasoning.

Thus, I will suppose that each hierarchy is sufficient condition for another to exist (*if*... *then*... statements) and see what conceptually follows. In particular, both cases in which the condition is positive (*if* a *then* b) and the case in which it is negative (*if* a then *not*-b) will be considered.[115] The first set of arguments gives reasons to support a certain statement, therefore as a speech act could be called "justification". The second is focused on providing reasons to deny a statement, thus it will be called "denial".

The theoretical advantage of this kind of combination is that this way we obtain a *typology*. The arguments we will consider are *type-arguments* that is quite likely to find in judicial argumentation. One last *caveat*: here I will consider type-arguments in which the normative hierarchy predicated in the premise is sufficient condition for another. Thus, it is the only reason that supports another's justification or denial. This hypothesis is considered in order to enrich our model with a typology that considers *only* the interactions between the different kinds of hierarchy. Of course, anyway in real arguments the set of reasons given to justify a certain conclusion including hierarchy's predication could be much more complex.[116]

So, a simplified type-argument could be:

if A is *axiologically superior* to B, then A is *materially/formally superior* to B

A is *axiologically superior* to B

therefore, A is *materially/formally superior* to B[117]

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[115] On the heuristic role of conditionals and negations see Brandom, 2000, 60-61 and *amplius* chapter 4.

[116] For a detailed analysis of grounds in legal justification see Wroblewski, 1992.

[117] As already clarified, special attention shall be paid to cases in which axiological hierarchy is in the antecedent (if p), because these cases will hallow us to describe decisions discussed in section 3.3.

Let us first have a brief recap of what has been established, defining out three kinds of normative hierarchy:

i. A rule R^1 is formally superior to a text T^1 if, and only if, (1.) R^1 is a competence or procedural rule and (2.) T^1 is the text whose production is governed;
ii. A rule R^1 is materially superior to a rule R^2 if, and only if, R^2 must be consistent to R^1 and there are institutional mechanisms to void R^2, if inconsistent;
iii. A rule R^1 is axiologically superior to a rule R^2 if, and only if, according to certain normative reasons (moral, legal, etiquette, etc.) R^1 must be preferred to R^2, and R^2 shall be dis-applied if inconsistent;

3.2.1. *Material and axiological hierarchy*

A) It can be the case, and often happens, that material and axiological hierarchy act together.
Axiological hierarchy can be employed to justify a material hierarchy. One rule will be considered materially inferior to another *because* otherwise a certain moral or legal order would be betrayed. And invalidity shall be the relevant remedy. Remember the decision *Madison v. Marbury*: laws *shall* be consistent with the Constitution[118] and a certain authority shall be empowered to check.
This is also a conceptual explanation of how we can have systematic preferences for certain type-source. Material hierarchy derives from a certain belief that specific sources must be preferred to others. In a sense, this is exactly the meaning of the *lex superior* criterion: the ideologically preferred source prevails.[119] For example, ordinary law is superior to administrative rulings because enacted by a democratically elected body, differently form the latter. *Therefore*, because of the axiological priority of democratically enacted rules over non democratically enacted one (value judgement), we shall have institutions in order to check this *supremacy*.
On the other side, an axiological hierarchy could also be used to *deny* that a certain material hierarchy is acceptable. That is, since one rule is preferable to another, then it cannot be the case that the axiologically superior is voided or ignored because of the inferior. This can entail both that what was

[118] See Troper, 2005, 27-29.
[119] See Bobbio, 1998, 96.

previously accepted as a material hierarchy is neutralised and that it is radically overturned. An example of the former hypothesis is the search for "intrinsically" constitutional principles in ordinary law: the common hierarchy between ordinary law and the constitution is this way deprived of its relevance (neutralised) in order not to damage a certain order of values. For the latter consider the case of balancing between constitutional and ordinary principles in which the second prevails: the source that is usually superior is set aside by means of an interpretive operation.

B) Similarly, we could use material hierarchy to justify or deny an axiological preference. That is to say that by definition if a rule is superior to another in law, then it is also superior in other normative orders, e.g. it is morally preferable. As an example, suppose again to balance freedom of press and privacy. Now, imagine that the first is part of the Constitution and the latter is only part of ordinary law. One could say that, since freedom of press is part of the supreme law, then it is *of course* also ethically preferable. But the same would be true if only the former was constitutionally relevant, while the latter was only a moral rule. Thus, legal rules in authoritative decisions would be *always* preferred to other rules – let us say, common or critical morality – actually because of their *legal* or *legally supreme* character. This kind of reasoning "by authority", in which law is the ultimate source of fairness, is not far away from what Bobbio called "hard ideological positivism".[120]

3.2.2. *Formal and axiological hierarchy*

Here the enquiry of possible interactions becomes much harder because of a structural limit: formal hierarchy can only occur between rules (of change) and legal acts and always, *by definition*, it envisages the rule as superior and the act as inferior.

