NORMS ON LANGUAGE AND THE REGULATIVENESS OF CONSTITUTIVE NORMS

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ABSTRACT
The paper analyses two categories of legal norms on language, definitory and interpretative norms, in order to establish the differences and similarities between them. Whilst specifically asserting their common regulativeness, the underlying purpose is, however, to make the more general claim that constitutive norms are simultaneously regulative and then that constitutivity is merely a feature of some norms, without preventing them from also guiding human action. Accordingly, constitutive norms are not opposed to regulative norms, but merely a category of the latter.

KEYWORDS
Definitory norms, interpretative norms, linguistic uncertainty, constitutive norms, deontic contradiction

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1. *The context of norms on language*

Given that communication between normative authorities and addressees is a necessary condition for knowledge of the content of law, it follows that it is language, as the basic communication tool, that makes it possible for the law to guide human action. Thinking specifically of contemporary developed legal orders, where norms stem mainly from normative authorities, this explains why, if only as a contingency, there is usually a norm defining the natural language, or languages, adopted in those orders[1]. It is reductive, however, to see this norm as doing no more than defining the official language used in public legal acts. In reality, the norm defining the natural language adopted is a norm of incorporation into the legal order of the principles and rules that govern the natural language in question[2]. Its legal consequence, imposing the use of a specific natural language, entails a reception of those principles and rules, given the fact that no use can be made of language by normative authorities without complying with them[3].

   i) If in legal order Z, there is a norm X establishing the natural language Y as its official language, then norm X implies that the principles and rules of Y are also part of legal order Z.

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[1]   Nonetheless, the contingency of the norm defining the natural language, even if based on the premise that the content of a legal order is by definition contingent (for instance, BULYGIN 2010, 285; MENDONCA 2000, 63), might not be entirely undisputed. If language is a necessary condition for the application of law, then that norm, whether constitutional or merely customary, turns out to be a necessary content of any legal order.

[2]   For natural languages as sets of principles and rules, see, for instance, GARNER 2014, 111; MARMOR 1992, 113.

[3]   Additionally, only incorporation explains why normative authorities adopt norms modifying the content of rules of language (definitory norms): if norms of the natural language adopted were an unconnected normative set, then it would make no sense for them to be modifiable by the norms adopted by normative authorities.

The incorporation that follows from the imposition of a natural language as the official language of a legal order seems to be a standard case of a formal reception, quite similar in its main features to known cases of reception of international law into internal law. It is a reception in the sense that norms from a different set, with a distinct rule on recognition, become part of another set, here a legal order. This reception is formal because the set incorporated retains its autonomy and, for this reason, its norms are applied subject to their own dynamics: if a norm of the natural language is altered through the common practice of its speakers, it is the new norm that is applied within the legal order. As an instance of formal reception, its only distinctive feature is the sources of the norms of the incorporated set: principles and rules of a natural language are of conventional origin, deriving from the shared usage of speakers, and they change through specific processes of customary development[4].

The set of norms that governs a natural language is essentially formed by the principles and rules that define the semantics and the syntax of the language in question, imposing on normative authorities (speakers) and interpreters (readers) the meaning of words and how words should be organized in sentences[5]. Accordingly, with formal reception, and in order to state and to understand a norm sentence such as "No one is permitted to kill", both parties in the communication process are subject to the norm that establishes the meaning of the word "kill" and to the norm that states that the order of a basic positive sentence is "subject-verb-object"[6]. Application of the principles and rules of a natural language by normative authorities and interpreters can lead, however, to complex procedures: as well as incoherence, or constant processes of change, mostly in the semantic domain, norms of a natural language often give rise to uncertainty, i. e., cases of understanding where the meaning of a word or sentence is not clear.

When applying the incorporated principles and rules of the natural language employed, normative authorities and interpreters are faced with two possible linguistic outcomes: (i) certainty, where only one meaning is possible, from which it follows that only one potential norm is encompassed by the text ("$NS \rightarrow N$"); or (ii) uncertainty, where there are more than one alternative meanings, with the consequence that the text contains more than one potential norm ("$NS \rightarrow N_1 \vee N_2 \vee N_3$")[7]. Linguistic uncertainty is, evidently, the difficult case for the application of the norms of a natural language, a not unexpected outcome considering that those norms regularly lead to different possibilities in the "word-world"

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[4] GARNER 2014, 115; LÜDTKE 1999, 50.

[5] SAEED 1997, 10; WIGGINS 1971, 24.

[6] Principles and rules of a natural language are therefore the base for a common code shared by normative authorities (enacting norms) and interpreters (understanding the meaning of norm sentences); on this code, PATTARO 2004, 296; DUARTE 2011, 115.

[7] For instance, HELIN 1997, 200; DUARTE 2011, 131.

relationship: this follows from norms on the meaning of words without precisely defining their reach, which is the case of vague words, in a way similar to certain norms of syntax, which leave a significant margin of doubt, as happens with the use of "and" or "or" as conjunctives or disjunctives[8].

Syntactical uncertainties and particularly semantic uncertainties, given the widespread impact of open texture, make linguistic uncertainty the usual scenario for normative authorities and interpreters, a direct outcome of the application of the principles and rules of a natural language[9]. However, the causes and types of linguistic uncertainty are to a certain extent irrelevant, since uncertainty leads in all cases to the same scheme: a norm sentence has two or more alternative meanings or, at the level of law, expresses more than one potential norm ("NS → N_1 ∨ N_2 ∨ N_3,"). The scheme of alternative meanings is nothing other than a representation of the "linguistic discretion" conferred by the principles and rules of a natural language. Accordingly, and as in any instance of normative discretion, different options are legally conferred and, *prima facie*, all of them are then legally admissible. So within the boundaries set by the principles and rules of a natural language, and in order to "obtain" the norm expressed, the issue is, of course, how alternatives of meaning can be limited or how discretion can be reduced to zero[10].

