# LOGICAL TOOLS FOR LEGAL PLURALISM

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**Abstract**

The development of the internet, the rise of transnational law, globalization and the existence of different legal traditions next to each other all make that the opportunities for conflicts between rules of different legal systems increase. On the assumptions that the results on different legal systems in one case cannot conflict and exclude each other– the assumption of consistency and the excluded middle – conflicts between legal systems appear problematic. This contribution gives an overview of logical tools that can help to avoid these conflicts, or to deal with them. In this way it hopes to contribute to a use of logic to which Patrick Glenn alluded in the concluding chapter of his classic *Legal Traditions of the World*.

A conflict of rules occurs when it is possible that two or more rules attach incompatible legal consequences to a case. Within a single legal system, the possibility of rule conflicts is limited by adding *scope conditions* to the ordinary rule conditions. Another limitation of this possibility consists in *limiting the powers* of rule creating agents.

Often it is impossible to create rules that conflict with already existing rules. If there are actually conflicting rules, it becomes necessary to handle the conflict. By adopting a non-deductive logic for rule application it becomes possible to account for *exceptions to rules*. An exception to a rule makes that a rule which is applicable in a case should nevertheless not be applied. Then the rule does not attach its legal consequences to the case. One reason for making an exception to a rule is that application of the rule would lead to legal consequences which are incompatible with the legal consequences of another applicable rule.

If a conflict occurs between rules of different legal systems, there is logically speaking no need to deal with the conflict. It is logically well possible that an agent ought to do X from the point of view of one legal system and ought to refrain from doing X from the point of view of another legal system. However, an agent who is subject to incompatible prescriptions from different legal systems is burdened with a dilemma. Legal system often come to the assistance of such individuals by *referring* to the rules of other systems, or by *incorporating* 'foreign' law.

**Keywords:** applicability of rules, application of rules, compliance conflict, conflict of imposition, exceptions to rules, incorporation, legal pluralism, legal system, logic of rule application, roles of logic, rule conflict, scope of rules,

## 1 Introduction

Legal rules often conflict with each other. For our present purposes rules may be said to conflict if they are all applicable to one and the same case, while the legal consequences that would result from their application are incompatible.[1] This happens within one legal system, as when theft is

[1] In the following I will write about the incompatibility of legal consequences, and about the inconsistency of conclusions of rule applying arguments. The reason for this difference in terminology is that (in)consistency

punished with at most four year incarceration, while theft during the night time is punished with at most six year[2], or when a municipality locally prohibits pubs to be open on Sundays, while that is allowed nationally. It also happens when the norms of a national legal system deviate from those created by an international organization, as when a Member State of the European Union taxes what is not taxable according to EU Law.[3] It happens when a contract violates rules of mandatory law, and also when state law collides with rules belonging to a particular religion such as the Shari'a or Jewish law.[4]

With legal rules stemming from diverse sources, law has perhaps always been pluralist, with rule conflicts as a consequence. However, even if legal pluralism is an old phenomenon, it has gained in importance during the last decades of globalization. The resulting rule conflicts have also gained in prevalence, and it is important to pay special attention to the ways in which law can deal with them. The central question of this contribution is whether logic can be helpful in this connection. In his famous book *Legal Traditions of the World*, Patrick Glenn (2014) already raised this question. After having described the main legal traditions, he addressed in the tenth chapter of his book the question how the different traditions could be reconciled, and in this connection he pointed to modern developments in logic which might make it possible to leave the traditional laws of consistency and of the excluded middle behind. This contribution is an attempt to explore these possibilities in a mainly informal way. The emphasis will in this connection be on the use of logical tools that are usually associated with the technical notion of non-monotonicity (Hage 2005, p. 24).

At first sight, the logic of rule application is nothing else than an ordinary syllogistic argument (Alexy 1983, p. 273-283; MacCormick 1978, p. 19-53). The facts of a case are subsumed under a general rule, and the conclusion that describes the legal consequence of the case follows deductively. For example, a rule reads that the major of a city has the power to issue emergency regulations. Boris is the mayor of Kropotkingrad. By subsuming this fact under the rule, the conclusion can be deduced that Boris is competent to issue emergency regulations.