A) One could justify an axiological hierarchy on the ground of formal hierarchy. Thus: if there is formal hierarchy, then the rules of change (formally superior) are "more relevant" (axiologically superior) than the enacted rule. That is, all rules possibly deriving from a legal act are less *relevant,* e.g. under the ethical point of view, than the rules used to enact it, *no matter what is their content*. This hypothesis explains preferences for rules on *how* to enact law, more than to their content. This

[120] Bobbio, 1979, 268-277.

kind of preference for secondary rules and in general a certain emphasis on the role of procedural values, is broadly ascribable to what we are used to call the formal meaning of *rule of law*.[121]
Note that the "rule of law", or more precisely part of this concept, could also be explained in a weaker sense: if formal hierarchy is the base to *deny* axiological hierarchy (if formal hierarchy, then no axiological hierarchy), we shall say that the enacted rule cannot be *more* relevant (important, ethically preferable, etc.) than the relevant rules of change, but it can be *equally* important. I will call it the *soft* rule of law, in comparison with the *hard* one in which the rules of change are preferred in principle.

B) On the other side, one could ground formal hierarchy on axiological hierarchy. Since a certain rule is considered more important than another, then the source of the former shall be a text enacted respecting the relevant rules of change. Here we see an example of fallacy: that something *ought to* be, according to our value judgements, does not mean that something actually *is*. E.g. if a rule is consistent with our moral intuitions, in comparison with "unjust" ones, this does not mean necessarily that it is a *legal* rule. This happens because a fact, *viz* that rules of change have been respected, is derived from a normative statement. But it is not hard to understand that one could be tempted to say that if it is moral, then it *shall* be part, for example, of divine law since divine law is fair by definition. We can consider this[122] as an explanation of the natural law assertion that only fair rules come from God, and that they are not fair because they come from God, but that *since* they are fair and rational, *for this reason* they are God's wills and therefore legal.[123]
But one could also ground the *denial* of formal hierarchy on axiological reasons: since a certain rule is more important than another, it *cannot* be the case that the inferior one governs the enactment and change of the superior. An example is the exclusive jurisdiction on criminal law cases: since the guarantees for the charged are *so* relevant and since it would be too risky to assign the decision to a democratically elected body, or directly to the people, then it cannot be the case the decision is ruled by other authorities and with other procedures than the ones ensured by the courts. In general, this explains what in civil law countries is called the *reserved* source.

[121] See for example Waldron, 2010, who pays much attention to procedural values in judicial adjudication and Raz, 2009, for a more general account.
[122] Axiological hierarchy can also be the ground for formal hierarchy in a different sense: to choose a certain procedure always entails, in some way, a value judgement. For example, allowing a decision on crimes only after evidences have been examined and discussed *both* by the prosecutor *and* by the charged, is a civil rights-oriented procedure.
[123] E.g. Aquinas, 1265-1273, 1, q. 21, a 1: "It is impossible for God to will anything but what His wisdom approves. This is, as it were, His law and justice in accordance with which His will is right and just".

3.2.3. *Formal and material hierarchy*

Lastly, one could ground material hierarchy on formal hierarchy or the other way around.

A) In the first case, formal hierarchy is a condition that entails material hierarchy. Thus, if one rule defines the enactment of another, the latter *must* be consistent with the first or voided. This is a way to conceptualize the problem of how to change rules of change: can rules of change be modified by acts they themselves enacted or must the latter be consistent to the former? If formal hierarchy is actually condition of material hierarchy, the answer is that they cannot, because the formally inferior shall also be materially inferior, therefore consistent or voided. This is a conceptual explanation of denial for *legal* changes of rules of change. Therefore, every change of this class of rules would be exercise of constituent power and introduction of a new legal order.[124]
The other way around, if formal hierarchy is the base to *deny* material hierarchy, the same problem is solved in a positive way: a norm ruling the change of another (formally superior), cannot be *also* materially superior, therefore the formally inferior must not be consistent with the formally superior or voided.

B) In the second case, if a rule is materially superior to another, then the materially superior rule shall also provide the rules of change for the inferior one. That is, since a rule R^1 has to be consistent with a rule R^2, or it will be voided, *for this reason* the source of R^1 is R^2. Here we have another fallacious reasoning, but this last combination seems less useful to explain opinions in jurisprudence or judicial practices.

[124] E.g. see Ross, 1974, 81-82, who considers the “relexivity” of a rule defining its own way of modification as a logical fallacy.

3.3. *Applying the model*

The theoretical framework shaped in 2. and 3.1-3.2 will now be used to explain cases involving normative hierarchies in constitutional adjudication. Considering the structure of contemporary legal systems, the role of Constitutional and Supreme Courts is the one of final arbiter on competence and procedure, consistency and coherence. If a legal order accepts centralized judicial review,[125] decisions of the superior court will affect both formal and material validity of an act.[126] In some cases, like in the Italian legal order, there also are specific rules on this kind of decisions. For example, art. 134 of the Italian Constitution reserves to the Constitutional Court the power to solve competence conflicts between public authorities (*conflitto di attribuzione tra poteri dello Stato*). This kind of complaint can *only* introduce decisions involving competence conflicts. Therefore, it will be very frequent for the Court – or at least more frequent in comparison with other courts – to define and use the theoretical concepts previously described.

Thus, the reason why we shall look at constitutional reasoning is both that the supreme position of the court makes of it the institutional actor that more likely will deal with the issue of normative hierarchy, at least among judges, and that its decisions will be considered conclusive.

Furthermore, if we accept the idea that material hierarchy requires on a *conceptual* level authoritative decision of superior-inferior rule consistency,[127] we will also have a theoretical reason, not only an empirical one, to look at these judicial decisions, at least for material hierarchy.