2. *Norms on language*

Faced with linguistic uncertainty, legal orders react in two main ways: through (i) definitory norms, and (ii) interpretative norms[11]. The first reaction is specific; the second is general. When enacting a definitory norm, a normative authority deals directly with the semantic problem of what a word means, doing so by enumerating the essential properties that establish what falls and what does not fall within the word's reach. With this norm, a normative authority, with the general purposes of conferring semantic clarity and coherence on a statute or a

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[8] On vagueness, SAINSBURY 1996, 252; GUASTINI 1993, 350. On the syntax of conjunctives and disjunctives, see GUIBOURG et al. 2008, 52.

[9] On the impact of open texture, CARRIÓ 1965, 70.

[10] Linguistic discretion also explains why no potential norms under a norm sentence can be found beyond the limits of what was expressed: if a "bicycle" can be a "vehicle", there is no doubt, given the meaning of the word "vehicle", that a "laptop" is not a "vehicle". The normativity of the definition prohibits meanings outside the margins of uncertainty of the word (similarly to what happens with the outer limits of discretion), which is a reason for considering that interpretative operations that go beyond those limits, such as "teleological reduction" (LARENZ 1969, 333), are simply legally illegitimate.

[11] Definitory and interpretive norms do not exhaust all the "norms on language" usually found in legal orders. Norms stating how norm sentences should be written, for instance, quite commonly found today, dealing with aspects of style and the like, are also "norms on language". The focus on those two categories is justified by the fact that they are the main categories where norms adopted by normative authorities have significant effects on the content of the principles and rules of a natural language.

branch of the law regarding the word in question, pursues two different goals: (i) to create a new meaning for the word, distinct from that provided by the semantic rule of the natural language, or (ii) to reduce, or eliminate if possible, the margins of uncertainty around the word under the semantic rule[12]. The reasons for doing this are, however, irrelevant here; what matters is that the new meaning has a consequence: whenever the word is used in a norm sentence, its meaning is that given by the definitory norm.

In contrast, when setting an interpretative norm, a normative authority is not reacting to the semantic characterization of a word: instead, the normative authority sets criteria for dealing with linguistic uncertainty in general, without focusing on a specific doubt raised by a particular word or norm sentence. Normative authorities therefore use interpretative norms to define in which "direction of choice" all cases of linguistic uncertainty have to be solved[13]. It is therefore a category of norms applying to all norm sentences in the legal order, and not, as with definitory norms, a category of norms relating only to norm sentences containing the word being defined. Within this wider scope, the aim of curtailing "linguistic discretion" by means of interpretative norms turns out to be achieved in a way very reminiscent of ordinary norms of conflicts: interpretative norms establish that any alternative of meaning that best fits its "direction of choice" is that which has to prevail[14].

Another relevant difference between definitory and interpretative norms lies in the fact that, in contrast to interpretative norms, definitory norms alter the content of norms of the natural language: while interpretative norms address only the choice to be made between the alternative meanings present in a norm sentence, without interfering in how those meanings arise, definitory norms, both when creating a new meaning or when merely reducing the margin of uncertainty, directly alter the meaning established by a semantic rule. This specific feature also shows that definitory norms, differently from interpretative norms, effectively derogate norms of a natural language: if the word "kill" has the meaning M_1 under the semantic rule of the language in question, it will have meaning M_2 when a definitory norm establishes that the word takes on this new meaning. Of course, the fact that definitory norms may address merely a subset of norm sentences in a legal order, such as those of a particular statute or branch of the law, means that the same word can have different meanings, in the whole legal order, depending on the scope of norm sentences subject to the definitory norm[15].

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[12]   ALCHOURRÓN, BULYGIN 1991, 447.
[13]   GUASTINI 1993, 389.
[14]   Or, at least, that the alternatives that do not fit within it are not eligible.
[15]   Derogation from semantic rules by definitory norms poses, however, another problem: what happens when the semantic rule, through its own processes of change, acquires a new content distinct from that given by a previous definitory norm? However, as a conflict of norms, the solution depends on the

Both definitory and interpretative norms are strictly contingent. Even if a trivial statement, it shows that in both cases each legal order reacts to linguistic uncertainty through specific decisions taken on the matter by normative authorities. For this reason, nothing forces a legal order to have any particular definitory or interpretative norms and, consequently, nothing prevents a legal order from having none or from having many, with all conceivable kinds of content. Naturally, the contingency of definitory and interpretative norms does not prevent them from being analyzed as categories.

3. *Definitory norms*

As mentioned above, definitory norms entail a definition. However, as norms, they have the standard structure of an antecedent, a deontic operator and a consequence, as regards their material content, and a definition of a circle of addressees. Irrespective of the definition used and how is written (although the usual sequence is a *definiendum* followed by a *definiens)*, the content of a definitory norm is to attach an obligation to assign a certain meaning to a word used in norm sentences whenever that word is used, requiring addressees to interpret the text with that meaning. With this norm structure, a definitory norm entails: (i) a consequence with an action to be performed, which is to assign a certain meaning to a word when interpreting a norm sentence; (ii) a deontic operator defining the action as mandatory, because usually the action is neither permitted nor forbidden; and (iii) an antecedent concerning the opportunities of action, which is whenever a norm sentence contains the word in question.