An argument can only be deductively valid if it is logically impossible that all the premises of the argument are true, while the conclusion of the argument is false (e.g. Weinberger 1989, p. 91). Because a conclusion of a rule-applying argument is deduced from the two premises, it can only be false if either one of the two premises is false. The falsity of the conclusion would imply that either the used rule is not valid, or the facts are different from what the second premise said.

Given this definition of deductive validity, a conflict of rules may lead to inconsistent legal consequences. Suppose that there is a rule that emergency regulations can only be issued in case of an emergency. If Boris issues an emergency regulation although there is no emergency, the power conferring rule leads to the conclusion that the emergency regulation that Boris created is valid. The rule specifying the circumstances under which an emergency regulation can be issued, makes that the regulation by Boris is invalid. Going by deductive logic alone, the regulation is both valid and invalid, an unattractive outcome.

It will be obvious to most lawyers that the two rules should be combined. An emergency regulation can only be created in case of an emergency, and then the mayor of the city is empowered to do so. Obvious as this outcome may be, it can only be reached if the logic of rule application is not ordinary

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is a characteristic of linguistic entities such as descriptive sentences or propositions, while (in)compatibility is a relation between facts.

2 Dutch Penal Code (*Wetboek van Strafrecht*), Art. 310 and 311.

3 CJEU case 26/62 [1963] (Van Gend & Loos).

4 A more elaborate overview of kinds of conflicts between legal rules can be found in Berman 2012, p. 23-57.

deductive logic. Lawyers often say that they handle such cases by means of 'interpretation', but that does not clarify much. We would like to have a more precise account of what goes on when legal subjects or legal decision makers must cope with conflicting rules. In the last few decades major developments have taken place with regard to the logic that can be used to model rule application (Schauer 1991; Gordon 1995; Verheij 1996; Hage 1997 and 2005; Prakken 1997; Lodder 1999; Sartor 2005). The question that will be addressed in this paper is in what manner these modern logical theories can help lawyers to deal with conflicting rules.

## 2 The roles of logic

Before the real argument starts it is important to make clear what can be the role of logic in law. Lawyers sometimes have been a bit suspicious about this role. The suspicion can be recognized in the resistance of lawyers against 'formalism' (Hart 2012, p. 124-154) and '*Begriffsjurisprudenz*' (Kaufmann and Hassemer 1977, p. 92-95). Characteristic in this connection is the famous quote from Oliver Wendell Holmes that 'The life of law has not been logic: it has been experience …'.[5]

Most likely, this resistance can be traced to the fear that logic would dictate solutions for legal cases that are not desirable, but which are nevertheless taken because logic would 'require' them. Such a fear would be misgiven, because logic does in first instance nothing else than to indicate which conclusions follow from which premises. It cannot indicate that particular conclusions should be drawn; the most it can do is to show that a particular conclusion follows from certain premises. Moreover, deductive logic is as 'empty' as possible. Logical rules are formulated in such a way that the task of determining the outcome of an argument is as much as possible assigned to the premises of the argument. Deductive logic aims to do no more than to make explicit what was already implicit in the premises. This means that a legal decision maker who, for whatever reason, does not want to draw a particular conclusion that follows from his premises, can always decide to drop one or more of the premises rather than to draw the conclusion. Logic in first instance informs us what follows from what, but it cannot force us to draw a specific substantial conclusion. Therefore, the fear of some that logic may require that legal decision makers take the 'wrong' decisions is not justified.

The limited role of logic also means that the hopes of some others, that logic may assist the legal decision maker in cutting difficult knots, is also misgiven. This still holds if the blunt instrument of deductive logic is replaced by the sharper edged instruments of modern logic. It is the task of logic – and this is more a programmatic starting point than an empirical observation – to be as 'empty' as possible. Logic should study which conclusions follow from which premises, but it should at the same time attempt to leave as much as possible of the factors contributing to some conclusion for premises that deal with the content of a domain. To phrase it by means of a slogan: *if it can be a premise, do not turn it into logic*.