Considering the threefold distinction of "normative hierarchy" previously shaped, it is the notion of axiological hierarchy that will likely give us a deeper understanding of how relevant the notion of hierarchy can be in legal reasoning. Therefore, the cases that will be considered are all featured by a common ground: axiological hierarchy is employed as a reason to justify or deny another kind of normative hierarchy. In other words, it is used as a premise in arguments, while another hierarchy is part of the conclusion.

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125 On centralized/decentralized judicial review see Cappelletti, 1970, 1033-1051.
126 On the role of "norm-applying" institutions, Raz, 1990, 132-137
127 See 2.3.2.

3.3.1. *Building material hierarchy: decision 1146/1988*[128]

The first decision is the "easy case" to deal with. Recognition of a hierarchical reasoning in constitutional argumentation will therefore be quite simple in this case. However, it represents a stunningly paradigmatic case of a type-argument based on a hierarchical ordering of norms: after some basic mechanisms of hierarchical reasoning are recognised here, analysis of more complex case will become easier. Decision 1146/1988 is a quite famous and studied one among Italian scholars and has been already cited in this work (see 2.3.2). It will be taken into account in order to test our analysis on a known field before moving to some harsher ones.

In decision 1146/88 (hereafter *Franz* decision) the Constitutional Court is asked to void a regional statute (Region Trentino-Alto Adige) restricting regional MPs' immunity. Mr. Franz, member of the regional House of Representatives, is charged for desecration of the National flag. As a member of regional Legislative, Mr. Franz enjoys guarantees in expressing opinions: the Statute of Region Trentino Alto Adige – similar to a regional constitution – safeguards MPs' opinions by means of a specific immunity (articles 28 and 49). This guarantee could save him from being charged. According to the judge, however, these norms are problematic: a strictly literal interpretation of articles 28 and 49 would limit safeguard to a narrow set of acts strictly functional to the law-making process. This would represent a possible discrimination for regional MPs, since equivalent article of the National Constitution, article 68, endows National MPs with larger immunities. On the other hand – the judge argues – an extensive interpretation of articles 28 and 49, equalizing National and local MPs, would represent a discrimination towards common citizens, who are not endowed with these specific guarantees. Therefore, the judge asks the Court to strike down articles 28 and 49, since they are inconsistent with the general principle of non discrimination (article 3 of the Constitution).

The State Legal Advisory Service, on the other side, stands up for the Regional Statute: according to the Italian hierarchy of sources, regional statutes of the five Special Independent Regions[129] are considered *equal to* the Constitution. Since Trentino-Alto Adige Region is one of the five, its statute is equal to the Constitution as a source. Therefore – the Advisory Service argues – the Court cannot decide the case, since otherwise it would risk to consider inconsistent with the Constitution, and thus

[128] Livingston – Monateri – Parisi, 2015, 63-66.

[129] See Barsotti – Carozza – Cartabia – Simoncini, 2016, 184 and 189 for the ordinary/special Regions distinction.

void, another “part” of the Constitution itself. In other words, the Advisory Service claims for a lack of power of the Court that would leave the case undecided: the Constitutional Court can void acts inconsistent with the Constitution, not the Constitution itself.

Let us stop and look closer at the concepts involved. The *a quo* judge considers the Regional statute inconsistent with the Constitution and asks for it to be voided. This is simply the relation between meanings that shapes what we called material validity: a rule is inferior to another and it is going to be voided if inconsistent with the former.

On the other hand, Advisory Service's argument to reject the challenge is the following: even if the *a quo* judge was right, the Court could not decide antinomies between constitutional norms.[130] This claim – using the conceptual apparatus here employed – can be developed on a twofold path. First of all, if endowed with that power, the Court actually would be in the position to strike down a constitutional rule, but its task is to strike down statutes affecting the Constitution. Therefore, *a contrario* it cannot strike down the Constitution itself. Secondly, it could be the case that R^1 (Regional statute) is inconsistent with R^2 (the Constitution), but there is no reason to *prefer* one of the two, since there is no superior R^3 rule establishing a hierarchy among constitutional norms. In sum, argument against the judicial scrutiny of the regional statute can be conceptualized as a twofold one: *a)* since the Court has the power to strike down primary laws, and primary laws only, then there can be no implicit power to decide the case or, using the lexicon previously employed, in the R^3 rule there is no voiding mechanism conferring a specific competence; *b)* more radically, there is no R^3 rule at all, no criterion to decide whether R^1 (the Constitution) or R^2 (Special Region Statute, a separate part of the Constitution) shall prevail. Argument *a)* denies that a material hierarchy is at stake here, while argument *b)* rejects a normative hierarchy in general.

Only if there were procedural vices this decision would be possible, because the *formally* superior rule would be recognisable by means of its content.[131] That is, if a constitutional norm, say the Trentino Statute, was approved ignoring the relevant competence rule (formal hierarchy infringement), then there could be a Constitutional decision. This would happen because the criterion to recognise which rule is “superior” is *in re* in formal hierarchy (see supra, 2.2.1 and 2.3.1) and because the comparison here would be between a constitutional rule on *iter legis* and a non legal act.

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[130] More precisely, we are comparing two equal type-sources: Special Regional statutes and the Constitution itself.

[131] See *Considerato in diritto*, § 2.1.