> i) The norm sentence of a definitory norm for the word "vehicle" is, for instance, "A vehicle is a machine, with wheels and an engine, used for transporting people or goods on land";
> ii) The material structure of this norm sentence is: antecedent ("whenever the word vehicle is used in a norm sentence"), deontic operator ("it is obligatory to"), consequence ("read as meaning a machine, with wheels and an engine, used for transporting people or goods on land");
> iii) The structure is: "$q \rightarrow Op$", where "Op" stands for an "obligation to read as meaning...".

Although frequently forgotten, another element in the structure of norms is the demarcation of their subjective scope, which is a description of the universe to which the norm applies, arrived at through interpretation of the text or through the effects on the matter of other norms. Because a norm describes the prescribed action in its consequence, it is here that the circle of addressees is originally

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norms of conflicts existent in the legal order. In Portuguese law, for instance, roughly speaking, a subsequent general norm does not revoke a previous special norm (article 7/3 of the Civil Code).

defined[16]. Be it the whole universe of addressees of a legal order, merely a class of subjects, or only determinable persons, the consequence always relates the action prescribed to the subjective scope in view for its material content. In a definitory norm, given that the action required is to assign a certain meaning to a specific word, irrespective of the circumstances of interpretation, the circle of addressees seems to be well defined as the class of "interpreters": in fact, the action is imposed on everyone who has to interpret the norm sentence with the word defined. Of course, "interpreters" is just another way of selecting the whole universe of addressees of a legal order.

i) The structure is: "q → Op", where "Op" stands for an "obligation to read as meaning...";

ii) With the circle of addressees, a definitory norm entails: "q → O (interpreters) p".

To say that interpreters are the addressees of definitory norms is to consider only the default case. Of course, contingency of definitory norms also means that their circle of addressees depends on the will of the normative authority and that, even if with absurd consequences, there is nothing to prevent a norm of this kind from defining that only judges or legal scholars, for instance, are subject to the obligation expressed. However, a degree of uniformity can be found here and so it is usual for these norms not to restrict addressees to a class smaller than that of interpreters. This point is also relevant, however, due to the apparent lack of consistent reasons for affirming that definitory norms, or more generally conceptual norms, have the property of being solely addressed to judges[17]. Despite the contingency argument, it appears that the obligation of a judge to apply the law is no different in nature from the obligation of applying the law to which everyone is subject: if a norm requires an action, it applies whenever its addressees perform that action; and from this it follows that, if a norm does not restrict its subjective scope to judges, there are no normative grounds for asserting that the action in questions is the sole province of judges. But this issue is more complex. It is hard to see how judges could be obliged to interpret a word in a given way while others were not: to accept that definitory norms are by definition addressed solely to judges would mean accepting a legal order with different norms for the same norm sentence, depending on whether it is interpreted by judges or by someone else.

i) If the norm sentence "A vehicle is a machine, with wheels and an engine, used for transporting people or goods on land" is only addressed to judges, then only judges are

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[16]   But there is nothing to prevent a third norm, for a set of norms, from redefining the circle of address-ees, changing the scope of the circle. On this, DUARTE 2016, 85.

[17]   As ALCHOURRÓN, BULYGIN 1991, 451 seem to defend.

obliged to assign that meaning to the word "vehicles" in the norm sentence "Vehicles are not allowed to enter into the park";

ii) Under this norm sentence, a bicycle with an engine is, for a judge, prohibited from entering the park, whilst it is not (at least, it is a defensible interpretative claim) for any other interpreter.

The understanding of definitory norms as obligations to ascribe a certain meaning to a word relies on the premise that definitions and definitory norms are two different kinds of entity. Leaving aside all the classical approaches, it appears that on the one hand we have the definition, whereby "something" is said to mean "something", and on the other we have something quite different, a requirement to act in accordance with the fact that "something" means "something". Whilst a definition is an analytical proposition, a definitory norm is a synthetic one, in the sense that it refers to an action, particularly a deontic modalization of that action. It follows, then, that a definition is no more than a "material assumption" used by the normative authority in order to create the content of a norm, considering that the aim is for addressees to act in accordance with it: a definitory norm is an obligation to act in a particular way which is to act using that definition. So failing to distinguish between the definition and the definitory norm is exactly the same as confusing the object of an action prescribed in a norm and the norm imposing that action.

i) Therefore, a definition is "a = b" and a definitory norm is "O (to act as if) a = b".

The observation that definitions and definitory norms are entities of a different nature and, consequently, operate at different levels is indispensable for an understanding of how definitory norms can alter the content of other norms. If a definitory norm is altered and the defined word obtains a new meaning, it follows from this that the scope of the norm expressed by the norm sentence using the word is changed. With this alteration, the deontic status of an action may also change, which happens as a direct consequence of a definitory norm. This interaction between norms poses a complex problem for those who contend that these norms are merely analytical propositions: how could such a proposition change a norm or, in other words, how could it modify the deontic status of an action? Even if the problem raises wider questions, the answer seems to be that such modification is not possible, if we accept that within a set of norms, only other norms can alter their consequences[18].

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[18]   ALCHOURRÓN, BULYGIN 1991, 457. Also, MENDONCA 2000, 122.

i) The first definitory norm is: "A vehicle is a machine, with wheels and an engine, used for transporting people or goods on land"; the second definitory norm is: "A vehicle is a machine, with wheels and *with or without* engine, used for transporting people or goods on land";

ii) Then, under "Vehicles are not allowed to enter into the park", when the second definitory norm enters into force, the action of entering the park on a bicycle changes from permitted to forbidden.