However, there is also an additional function for logic, a function that has little to do with making inferences. Logic can help us in making analytical distinctions that are useful in formulating precise theories about law. We have already seen an example of this function of logic when we noticed that if the logic of rule application would be deductive logic, the application of conflicting rules to a set of cases may lead to incompatible legal consequences. Logic does not force us to adopt these incompatible consequences; it only makes clear that if we want to avoid them we had better look out for a different logic of rule application. Moreover, it can also help us to find alternatives for deduction that do more justice to good legal reasoning as it actually takes place. If the logic of rule

[5] Quoted after http://en.wikiquote.org/wiki/Oliver_Wendell_Holmes,_Jr. (last visited on May 1, 2015).

application is treated as if it were a branch of deductive logic, it is likely that conflicting rules will lead to inconsistent conclusions for concrete cases. By adopting a non-deductive logic, which allows for exceptions to rules, the inconsistencies that seemingly result from conflicting rules can be avoided (see Sections 4.4 and 4.5). However, let me repeat the warning: do not expect from logic that it tells us how imminent conflicts of rules should be handled. The law determines which rule prevails if there is a conflict; logic can only show how a higher level rule can solve the conflict. The content of this higher level rule is still a legal matter.

## 3 Kinds of conflicts

There are two ways in which rules conflict with each other. It is possible that one rule makes that something is the case, while another rule makes that something else is the case. For instance according to one rule, Blackacre is owned by Geraldine, while according to some other rule John has title to this ranch. Because rules impose facts upon the world – they make it the case that these facts obtain – such conflicts will be called *conflicts of imposition*. The conflicting rules impose incompatible facts upon the world, facts that cannot co-exist. On the assumption that the ranch Blackacre cannot have two owners, the fact that Geraldine owns the ranch is incompatible with the fact that John owns it.[6]

The second kind of conflict has to do with rules which prescribe incompatible forms of behavior. Such a conflict occurs if a farmer is obligated to combat thistles, but is at the same time not permitted to destroy plants. Another example would be that a journalist is obligated to reveal the sources on which he based a controversial publication, while she promised her informant not to reveal his identity. Such conflicts may be called *compliance conflicts*.

Rules conflict with each other if their conditions for application allow a case to which the rules attach incompatible legal consequences. Which legal consequences are incompatible may depend on other rules. Examples of conflicting rules are:

- the rules that a bona fide buyer becomes the owner of a good that was transferred to him, and the rule that the transfer of a good by a non-owner does not pass ownership;
- the rule that prescribes house owners to clean away the snow from the pavement before their houses and the rule that prohibits the use of snow bulldozers, if somebody can only clean the pavement with the use of a snow-bulldozer.

## 4 Rule conflicts within a legal system

To discover which logical tools are available to deal with conflicting rules that stem from different legal systems, it is useful to study first how rule conflicts are dealt with within single legal systems, because conflicts within a single system are the most frequent manifestation of rule conflicts. This immediately raises the question what a single legal system is.

### 4.1 The definition of a legal system

One way to answer this question is to look at the sources of law. A simple theory is that a legal system consists of all the rules that stem from one 'highest' rule which points out what the sources of the legal system are. An example of such a highest rule would be that law consists of those rules that were created by agents (legislators, judges) who were made competent by rules belonging to

[6] The phenomenon that the conflict of rules is also determined by constraints that determine which facts can go together plays a central role in Hage 2005, p. 142-144.

the system. This rule has a ring of circularity because it defines the content of a legal system in terms of the content of the system (the rules belonging to the system). However, this circularity can be circumvented by pointing out one rule that certainly belongs to the system even if it was not created on the basis of some other rule of the system. Kelsen (1960, p. 204-209) called such a rule the '*Grundnorm*' of the system; Hart (2012, p. 105-110) called it the 'Ultimate Rule of Recognition'. It is questionable whether such a highest rule that is the source of the rest of the legal system actually exists in all legal systems. Kelsen (ibidem) actually denied that the *Grundnorm* exists as a matter of social fact, and merely claimed that its existence is a necessary presupposition of the validity of the norms belonging to the system.