The Court answers as follows:[132] there actually are some *supreme* constitutional norms that cannot be affected by other constitutional rules, both in the Constitution itself and in other equal sources. In *Consulta*'s understanding, these "supreme norms" can even climb over rules usually considered as "winning" against common constitutional rules in application, such as the EU law. Article 139, stating that Italy shall be a Republic and that this rule cannot be changed by means of constitutional amendment, would certainly be part of this core of supreme rules, but the rest of it is a set of unstated principles to be discovered. These represent the "essence" of the Italian Constitution.

Let us stop again: the Court just considered two sets of rules as superior to common constitutional sources. On the one side we have a single, stated rule, art. 139, stating that (a.) Head of State shall be elected and (b.) in charge for a defined period. On the other side, we find an undetermined set of unstated rules, the "essential principles". Together, these rules represent the "supreme core" of the Constitution. But this hierarchy – as the Court seems to argue – is simply an axiological one. This means that in case of conflict between the supreme core and other constitutional rules, the former will be superior, but the only thing to do would be to apply the former and dis-apply the latter. Thus, applicability is involved as a consequence, while there is no reason to consider the "defeated" rule as radically invalid and non applicable in the future. So, suppose that the Parliament passes a constitutional amendment prohibiting black people's vote. This would surely conflict with the essential core. Nevertheless, although it would be possible to avoid the application of the rule because inconsistent with equality principle, likely a supreme one, that statute would still remain valid and applicable in the future. The problem here is that the supreme core is *not* the third rule we need to establish a material hierarchy. Only a material hierarchy, not an axiological one, ensures that a rule is actually declared invalid and will not be iterated in the future. This is an essential point if one wants to ensure plain "supremacy" of a source: only institutional mechanisms that allow to void undesired rules can ensure it. Therefore, material hierarchy is needed if we want to be certain that a specific axiological preference is actually respected (see *supra* 2.4.).

The Court seems aware of that. Thus, it states that the *Consulta* shall be competent to decide cases of inconsistency between common constitutional rules and the supreme core. Otherwise, we would embrace the "absurd"[133] conclusion that institutional remedies provided by the Constitution were

[132] *Ivi.*

[133] Note how close this argument is to *Madison vs. Marbury*'s reasoning. See 2.3.2.

insufficient to ensure supreme constitutional values' supremacy. *This* is the complete R³ rule that makes a material hierarchy of a merely axiological one. Somehow, the Court seems to agree with the idea that there is no material hierarchy without authoritative remedies.

In *Franz* the Court considers (a.) that the Constitution has a kernel of untouchable values and (b.) that a watchdog is needed to preserve it. The core of the Constitution has a *stronger* ethical value than the rest of it, *therefore* – for this very reason – the rest of the constitutional norms shall be consistent with it and, if inconsistent, voided.

The validity of this inference could certainly be questioned: the distinction between constitutional core and the rest of the Constitution is purely asserted by the Court. Moreover, some would define the inference from *ought* (supreme constitutional values shall be safeguarded) to *is* (there actually is an institutional mechanism to do so) a case of naturalistic fallacy. We can also discuss whether this interpretive operation is justifiable under the *political* point of view. Of course there are moral reasons behind it, but we cannot underestimate that this way the Court explicitly attributes to itself a new power, namely to strike down constitutional laws when inconsistent with a really vague parameter. We can also discuss whether this is a "correct" way to interpret its mandate as constitutional custodian. Lastly, it would also be interesting to compare this interpretive operation with other similar decisions.[134]

But to the extent this case is relevant to the aims of this work, what is really relevant is that Court's reasoning is actually explained by the material-axiological interaction in which axiological hierarchy justifies a material one. Constitutional reasoning here employed is deeply hierarchical: the whole argument of the Court is about establishing two normative hierarchies, an axiological and a material one and to employ the former as a premise to justify the latter. It also shows how relevant the existence of institutional mechanisms to grant supremacy can be, and how easily institutional actors can develop hierarchical reasoning to strengthen their own position.

The *Franz* case also shows us how even in legal systems where a final point of validity is established, hierarchical reasoning can be fuzzy and unpredictable. A final "point" of validity can guarantee a settled order of material hierarchy, but cannot avoid clashes between different axiological readings of the Constitution. Thus, exactly as a scattered set of ultimate rules on validity cannot grant that legal reasoning will not be hierarchical (see *supra* 2.4), a unique validity rule cannot ensure a linear,

[134] For example, the French and American ones. See 2.3.2.

predictable, consistent, hierarchical ordering of norms. That will always be reshuffled by different interpretations of sources.

Using the framework shaped in 2. it was possible to distinguish the concepts employed in case law (hierarchy, source, and validity) and to identify the judicial operations involved (e.g. the self-attribution of a new competence). Now this exercise will be repeated on other cases, where a similar, although less visible, hierarchical reasoning is at stake.

3.3.2. *Balancing formal hierarchies: decision 10/2010*[135]

Decision 10/2010 is a State *versus* Regions case: the Constitutional Court is competent to decide whether the Central Government or the Regions infringed their competence and intruded upon competences of other levels of government.[136] Regions Piemonte, Liguria and Emilia-Romagna ask the Constitutional Court to void the so called "social card" act (statute 133/2008). In 2008, considering the economic crisis and the risk of price rising on food, energy and other basic utilities, the Italian government enacts a national found to intervene. The found will help low-income families to buy goods and services. All national and local administrations have to collaborate with the central government in order to enforce the statute. Criteria to identify low-income families and to quantify their aid will be established by means of administrative rulings enacted on a central level. In order to enforce this welfare act, the statute empowers central institutions to employ knowledge and resources belonging to every administration, Regional ones included.