The ontological difference between the definition and the definitory norm also justifies why it is irrelevant for the understanding of definitory norms that a definition leads to an impossibility: if a minor is someone less than 18 years old, then it is impossible for a person aged 17 to be of age[19]. The point is that the impossibility relates only to the definition and not to the definitory norm. So when a normative authority states that the age of majority is 18 years, which is a definitory norm, what is stated is that all the other norms that confer legal positions on persons of age must only be applicable to persons aged 18 years or more, strictly because only those persons should be classified as such. If the right to vote is denied to someone at the age of twenty, on the grounds of being twenty years old, this is not an impossibility: it is a violation of the applicable law and, in particular, of the definitory norm. At stake is not whether the person has the right to vote as someone who has attained his majority, but whether the addressee of the definitory norm complied with the obligation to classify him or her as someone of age.

i) N_1 is the norm stated in "Only persons who have attained their majority have the right to vote"; N_2 is the norm stated in "Persons attain their majority at the age of 18";

ii) if person Q is not allowed to vote because he or she is twenty years old and not major of age, no violation can be assigned to N_1: this person is within the subjective scope of N_1, given by N_2; so the obligation violated can only be assigned to N_2.

4. *Interpretative norms*

As follows from the previous considerations, an interpretative norm does not entail a definition and does not change any semantic rule of the natural language. Instead, an interpretative norm is the unity of an antecedent, a deontic operator and a consequence, establishing for alternative meanings that a specific "direction of choice" must be followed. Even if strictly contingent, since a legal order contains the interpretative norms that a normative authority introduces into the set, that structure expresses a common pattern that can be induced. Within this pattern, the

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[19] ALCHOURRÓN, BULYGIN 1991, 453.

first specific feature lies in what is meant here by "direction of choice". Since they are conceived for linguistic scenarios of uncertainty ("NS → N_1 ∨ N_2 ∨ N_3"), and in order to reduce or do away with alternative meanings, interpretative norms do no more than provide a specific criterion for the choice[20]. Accordingly, their consequences do not necessarily yield a precise solution for the uncertainty, but merely a standard that points to how the solution can be obtained.

i) The material structure of an interpretative norm is: antecedent ("Whenever a norm sentence is linguistically uncertain"), deontic operator ("it is obligatory to"), consequence ("select a meaning in accordance with [...]");
ii) The structure is: "q → Op", where "Op" here stands for an "obligation to select a meaning in accordance with…".

The specific "direction of choice" inserted in the consequence depends on what the normative authority intends in this regard. In a legal order, there is nothing to prevent criteria such as "The intention of the normative authority" or "The meaning of the word at the moment of enactment" from becoming the consequence of an interpretative norm. Usually, and for instance, interpretative norms contain criteria such as: "The meaning of words in superior norms", "The unity of the legal order" or "The aim of the norm". The range of possibilities is, however, less relevant. Here, the main points are that the quantity and quality of interpretative norms is strictly dependent on what the normative authority decides and that linguistic scenarios of uncertainty, raising the problem of choice, may be confronted using distinct and diverse criteria. Naturally, when there is more than one interpretative norm, conflicts between interpretative norms can arise, and, in the specific task performed by these norms, a diversity of interpretative norms does not necessary signify a lessening of linguistic uncertainty: because of its specific features, an uncertainty can always remain untouched by the set of consequences provided for in the interpretative norms enacted.

i) Within the structure "q → Op", several "directions of choice" can be accommodated, and legal orders can have interpretative norms such as "q → O select a meaning in accordance with the meaning in superior norms", "q → O select a meaning in keeping with the unity of the legal order", or "q → O select a meaning in accordance with the purpose of the norm";
ii) The effects of an interpretative norm are completely dependent on the linguistic uncertainty in question; starting from the uncertainty scenario ("NS → N_1 ∨ N_2 ∨ N_3"), the spectrum of results can be: (a) inconsequential ("NS → N_1 ∨ N_2 ∨ N_3"), (b) reduction ("NS → N_1 ∨ N_2"), or (c) certainty ("NS → N_1").

[20]   On these criteria, CHIASSONI 2007, 80. Also, MACCORMICK 2005, 125.

Regarding the material content of interpretative norms, another point has to be addressed: why do interpretative norms apply only to linguistic scenarios of uncertainty, and not, also, to norm sentences that are linguistically certain[21]? A single principal reason justifies the assertion. Insofar as interpretative norms function rather like norms of conflicts between alternative meanings, setting a direction for an inevitable choice, they are necessarily dependent on a *prima facie* linguistic outcome with alternatives: whenever there is certainty, no alternatives of meaning exist and, therefore, no choice has to be made by the interpreter. If the word "water" only means "a substance with the chemical formula H_2O", then that contained within what is denoted by "water" is only the object that has those properties: no linguistic uncertainty exists and no choice will be needed when defining the content of a norm with regard to the part adopted using the word "water". Strictly speaking, this point comes from the very core of the structure of norms: if the antecedent of a norm entails the opportunities to perform the action provided for in the consequence, then the conditions for an interpretative norm can only be outcomes from linguistic uncertainty; in no other case is there an opportunity for the action of selecting a meaning[22].

> i) Accordingly, in interpretative norms the antecedent of "q → Op" is "q = whenever a norm sentence is linguistically uncertain" and not "q = whenever interpreting a norm sentence".