For my present purposes I will take a pragmatic approach and start from the perspective of an agent that has to apply the law to a concrete case, a judge for instance. Such an agent wants to have an unambiguous outcome for the case, and will therefore work on the assumption that the law, if it applies to the case, attaches a single legal consequence to it. The law is therefore assumed to be consistent. However, it does not follow from this assumption of consistency of the law as a whole that there are no conflicting legal rules within the system. The assumption of consistency 'merely' boils down to it that the rules of the system, whether they are consistent or not, somehow contribute to the content of the law, and that the result of the combined relevant rules of the system is somehow consistent.

We have already seen an example of how the combination of rules works in the case of Boris who made an emergency regulation for Kropotkingrad even though there was no emergency. The two inconsistent rules were combined into a single 'rule' that leads to a single consistent result. The word 'rule' was placed within quotes because it differs from the two rules that were used to construct it. Let us assume that both the rule that the mayor is competent to make emergency regulations and the rule that these regulations can only be made in case of an emergency can be traced back to an official legal source such as a statutory provision. The constructed 'rule' cannot be traced back directly to such a source but is the result of combining the two original rules in the light of what is their apparent purpose.

The example that theft is punished with at most four year incarceration while theft at night gives six year is dealt with in a similar fashion. The general rule about theft is (restrictively) interpreted as dealing with 'ordinary' theft, while the second rule is interpreted as dealing with theft during the night time. The resulting constructed 'rules' are that theft during daytime is punished with at most four year incarceration, and theft during nighttime with at most six year. These reconstructed rules do not conflict.

In an earlier publication (Hage 2005, p. 17) I introduced the expression 'case-legal consequence pair' (CLCP) for these constructed 'rules'. It is possible to describe a legal system as defined by an exhaustive set of such CLCP's: for every kind of case that has legal consequences there exists a CLCP that gives the characteristics of the kind of case and the legal consequences attached to it. These CLCP's are the outcome of the original rules (including rights and legal principles) of the system, interpretation and solutions of eventual rule conflicts by means of priority rules (such as *Lex Superior*) or whatever other techniques the system in question employs to resolve rule conflicts. The CLCP's are constructed in such a way that no particular case can fall under two different case descriptions to which incompatible consequences are attached. For example, there will be a case description for 'theft during daytime' and one for 'theft during nighttime', but not one for theft in general because the latter might give a different legal consequence in a concrete case of theft during

night time. The legal system, as I will define it for my present purposes, consists of such an exhaustive set of CLCP's and all the other materials (rules, rights, principles; the 'underlying materials' of the system) that were used to construct this set.[7] Given the way in which CLCP's have been defined, it is not possible that a case has inconsistent legal consequences according to a single legal system. Imminent inconsistencies are filtered out in the step from the original rules to the CLCP's.

### 4.2 The scope of rules

The idea of a legal system that does not lead to inconsistent legal consequences is a theoretical construction, and the question is still open how to arrive at such a system if the actual rules within a system do conflict.[8] Here is where the logical tools come into play. One of them has to do with the scope of rules. Most legal rules identify by means of their conditions the kind of cases to which they are applicable. However, even rules without conditions, such as the prohibition of committing murder, do not apply to everything. There are limitations on the cases to which a rule applies that are not mentioned in the conditions of the rule. These are scope conditions, which combine with the rule conditions in the narrow sense to determine to which cases and/or persons rules should be applied.

The rules about the applicability of Dutch criminal law (articles 1-8d Penal Code) provide a nice illustration of the operation of scope conditions. The first condition is that only those acts can be punished that are punishable on the basis of a rule that existed at the time of the act. This condition is a limitation of the scope of the Penal Code in time. More in general, all legal rules have a *scope in time* in the sense that they can only apply to cases that occur during a particular time span. This time span will often coincide more or less with the time that the rule exists, but that is not necessary. An exception that occurs quite often is the retroactive force that is, as we saw, excluded for Dutch penal law. If two rules have non-overlapping time scopes, they cannot apply to the same case, and that excludes the possibility of a rule conflict.

The Dutch criminal law can be applied to everybody who commits a crime in the Netherlands. *E contrario* this means that in principle it cannot be applied to crimes not committed in the Netherlands. There are several exceptions to this principle, but that does not detract from the starting point that the Dutch criminal law deals with crimes committed in the Netherlands. Dutch criminal laws tend to have a *territorial scope*. Since the criminal law of other countries in principle has a similar territorial scope, the possibility that criminal laws from different countries lead to conflicting outcomes for a single case is limited to transterritorial cases.[9] The same effect also holds within the Dutch legal system, because municipalities have the power to define criminal offences for, by and large, their territories. Those definitions will seldom conflict because the territories of the municipalities do not overlap.