The Regions consider this statute damaging their competence on social policies *ex* article 117^4 of the Italian Constitution: those exclusively belong to Regional Legislatives and administrations. According to the Regions, the central government is entitled to institute the found, but has no right to enforce it one sidedly both establishing the criteria to identify the addressees and forcing the Regional administrations to collaborate without any previous agreement. Furthermore, the Regions claim that, once instituted, if the found was considered as constitutionally valid, there would still be no reason to manage it on a central level.

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135 On this decision see also Ruggeri, 2012.

136 See Barsotti – Carozza – Cartabia – Simoncini, 2016, 49-50.

The State Legal Advisory Service argues in defence of the central government with a very simple argument. It claims that there is no violation of competence: the central government did not rule on "social policies" but on a similar yet separate area of article 117, "basic level of benefits relating to civil and social entitlements" (article 117^{2} *m)*.

As for now, it is simply a matter of competence interpretation: the question is whether institution and enforcement of a special welfare act belongs to the Central or to Regional level. Here it comes the Court's argumentation.[137] According to the *Consulta* the Regional complain must be rejected, but the reason why it has to be is surprising.

The *Consulta* does not recognise this competence as a Central one: the statute actually regards social policies, so it *is* part of Regional competences. But the Government enjoys a crucial power to identify the basic levels of benefits that every citizen shall benefit in the whole country. This competence is, using the same vocabulary employed by the Court, a cross-the-board competence. If mere identification of basic levels is not enough to safeguard citizens' rights, the central government *shall* also be in the position to enact every necessary measure to ensure homogeneous enjoyment of benefits. If, in order to achieve this goal, regional competences are damaged, the *restriction of powers must be accepted and tolerated*. That is, Central Government enjoys some implicit powers to guarantee homogeneous benefits to the whole country. If this requires an infringement of Regional competences, this shall be tolerated. In particular, the specific situation requires a restriction of Regional competences because of the deep economic crisis faced in 2008-2009: the particular aim of the statute and the particular economic context justify the restriction.

Let us try to conceptualize the reasoning of the Court. According to article 117^{4} of the Constitution,[138] "social policies" is Regional competence. This competence has been ignored. Employing the lexicon previously shaped, a formal hierarchy has been infringed. So, every rule enacted by a non competent authority should be formally invalid, *rectius* the text this way enacted cannot be considered as a source of law. Nevertheless, there is no invalidity, since – in Courts' opinion – considering article 117^{2}

[137] See *Considerato in diritto*, § 6.3.

[138] Actually the translation of article 117^{4} is: "The Regions have legislative powers in all subject matters that are not expressly covered by State legislation". "Social policies" competence is therefore residual. But the Court itself recognises "social policies" as certainly ruled by this norm in *Considerato in diritto*, § 6.3., recalling its former case-law (cases 124, 168/2009 and 50, 168/2008). For division of competences in the Italian Constitution see Barsotti – Carozza – Cartabia – Simoncini, 2016, 187.

m and articles 2 and 3^2,[139] a "diagonal" competence clause on "essential levels", crossing all the others, belongs to the State. The Court seems to embrace *two* rules on competence: the first one dividing "areas" between State and Regions, the other one working as a *condition* for the former to actually be employed. *If* all fundamental rights in articles 2 and 3^2 are respected, *then* the "ordinary" competence clause works. Otherwise, if respect of fundamental rights is in danger (empirical condition) the ordinary clause is set aside and central State is empowered to adopt all the legislative and administrative rulings necessary for these rights to be respected. The economic crisis is the empirical reason that justifies this process in the specific case.

Thus, the Court structures an unstated and complex rule on competence conferring to the State the needed "implicit powers". This complex clause is structured in order to safeguard certain "basic rights" that are considered as axiologically privileged. That is, the Court presupposes an implicit axiological hierarchy in order to safeguard these rights. Therefore the reasoning is the following: certain basic rights have a special axiological position and their safeguard is needed; since these aims have to be achieved, then the central authority *shall* have the required powers; thus ordinary competence division can be balanced and given up in order to safeguard fundamental rights. But here is the problem with this reasoning: there is no constitutionally stated hierarchy between these articles and the others. A literal reading of article 117 does not justify any supremacy for 117^4. It is a purely axiological evaluation that guides the Court in shaping the unstated competence clause.

On the one side, formal hierarchy is grounded (justified) on axiological hierarchy, since a new competence clause is shaped. On the other, a different formal hierarchy is denied and avoided, as Regions lose their powers in specific emergency circumstances (see *supra* 3.2.2).

This decision is a clear example of hidden hierarchical reasoning: a simple case of centre – periphery power division becomes the battlefield to shape the "borders" of a legal system. One could also say that it is a hierarchy of interpretive criteria that is at stake here: the supremacy of article 117^4 derives from a peculiar preference for systematic interpretation of the Constitution and of its values. So, by embracing a certain theory of interpretation in which systematic interpretation enjoys primacy over

[139] Articles 2 and 3^2 are at the same time two of the vaguest and most relevant constitutional articles. Here the English text: art. 2 "The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled"; art. 3^2 "It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country".

literal interpretation, we are forced to recognise primacy to article 117^4 and therefore to reshape the formal hierarchy too. In both cases, the role of axiological hierarchies in legal reasoning is stunningly relevant: also those rules that could seem safe from any interpretive influence because of their "neutral" function of power conferral, can actually be changed, suspended, or neutralized. Here a formal hierarchy is suspended.