The normative definition of a "direction of choice" regarding scenarios of linguistic uncertainty is established for the methodological operation of interpretation. As norms, therefore, interpretative norms comprise an obligation to deal with an instance of linguistic uncertainty in a specific way, which means that someone is subject to that deontic modality when performing the action of extracting a norm from a norm sentence. Like definitory norms, interpretative norms also define a circle of addressees, which are precisely those that have to select a meaning in order to define the content of a norm. Given the action in question, the obligation to perform it in a specific way is normally addressed to "interpreters", the universe of "everyone", as seen, even though this is always a contingent choice made by the normative authority. Naturally, all considerations regarding the peculiar consequences of seeing these norms concerning language as applying only to judges are here applicable. An obligation to interpret a norm sentence in a specific "direction of choice" in itself applies to anyone who has to select a meaning from an uncertain norm sentence: and it seems clear that, by default, everyone does.

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[21] WRÓBLEWSKI 1989, 24; HELIN 1997, 200.
[22] On the condition within the norm structure, VON WRIGHT 1963, 74.

i) The structure is: "q → Op", where "Op" here stands for an "obligation to select the meaning in accordance with…";

ii) With the circle of addressees, an interpretive norm entails: "q → O (interpreters) p".

Under the normativity of principles and rules of a natural language, the common use of words and sentences by the community of speakers is the framework for the operability of interpretative norms: as seen, when addressing linguistic uncertainty, the consequences of those norms start out from that common use. At the same time, when interpretative norms neither reduce nor eliminate linguistic uncertainty, the consequences of those natural language norms remain unaffected, as regards their outcome. Given that interpretative norms are the only tool at the disposal of legal orders to react, in a general way, to the "linguistic discretion" arising from the principles and rules of a natural language, if these tools are applied and a scenario of alternative meanings subsists, interpreters face an open-ended situation where each alternative enjoys equal legitimacy. Rather like any other case of discretion, this scenario opens the door to other criteria, not included in the set, and often indiscriminately designated as guidelines, arguments or directives, capable of supporting the interpretative arguments needed to arrive at a unique "all things considered" meaning. Faced with more than one possible norm, after unsuccessful application of interpretative norms, the linguistic choice lawfully accommodates any correct argument that may lead to assigning a meaning to a norm sentence[23].

i) An interpretative norm gives a "direction of choice" ("q → Op", where "Op" stands for an "obligation to select a meaning in accordance with…") for a linguistic uncertainty, represented by the scheme of alternative meanings ("NS →N_1 ∨ N_2 ∨ N_3");

ii) If the interpretative norm "q → Op" does not arrive at an outcome of certainty ("NS → N_1"), a choice still has to be made and, if no other interpretative norms are applicable, no linguistic criteria are provided by the legal set;

iii) With "remaining discretion" (for instance, "NS → N_1 ∨ N_2") other criteria can be used; however, these are not interpretative norms and, hence, are not used in the performance of an obligation.

Accordingly, interpretive norms, as norms belonging to the set, adopted by a normative authority, are not at the "same level" of any other of those criteria possibly used by interpreters. While interpretative norms are norms of the legal order, those other criteria are merely possible resources that an interpreter may use in cases where "linguistic discretion" is not reduced to zero[24]. It is from this

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[23] For "interpretative discretion", ENDICOTT 2005, 133; BANKOWSKI 1981, 2.

[24] Which is the case of "NS → N".

perspective that it is claimed here that there is no normative basis for an indiscriminate assessment between those norms and the criteria generally used. Given that interpretative norms are strictly contingent, only in a one-legal-order approach is it possible, or sustainable, to paint the whole picture of how the processes of interpretation can be carried out, specifically regarding this connection between interpretative norms and other criteria[25]. In this approach, the lists of interpretation criteria usually provided in legal literature, taken as equally usable, are, on the one hand, an incorrect description of how legal orders deal with linguistic uncertainty, and, on the other, a misrepresentation of the role played by interpretative norms[26]. As norms like any others, they must not be confused with extra-legal standards used in cases of discretion.

5. *Regulativeness of constitutive norms*

As is widely known, the concept of constitutive norms comprises two different types or, in other words, it is used with two distinct meanings: (i) as norms that create a type of action hitherto unknown, in particular by defining that something counts as something else, and (ii) as norms that have immediate effect, creating a certain state of affairs upon entering into force[27]. In the first sense, a norm is constitutive because it creates something that did not exist as such before, which is the case of norms concerning institutions, status, entities or concepts. It follows the traditional "counts-as locution" (X counts as Y in context C) where the constitutive nature lies precisely in the consequence of that locution: since something counts as something else, the norm does no more than express the conditions, sufficient, necessary or both, for the former to be the case. Accordingly, and in a more hard-core version of constitutivity, a constitutive norm of this kind does not regulate any action given the fact that it merely creates it (Y in the "counts-as locution")[28].

In the second sense, norms are constitutive as performative acts: they immediately perform the action they contain. Two properties can be assigned to this type of constitutiveness: (i) what they constitute is immediate; and (ii) it happens at the moment the norm enters into force. In this sense, constitutiveness is a result of the specific effect produced by the norm, which is to realize the action by itself[29]. The paradigmatic example of this constitutiveness is a revocation: when a normative authority enacts such a norm, the revoked norm ceases immediately to produce legal

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[25] As examples of interpretative norms, those within article 12 of the Italian Civil Code, article 3 of the Spanish Civil Code, or article 9 of the Portuguese Civil Code.
[26] For instance, CHIASSONI 2007, 81; MACCORMICK 2005, 121.
[27] ROVERSI 2011, 272. Also, CABRERA 1991, 276.
[28] HINDRIKS 2009, 255. However, SEARLE 1969, 36.
[29] ROVERSI 2012, 13.

effects, and its elimination from the legal order is, strictly speaking, what is constituted through revocation. As in the former sense, this type of constitutive norms is not also regulative: given that the action is performed by the norm, no deontic modality governs the action[30]. Moreover, for this constitutiveness, it is also argued that norms do not even have addressees and, since they realize themselves immediately, they cannot be violated[31].