The Dutch criminal law can also be applied to persons with the Dutch nationality for some kinds of crimes outside the Netherlands. This is an example of *personal scope* which functions as an exception

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[7] This makes a legal system agent-relative. It consists of the CLCP's and the underlying materials as used by this agent (Hage 2013 and 2015). A 'real' legal system can only exist if many agents ('officials') use the same materials to construct their CLCP-set.

[8] To facilitate my exposition, I ignore the possibilities of conflicts between legal principles, between principles and rules, between rights and rules, and more in general all conflicts that are not conflicts between rules. My hope is that these other conflicts can be handled along more or less the same lines as rule conflicts.

[9] One of the effects of the rise of the internet and of globalization is that such 'transterritorial cases' have become quite frequent.

to the territorial scope of the Dutch criminal law. Personal scope can also be the starting point of criminal liability. This will particularly be the case if the legal system in question is not defined by a territory but, for instance, by membership of a community defined by religion. In that case personal scope can function as a tool to avoid rule conflicts, as when the Shari'a only applies to Muslims, while Jewish law only applies to members of the Jewish people.

### 4.3 Limitation of power

A common way to avoid inconsistencies within a single legal system is to avoid rule conflicts. We have seen in the previous section that rule conflicts can be avoided by limiting the applicability of rules through their conditions and scope. They can also be avoided by making it hard for conflicting rules to enter into existence at all. If, for instance, the national legislator has made an exception to the general right of free speech for cases of hate speech, it will not allow a local legislator to make an exception to the exception for hate speech against people of a particular origin, say French speaking people from Walloon. If a local legislator nevertheless attempts to do so, its rules will simply not be recognized as valid law. The local legislator does not have the power to make rules that conflict with the 'higher' rules of the national legislator. This limitation of power avoids conflicting rules and therefore also inconsistencies arising from rule conflicts.

A different example of the same idea would be that contract partners cannot validly contract to do something that is prohibited by legislation or immoral. As this last example illustrates the technique of 'disempowerment' cannot only be used within a single normative system, but also in the relation between parallel normative systems such as national law and morality.

### 4.4 Applicability and application

There are two fundamentally different ways to look at the operation of legal rules, each with its own merits. One view sees legal rules as operating 'automatically'. If a case falls under a rule, that is if the conditions of the rule itself and the scope conditions are satisfied, then the rule is applicable to this case. On this 'automatic' view, an applicable rule will always attach its consequences to the case. Theoretically this might even happen if nobody were aware of it (Hage 2012). For example, if somebody violates a duty of care and causes damage, he automatically becomes liable for damages.

The other view sees rules as tools, used by legal decision makers, to attach consequences to cases. It is up to the decision makers to apply the rule or not. A rule is applied to a case when somebody attaches the consequences of the rule to the case. For example, a decision maker may decide to apply a rule by analogy to a case. Then the rule is applied, even though not all of its conditions were satisfied. Or the decision maker decides to make an exception to the rule and does not apply it, even though all the rule conditions are met. On this second view the issue whether a rule is to be applied to a particular case is not completely determined by the rule's applicability. Other factors may also play a role, such as the purpose of the rule, and also a possible conflict between the rule and some other rule. In particular this last possibility is relevant for us here.

### 4.5 Exceptions to rules

Normally a rule is applied if it is applicable, but it is possible to apply a non-applicable rule and not to apply a rule that is applicable (Hage 1997, p. 86-124; Hage 2005, p. 87-95). If a rule that is applicable in a case is nevertheless not applied to that case, we say that in that case an *exception* was made to the rule. The existence of an exception is the reason that an applicable rule is not applied, and for the existence of this reason there must be other reasons. It is, for instance, not possible to say that

Günther committed theft, but should not be punished because there is an exception to the rule that thieves should be punished, even though there are no reasons for making such an exception.

The 'logic' of exceptions to rules works as follows.