This case also shows that normative hierarchy does not require a voiding process to have a role in legal reasoning. It is the intensity of safeguard required in order to preserve the privileged value that can encourage the interpret to add a voiding power to R^3 rule, as the *Franz* case showed. But this does not happen always: in some cases, systematic sacrifice of the inferior rule does not seem necessary or desirable. In this case, for example, a simple dis-application of the ordinary rule on competence is enough, there is no need to void it in favour of the "special" competence clause. That is the reason why it is simply an axiological hierarchy, not a material one, that grounds the special formal hierarchy. But again, this difference is very thin: no structural difference in reasoning allows us to distinguish this decision from an hypothetical one in which a voiding mechanism is actually employed.

3.3.3. *Neutralizing levels of sources: the Kadi case*

The last case here analysed is one of the most interesting and discussed decisions in recent European Court of Justice's case law: the Kadi case.[140] Decision C-402-414/05 is another example of "deep" hierarchical reasoning. Despite the fact that the Court explicitly rejects to shape relations between EU law and International law in hierarchical fashion, the solution proposed by the Court is indeed hierarchical.

Here it is a brief and simplified description of the case. After 9/11, the UN Security Council enacts resolution 1267 (1999) on the Afghani situation, prescribing economic sanctions against people considered close to terrorist groups. As a consequence, a series of EU statutes is enacted in order to enforce the UN resolution. Mr. Kadi and Al Barakaat International Foundation – with distinct but reunited complaints – challenge internal EU legislation applying the UN resolution, since – as they claim – it violates both their property rights and their rights of defence. The Court of First Instance

[140] On Kadi case, see at least Avbelj, 2014, a series of essays on the Kadi saga.

rejects their claim,[141] considering fundamental rights granted by EU law (property and defence rights) as non relevant norms in the specific case. Acts belonging to International law should be applied as such in the EU, since they belong to a superior level of legal sources. In this sense, the only set of rules applicable in order to scrutinize the restriction of property and defence rights would be *ius cogens*, the untouchable core of International law. Since *ius cogens* is not violated in the examined cases, the complains shall be rejected.

The European Court of Justice (ECJ), as court of appeal, overrules the reasoning of the Court of First Instance. Here the *focus* will be on the final part of the decision (§§ 278 ff.), were the Court answers the question whether UN acts can be scrutinized by the European Court in case of conflict between European rules – on fundamental rights, in particular – and International rules.

The answer given by the Court is positive: it is possible to scrutinize an international act and, if necessary, declare it void or non applicable in the EU, if inconsistent with a certain core of internal rules. The Court argues in this sense on four main grounds (reasons).

The first ground is the "rule of law" argument (§§ 281 and 316): the Community is based on *full* scrutiny of National or EU acts by the European Court of Justice. Thus, each and every act could be subject of ECJ's scrutiny, included acts which simply enforce international rules. Therefore the UN Security Council acts shall be controlled by the Court. Note that this argument is a *petitio principii*: the point under discussion is whether a certain kind of act is under ECJ's control or not, and the reason for a positive answer is that every kind of acts within EU law shall be scrutinized by the Court. An argument in which *petitio principii* occurs is not an invalid one. What is wrong with it is the procedure followed to prove that the conclusion is correct. Thus, it may be true that since every act is under ECJ's scrutiny, the acts at stake are under the same scrutiny too, but the point is exactly to provide reasons to hold the premise "each and every act is under ECJ's scrutiny".

The second ground is the "complete system of remedies" argument (§§ 281 and 316): the Treaties establish a complete system of "remedies and procedures" that allow the Court to review the legality of acts. Here the answer given to the very same question, namely whether the ECJ enjoys the power to scrutinize those act that enforce external rules, is an argument by authority: the Treaties, as a source of rules, empowered the Court to review every kind of act produced by EU or Member States' Institutions. Note that this would limit Court's power to scrutinize acts only to those produced by

[141] See decisions T-315/01 and T-306/91.

internal authorities or to those that, although applying “external” rules, still are formally enacted according to internal rules on competence and procedure. Therefore, the “complete remedies” argument” would not empower the Court to check external acts *directly applied* by EU law-applying institutions. Moreover, this arguments seems to be a *petitio principii* too: although recalling a rule from the Treaties as the basis for its power to review, the Court does not quote which source grounds this norm.

The third ground is the “exclusive jurisdiction” argument (§ 282). Here the Court quotes article 220 EC: this article states that the European Court of Justice’ jurisdiction shall be exclusive.

No matter we agree about this norm as the correct interpretation of article 220 CE or not, what is interesting is that exclusive jurisdiction is considered as a consequence of the “autonomy” of EU law: since EU law shall be autonomous and its allocation of powers, i.e. the exclusive judicial review by the ECJ, cannot be affected, therefore an institution empowered to review every act representing a threat to this allocation, including external ones, shall exist. It is the same reasoning already seen in 1146/1988 case: since a certain axiological hierarchy shall be preserved, we need a material hierarchy (and therefore a certain re-allocation of judicial review power). This is the core argument and it is disclosed as a general one, applicable both to acts produced by EU institutions and to “external” acts. Truly, § 285 claims that “the review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such”, but considering the foundational character conferred by the Court to the autonomy of EU law, it is likely that at least dis-application of international norms directly applicable and conflicting with the internal “supreme” norms would be granted.