Even though these two senses of constitutive norms cannot be wholly reduced to a strict common notion, they both form the core of the concept of constitutiveness, a concept that has been successfully adopted in jurisprudence and which, as a corollary of this, has lain behind the assumption that constitutive norms are a category of norms in opposition to regulative norms[32]. With the main arguments that constitutive norms, unlike regulative norms, are incapable of deontic contradiction and cannot be breached, that opposition has sustained the idea that legal orders are also formed by norms without any impact on the guidance of human action. This opposition seems to be, at least, overestimated. If we can assume that some norms have a constitutive nature, creating or performing "something" on their own, it does not follow from this that those norms are wholly devoid of regulativeness. So, it is claimed here that all norms are regulative and that, for this reason, constitutivity is just a specific property of a subset of norms that are just as regulative as any others. Several arguments can be presented in support of this claim.

5.1. *The "counts-as locution" argument*

The opposition between constitutive and regulative norms was originally based on the idea that they have distinct structures. While constitutive norms have the structure of the "counts-as locution", represented by the scheme "X counts as Y under condition C", regulative norms have the structure of prescriptions, represented by the scheme "if Y, do X"[33]. It would follow from this difference that while constitutive norms limit themselves to create "something" as something else in certain circumstances, without any further output, regulative norms guide behavior and so establish that an action is permitted, prohibited or imposed. Irrespective of the specificities to be found in constitutive norms, certain generic features can be, or usually are, assigned to them: (i) they do not refer to actions known before their existence, since they are precisely constitutive of those actions; and (ii) they merely define the conditions for "something" to count as "something else".

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[30]   CARCATERRA 2012, 95.
[31]   CARCATERRA 2012, 102.
[32]   On that irreducibility, GUASTINI 1983, 549; ROVERSI 2011, 273.
[33]   SEARLE 1969, 34. Also, HINDRIKS 2009, 258.

The first feature seems to be a consequence of a merely linguistic problem: the simplification effected by the assertion that a norm creates a "new and unknown action". It may appear a trivial point, but it seems clear that no action can be created by a norm: norms do not change the empirical world, except, indirectly, if their addressees comply with the actions imposed. So what this effectively means is that a known action subsequently counts as another, under certain conditions. This being the case, it is not accurate to say that constitutive norms do not refer to known actions, since what they do is to qualify a known action as another. Within this framework, actions created by a constitutive norm are dependent on the conditions for that "equivalence", but also on the effective application of that equivalence: without it, nothing is created by a constitutive norm, since the equivalence is no more than a tautology. At first glance, it appears that, without any normativity, the statement that "X counts as Y under condition C" is merely descriptive.

The second feature provides the opportunity to see that conditions in the "counts-as locution" are somehow irrelevant to the present discussion. Those conditions, irrespective here of whether sufficient, necessary or both, act in a constitutive norm in the same way as the conditions of a regulative norm: they consist of a certain state of affairs that has to exist for "X counts as Y" to function. So a conditional scheme of "if C, then X counts as Y" expresses the "counts-as locution" in exactly the same way, since no X will count as Y if C is not the case. Relevancy of conditions in a constitutive norm is strictly connected, then, with the transition from brute facts to institutional facts: they explain precisely how and when the latter are constituted. However, this says nothing about how the consequence of "X counts as Y" is or is not dependent on human action. Bearing this in mind, it would appear that defining conditions of constitutiveness offers a limited view of constitutive norms.

The main point about the regulativeness of constitutive norms has to do with the fact that X cannot count as Y if the equivalence is not accepted by the community where it is shared. Since Y is not a brute fact, its creation as an X with another meaning is only the case if a classification is effect and, for a community, if it is shared among its members. Underlying the "counts-as locution" is therefore an appeal to those who have to make the classification and accept it as such. It is for this reason that acceptance has been stated as a necessary condition of the "counts-as locution", an idea that expresses the point argued here that constitutivity is by definition dependent on an action performed by its addressees: as said above, to classify "something" as another "something"[34]. From this it will follow that what confers social meaning on the equivalence and

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[34] On acceptance as a necessary condition of the "counts-as locution", SEARLE 1995, 113; TUOMELA 2003, 147.

prevents it from being just a tautological proposition without significance is the accepted widespread action of classification. It may therefore be said that the "counts-as locution" would be better expressed by a scheme such as "X counts as Y in condition C if accepted", or "if C, with acceptance, X counts as Y", which amounts to the same thing.

In contemporary developed legal orders, acceptance is not achieved through a system of common beliefs as it is when dealing with mere social practices. When what is at stake is a norm enacted by a normative authority, the process of acceptance is realized with the use of a deontic modality, in the present case an obligation, which is the common way for arriving, in an institutionalized form, at the social state of affairs that acceptance reflects. It can be said that, in the context of a legal order, the normativity underlying acceptance is replaced by the deontic modalization of the action and that no relevant difference exists between "if C, with acceptance, X counts as Y" and "if C, X ought to count as Y". With acceptance as a necessary condition for the "counts-as locution", its nature is totally changed: it becomes normative and, for a norm adopted by a normative authority, it shows the difference between giving information, something not depending on agreement, and defining a course of action in order to create an ideal state of affairs[35]. The "counts-as locution" is, in itself, the basis for the regulativeness of constitutive norms.

5.2. *The games argument*

At the same time, it is relevant to observe that constitutive norms create actions, institutions, status or concepts that throw up other sets of norms, as in the familiar case of games, meaning that a difference has to be made between what might be called constitution in itself, or the constitutivity of the system, and, on the other hand, the subsequent set of norms[36]. It is within this scenario that the common games argument is presented: a norm defining an action in a game limits itself to constituting that action, which has no meaning as such outside the game; for that reason, when someone fails to "follow" the norm, what happens is not a violation, but merely a different action reflecting that the game is not being played anymore[37]. From this it would follow that no regulativeness exists in this constitutivity: if we celebrate as a goal an action in which the ball did not fully pass the line, it is not that the norm defining goal was violated, but, rather, that soccer is not being played; it is probably another game. But this argument is misleading.

What causes constitutive norms to be second-order constitutive norms is that they are posed within the constituted system. From this it follows that they only

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[35] GARCIA 1987, 259.
[36] SCHAUER 1991, 7; FEIS, SCONFIENZA 2012, 130.
[37] ROSS 1968, 54.

make sense as a part of the system, which means, for their normative structure, that they depend on a condition expressing this belonging: a norm defining a goal in the game soccer has the condition that soccer is being played. This implies that the alleged impossibility of violating a second-order constitutive norm, because the action performed is already outside the game, becomes illogical: playing the game is a condition for the action and, consequently, it cannot be outside the game[38]. A relevant consequence follows: as an action within the game, either it accords with the norm of the game in question, or it does not. If, when playing soccer, an action is regarded as a goal even if the ball did not fully pass the line, the norm defining goal was violated: nobody is playing another game; instead, while playing soccer, something that ought not to be classified as a goal was in fact classified as such[39].

5.3. *The will argument*

When a legal order has a norm establishing the conditions for a will to be valid, it states a set of conditions for a document to count as a legitimate will and, consequently, to produce the legal effects other norms assign to that formal condition of being a valid will. At the same time, this norm would not be violable because enumerating conditions only calls for an assessment of whether they are met and there is no obligation on anyone to cause them to be met: it cannot be said that producing a document without meeting the requirements necessary for a will is a violation of the law and and we cannot point to any duty unperformed[40]. A norm defining the conditions for a valid will is therefore a constitutive norm, and it contains no regulation of human action. Accordingly, no penalty can ensue and the invalidity of a will cannot be seen as such, but, rather, as an effect resulting from the failure to meet those conditions. One principal argument supports this assertion: while we can conceive of a norm imposing a duty without the corresponding norm setting a penalty for violation of the first norm, this is not the case for a norm defining the conditions for a valid will; here, its invalidity is a part of that norm that, moreover, is not conceivable as such without the consequence of invalidity[41].

The argument of the will raises different points. The first, directly related to the constitutive norm in itself, is already affected by the previous considerations. In fact, establishing the conditions for a valid will is exactly the same as saying

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[38] It would be possible to argue that the game stopped being played at that precise moment. However, the point is logical and not chronological. If the norm that defines what a goal is depends on soccer being played, one cannot be not playing soccer when the definition is triggered.
[39] Refuting inviolability, but with different reasons, FEIS, SCONFIENZA 2012, 132. Generally, RAZ 1975, 116.
[40] HART 1961, 37.
[41] HART 1961, 35.

that if some requirements are met, a document counts as a valid will (or has the value of a valid will). It is therefore a constitutivity that does not suppress regulativeness, as seen, since the norm enacted entails the obligation to classify as a will a document that meets a set of conditions. Any testator, legatee or judge violates the law if they treat as a will a document not compliant with the required conditions or, inversely, if they fail to treat as such a document that meets all the conditions necessary for the consequent equivalence. As stated above, the "counts-as locution" that here underlies the will argument suffers from the insufficiency of being deficiently expressed: because the document is only a will if addressees accept the equivalence and act accordingly, it follows that a norm setting the conditions for a valid will entails the obligation of classifying a document as a will when those conditions are met[42].

The second point is closely connected to the argument to the effect that the consequence of invalidity is part of the norm defining the conditions for a valid will, which is inconceivable as such without that consequence. This argument falls down for two reasons. The first is that it fails to take into account that the norm in question is applicable in four cases: (i) if the conditions are met, and it is treated as a will; (ii) if the conditions are met, and it is not treated as a will; (iii) if the conditions are not met, and it is treated as a will; and (iv) if the conditions are not met, and it is not treated as a will. Its applicability to all these cases follows from the fact that, if those conditions are necessary, which they are, then the norm covers the negation of the expressed equivalence: it also states that, without conditions, "X does not count as Y". On these terms, it follows that case (ii) above makes no sense without regulativeness: rigorously, X counted as Y where it should not. But, mainly, case (ii) above shows that the norm was left intact without the consequence of invalidity: a document not treated as a will despite meeting all the necessary conditions is not invalid. The point is, then, that invalidity is merely a possible, but not a necessary, consequence of a norm stating the conditions for a valid will[43].

The second reason why the argument falls down is related to the consequence of invalidity in itself. It is not new that, in contemporary developed legal orders, invalidity is one consequence among many and that there is nothing to prevent a normative authority, in some circumstances, from adopting a norm removing all the consequences of invalidity for the sake of an opposing principle that has to prevail in those circumstances[44]. Even though it might appear contradictory, it is

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[42] Thus, applying "if C, X (ought to) count as Y".

[43] Consequently, the norm in question is not only conceivable without that consequence, but, moreover, it even involves the absence of that consequence.