The fourth ground is the “human rights” argument (§ 283): the Court shapes the border of the set of rules that cannot be affected both by external and by internal law, adding a set of human rights deriving from constitutional traditions of Member States and from the European Convention on Human Rights. Apart from division of competences established by the Treaties, also those human rights will be part of those rules whose violation will enable the Court to strike down conflicting rules. This point is based on previous case law by the ECJ.

As a consequence of this reasoning, the Court considers its own power to review both internal and external acts as proven (§§285 and 326).

Once established its power to review and to safeguard certain rules, namely competences established by the Treaties and human rights, the Court provides additional arguments to rule out the “UN acts exception”, i.e. the possibility that UN acts deserve a special regime of protection against ECJ's rulings, despite the “constitutional guarantee” of full judicial review by the ECJ (§ 290).

The Court finds no ground in the Treaties to accept this exception, no source for this *lex specialis* rule (§ 300). Moreover, although EU primary law can be sometimes dis-applied (§§ 301-302), this never happens to the “very foundations of the Community legal order” (§ 304), including fundamental rights. Therefore, no exception is specifically reserved to UN Security Council resolutions. Moreover, even if this was true, it would never be the case that the “foundations” of EU law are dis-applied or *a fortiori* voided. Thus, according to the Court, no normative hierarchy, both axiological and material, is possible in which the “core” of EU law is the “weak” part of the couple.

Here it already follows the ultimate conclusion of ECJ's reasoning: there is no hierarchy between EU law, at least its main core, and international public law (§ 305). The Court also provides an additional premise to justify this conclusion: in §§ 306-307 the Court argues that international treaties accepted by the EU are binding for its institutions and Member States. This rule shall be interpreted as strictly applying to EU and National Legislatives in their ordinary legislative action, it does not apply to EU *primary* laws, namely the Treaties (*argumentum a contrario*). This interpretation shall be preferred to an analogical reasoning because of article 300 CE, which empowers the Court to review an international agreement's compatibility with the Treaties (§ 309). Therefore the argument is: since the ECJ enjoys a power to review an international agreement if inconsistent with the Treaties, then an interpretation of EU duty to respect international agreements cannot be too wide. In particular, the duty cannot force law-applying institutions to dis-apply EU primary law. This narrow applicability of international rules is an additional ground to refuse a hierarchical ordering of EU and International law.

It is due noticing how §§ 301-304 are quite similar to the *Consulta* argument from “supreme principles”. In both cases, Courts establish a special core of norms considered “supreme” in hierarchical confrontations, both axiological and material. Courts also establish a power of judicial review as a necessary remedy to grant this primacy. In both cases, therefore, a material hierarchy is grounded on an axiological one. What is different here is that the European Court of Justice also neutralises and deletes a possible relation of subordination between International law and EU law,

employing the same argument. Thus, an axiological hierarchy is employed to justify the *lack* of a material hierarchy. Therefore, in this case the establishment of an axiological hierarchy is functional both to ensure the ECJ a specific power (to review each and every EU norm) and to rule out a normative hierarchy between EU and International law: ECJ's reasoning is twice hierarchical. Moreover, this case is particularly interesting since it shows how hierarchical judicial reasoning works in the context of legal pluralism. Cases *Franz* and 10/2010 are enclosed in a single legal system. Despite the entangled complexity of sources, norms, and interpretive techniques that feature both, lack of "external" source and norms ease the reasoning. In *Kadi*, on the other hand, we face this further reason of complexity.

The European Court denies the subordination of EU law to International law. This seem to counter the "monistic", Kelsenian thesis of hierarchical ordering of legal rules. But, on the other hand, its reasoning builds a material hierarchy in order to tame "external" legal norms and subordinate them to its own check. In other words, remembering our picture of contemporary, pluralistic legal systems as the battlefield of several legal institutions claiming to be custodians of the supreme validity rules, the ECJ seems to act like one of them. This is seems to support the relevance of Culver and Giudice's criticism to MacCormick: it is hard to consider this kind of reasoning as a non-hierarchical one. Moreover, this axiological primacy can also have further implications. Imagine that no material hierarchy was established. Yet, although the Court never claims that, the axiological preference reserved to core of EU norms will make a consistent interpretation of external, applicable legal rules more likely. For example, if a legal text T^1 produced by an external institution is going to be applied in the EU legal system and two norms N^1 and N^2 can be the meaning of T^1, the N that is "closer" to the core of EU law will likely be preferred, according to ECJ's reasoning. Thus, N^1 – say – is preferred and applied as a premise in legal reasoning, while N^2 is dis-applied. "Apply the interpretation that is closer to a specific set of rules, i.e. EU core norms" is the applicability criterion that settles this normative hierarchy, and it derives from the axiological primacy conferred to EU core norms. According to the definition of normative hierarchy shaped here, that would be enough to consider *this* argumentation, *contra* – or maybe *praeter* – Culver and Giudice, as a hierarchical one. No matter how judges share and recognize mutual activities, a reasoning like the former remains hierarchical and it would be valid even if the ECJ had not established a proper material hierarchy in *Kadi* case.