[44] In Portuguese law, for instance, article 277/2 of the Constitution, removing the consequence of voidness for unconstitutional international treaties under certain conditions.

common in a legal order to have norms stating that the general consequence of invalidity does not follow or, for instance, that only a secondary penalty is applicable to a notary who registers as valid a will that meets none of the relevant conditions. In these cases, we cannot say that the removal of invalidity as a consequence for the will is the suppression of the conditions necessary for its validity: those conditions are still necessary to assess validity, relevant for other purposes (in particular, to determine whether the notary is subject to a penalty). What happens is that a third norm set aside the consequence of invalidity, actually established elsewhere, stating that no invalidity will follow. The point is, therefore, that the consequence of invalidity is contingent: a norm setting the conditions for a valid will is a norm distinct from that with the consequence of invalidity.

5.4. *The deontic contradiction argument*

The opposition between constitutive and regulative norms is often sustained on the premise that the former cannot enter into a deontic contradiction. However, if by deontic contradiction we understand incompatibility of legal consequences, as commonly understood, the premise seems to be at least questionable[45]. This point may be illustrated by a definitory norm. If a normative authority adopts the norm "a = b" (or "Oa = b") and, then, another such as "a = c" (or "Oa = c"), it follows from this that different properties, and consequently distinct denotations, "b" and "c", are being assigned to the same word "a". As seen above, these distinct denotations imply different legal consequences in terms of what is and is not permitted, forbidden and mandatory. Of course, at their level, no contradiction exists between the analytical propositions. However, considering that those analytical propositions are merely that which is required to be done under both norms, as explained above, it becomes clear that a deontic contradiction occurs and, more importantly, that the contradiction cannot be assigned to anything other than the two definitory norms in question[46].

> i) Under the definitory norm "a vehicle (v) is a machine (a), with wheels (b) and an engine (c), used for transporting people or goods on land (d)", the definition is "v = a + b + c + d"; under the definitory norm "a vehicle (v) is a machine (b), with wheels (b) and *with or without* engine, used for transporting people or goods on land (d)", the definition is "v = a + b + d";
> ii) Then, under the rule "vehicles are not allowed to enter into the park", two incompatible deontic statuses appear for vehicles without property "c" (engine): they are allowed to enter into the park under the second definitory norm, but forbidden under the first;

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[45] On deontic contradictions, RATTI 2013, 133; ZORRILLA 2007, 87.
[46] Accordingly, FEIS, SCONFIENZA 2012, 129. See, also, MENDONCA 2000, 123.

iii) Since the rule "vehicles are not allowed to enter into the park" remains unchanged, the deontic contradiction can only be assigned to the (incompatible) definitory norms[47].

5.5. *The violability argument*

The alleged opposition between constitutive and regulative norms is also sustained on the premise that constitutive norms are not violable[48]. However, following on from the same test, which is to assess if violation cannot be assigned to a norm other than the constitutive norm, the consequence appears to refute the inviolability dogma. This point can also be illustrated by the definitory norm for the word "vehicle". If an administrative official allows a person to enter the park with a toy car with an engine under the norm that prohibits vehicles from entering, law has not been violated: a toy car with an engine is in a grey area on the fringes of the word "vehicle" and she has discretion that confers legitimacy on that decision. However, if there is a definitory norm that qualifies toy cars with engines as vehicles, then there is no doubt that the administrative official violated the law: she has been moved from a zone of linguistic discretion, that gives her room for a legitimate administrative decision, to a situation where entrance is prohibited by a definitory norm. It is the existence and the subsequent violation of the definitory norm that makes her permission to enter unlawful: in the first case, permission was an unassailable exercise of administrative discretion. And, more relevantly, this violation cannot be assigned to any norm other than the definitory norm.

i) Under the norm expressed by "vehicles are not allowed to enter into the park" ("~Px"), the administrative official has discretion whenever she is faced with a case (for instance, a toy car with an engine) that falls in a grey area around the word "vehicle": "~Px ∨ Px"; an administrative decision of "Px" is therefore wholly legitimate;

ii) With the definitory norm "a vehicle is a machine, with wheels and an engine, used for transporting people or goods on land", a toy car with an engine moves from the fringes to the core of the word "vehicle": entrance with it becomes "~Px";

iii) If, with the definitory norm, an administrative decision of "Px" is taken, this decision is legally illegitimate; however, its legal illegitimacy does not follow from the prohibition of entering with vehicles in itself (since "~Px ∨ Px"), but, instead, from violation of the definitory norm (as an obligation to classify a toy car with an engine as a "vehicle").

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[47] It could be said that the argument falls down because it presupposes exactly what it was supposed to demonstrate: the existence of an obligation. However, for this test what is relevant is the existence of opposed consequences and in this case that they are only assignable to the definitory norms in question: the obligation is somehow secondary.

[48] On the inviolability of definitory (conceptual) norms, ROSS 1968, 54; PINO 2016, 69.

5.6. *The norms on language argument*

Norms on language, specifically considering the contraposition made between definitory and interpretative norms, are also an argument for the inconsistency of an opposition between those two categories. The point is that the properties shared and not shared do not justify the traditional classification of definitory norms as constitutive and interpretative norms as regulative. As seen above, both definitory and interpretative norms have similar antecedents, outcomes of language, both establishing that "the action" of interpretation has to be done in a certain way. As stated above, to give a certain meaning to a word is "to interpret", just as it is to choose alternative meanings on the basis of a given criterion: in both cases there is an action, specifically to deal with the language used to express norms, it here being of no consequence that that action might consist of reading a word with a specific meaning or of applying criteria for selecting one meaning among others. So in the absence of any structural difference between interpreting with a definition and interpreting with a "direction of choice", there appear to be no grounds for such a wide gap between them.

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