This kind of reasoning provides us a concrete example of the reason why in this essay a strong defence of hierarchical characterization of legal systems has been embraced. The role of normative hierarchies in legal reasoning is widespread and sometimes elusive. A non-hierarchical characterization is misleading: it risks not to focus on superior-inferior relations between norms and values in legal reasoning and not to capture the slight transfers of power that derive from them.

4. Conclusion

In this essay a brief conceptual overview of “normative hierarchy” has been given. Summing up, the whole enquiry allows four main conclusions.

First, the concept of normative hierarchy has a strong explanatory power towards legal phenomena, but only if we disentangle its ambiguity. The rising idea that hierarchical understanding of legal systems is incorrect depends on a misleading picture of what a normative hierarchy is. This lack of perspicuous distinction is twofold: the different meanings of “normative hierarchy” are not enquired and its nature of predicative term in legal reasoning not underlined. Here a threefold taxonomy has be followed to solve the first problem, while a speech act vocabulary and the *modus ponens* scheme of representation of arguments have been employed to amend the second. Maybe it is possible to shape the concept of “hierarchy” in a different, more explicative way, but it still seems quite clear that a *certain* distinction has to be drawn. That is, it may be possible to explain better the very same cases here considered by means of different taxonomies, but an *undifferentiated* concept of “hierarchy” is likely useless or even misleading. Moreover, under the conceptual point of view much of the explanatory power of the model on normative hierarchy comes from the interaction between the proposed meanings of “hierarchy”. Although baroque, it is by virtue of these combinations that cases can be explained.

Secondly, in considered cases the concept of axiological hierarchy is the key to understand the reasoning of the court: in *Franz* the *Consulta* uses it to establish a super-constitutional level of rules (a new level in the pyramid of sources) and confer a new competence to the ultimate judge, in 10/2010 it justifies on axiological basis an exception to ordinary division of competences, in *Kadi* it is employed both to grant the Court a new power and to neutralize a relation of subordination between EU and International law. Why axiological hierarchy is established between certain values and not others, how precise is the interpret in identifying the rules involved, how do they change through time, are all intriguing questions, but good answers would need a much larger analysis of case law, that is impossible here, and would involve a “psychological” understanding of the Court that is not relevant for conceptual analysis.

Third, the concept of “hierarchy” interacts with other concepts, namely “validity”, “applicability” and “source”. One can focus on one or another in analysis, but in the end it is important to take all of them

into account if we want to achieve a deep insight on legal phenomena. The proposed analysis, in particular, allows us to underline the deep connection between the notion of applicability and the notion of material validity, that are likely to be different consequences to the same kind of relation, namely normative hierarchy *stricto sensu.*

Lastly, both the interaction between the three meanings of hierarchy and between hierarchy and other concepts can show how relevant is the "dynamic" dimension of concepts. That is, how important is to remember that concepts are indeed tools that we employ in reasoning and that we can both use them in theory to understand and *explain* phenomena (e.g. explain the Constitution – ordinary law relation as a normative hierarchy) and apply them to *argument* in practical reasoning (e.g. use the concept of hierarchy in order to create a new competence). Our explanations will be more or less perspicuous depending on how close they are to practical applications, but perspicuous explanations will be likely impossible if we forget that in arguments concepts always interact and that what theoretical explanations are about are indeed arguments. More precisely, concepts work as reasons to justify or deny other concepts' application by means of inferential schemes. In the case of hierarchy, interactions allow us to draw a *prima facie* answer to the question about the argumentative role of hierarchy. And the answer is that hierarchy, in its specific axiological meaning, is used as a *justification* for (a.) re-allocating (*Franz, Kadi* cases) or waiving (10/2010 case) competences and (b.) shaping relations between type-sources (*Franz* and *Kadi* again). This seems to prove that the intuitive idea that hierarchy of type-sources is a *datum*, a premise providing rules to decide whether a legal norm is stronger or weaker, is misleading. Hierarchy of type-sources is *itself* object of disagreement and dispute and can be either a premise or a consequence in legal reasoning.[142]

But this is simply the most impressive instance of a more general disagreement among lawyers, practitioners, judges, and public servants, about normative hierarchies. These are sometimes used as premises, sometimes as consequences, sometimes as both, in legal arguments. In this paper the focus was on the last case, but the wider theoretical point is that if law is an argumentative practice about what decisions shall be applied, it will always be conditioned by ideological preferences[143] hold by

[142] E.g. (1.) primary laws are materially superior to administrative rulings, therefore (2.) if *a* is a primary law and *b* is a ruling, (3.) *a* is materially superior to *b.* Here the type-sources hierarchy is a *premise* whose truth is taken for granted in the argument. But, in cases analogue to *Franz*, we would say: (1.) the supreme core of the Constitution is axiologically superior to the rest of the Constitution, (2.) if something is axiologically superior, it is also materially superior, therefore (3.) the supreme core is materially superior. Here the type-source hierarchy is argument's *conclusion*, the very object of disagreement. Dolcetti – Ratti, 2013 call this kind of disagreement "institutional".

[143] Ross, 1974, 75.

lawyers. Legal reasoning is, therefore, deeply and essentially hierarchical, since it is the battlefield for distinct ideological preferences fighting for prevailing one another's in shaping norms and interpretive and argumentative techniques,[144] no matter how concerned we are in ensuring cooperation and agreement or forgetting disagreement.[145] This point should not be forgotten.

[144] Alexander – Schauer, 2009, 180-181.
[145] Sunstein, 2007, 12 ff.

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