- If a rule is applicable to a case, this is a contributory reason to apply the rule and to attach its conclusion as legal consequence to this case.
- Normally there are no reasons against applying an applicable rule, and then the applicability of the rule suffices as reason to actually apply the rule and make it attach its consequences to the case.
- Sometimes there are contributory reasons against applying an applicable rule. It is not a matter of logic what such reasons might be.
- If there are both contributory reasons for and against applying a rule to a case, these reasons must be 'balanced'. This 'balancing' is little more than taking a decision which reasons outweigh the other reasons.
- If the balance of reasons leads to the conclusion that an applicable rule should not be applied, we say that there is an exception to the rule. This exception is nothing else than the outcome of balancing the reasons for and against application.
- If in a particular case there is an exception to a rule that is applicable to that case, this rule should not be applied, and its consequences are not attached to the case.

It should be noted that this logic of exceptions to rules only provides a tool to deal with exceptional circumstances. It does not indicate what such exceptional circumstances might be, nor does it tell us how the exceptional circumstances should be balanced against the applicability of the rule.

### 4.6 Prevalence between rules

There may be many reasons to make an exception to a rule. For instance, in a particular case application of an applicable rule would be against the purpose of the rule. Or the person invoking a rule may have acted in such a way that invocation would be against good faith. For the present purposes the most important reason to make an exception to a rule is that the rule belongs of a set of conflicting rules which are applicable to the same case.

Since it is not desirable that the rules of a legal system attach incompatible legal consequences to a case, the possibility that this might occur is a reason not to apply one of two rules that are in conflict.[10] The question then becomes which rule to apply and which rule to disregard, or – in other words – which rules prevails over the other rule. Logic is not suited to answer this question by itself, but it can provide the tools to deal with prevalence between rules and the implication this has for avoiding actual rule conflicts. The argument that is relevant in this connection would be along the following lines:

- If two rules are applicable to a case, and their application would result in inconsistent legal consequences, this is a contributory reason against application of one of the two rules.
- The fact that application of both rules would lead to an inconsistency is a stronger reason against application than the applicability of the rules as reason for application.

[10] Some might argue that it is even impossible that two rules attach inconsistent legal consequences to a case. However, it is not immediately clear that the reality that is constructed through rule application must be consistent. It may be worth the effort to investigate the possibility that institutional reality can be inconsistent, but this is not the place to undertake that enterprise.

- The intermediate conclusion is that one of the two conflicting rules should not be applied. But which one?

  That is a matter of prevalence: the rule that prevails over the other rule should be applied. Logic cannot answer the question which rule prevails (under which circumstances). This is a substantive legal issue. As a matter of fact several contributory reasons can play a role in this connection[11]:

  - The rule that better fits in the overall legal system prevails over the less fitting rule (Coherence)
  - The rule that was made by the 'higher' authority prevails over the rule with the rule made by the lower authority (*Lex Superior*).
  - The more specific rule prevails over the more general rule (*Lex Specialis*).
  - The rule that was more recently made prevails over the older rule (*Lex Posterior*).

## 4.7 More is less

In deductive logic the inconsistency of a set of propositions is the result of too much information. A simple example can illustrate this. Take a set of propositions that contains only one proposition, for instance the proposition that Boris has the power to create emergency regulations. This set is consistent. If we add to this set the proposition that Boris does *not* have the power to create emergency regulations, the result is inconsistent. The inconsistency can be taken away again by removing either one of the two sentences from the set. The more propositions are added to a set of propositions, the more opportunities arise for an inconsistency between two or more of the propositions. Moreover, if a set of propositions is inconsistent, the addition of more propositions cannot make it consistent. Only the removal of one or more propositions can make an inconsistent set consistent. To state it in a maxim: more is less. The more propositions a set contains, the less chance that the set is still consistent.

In a non-deductive logic, such as the logic for rule application that was above sketched in outline, this 'more is less'-maxim can be turned around: more propositions can bring about that conflicting rules do not lead to inconsistencies. In this connection, 'more is less' stands for 'more propositions lead to less inconsistencies'. Let me illustrate this at the hand of the example of theft during night time. Suppose we have two rules, the rule that theft can be punished with four year of incarceration and the rule that theft at night theft can be punished with six year of incarceration. Add to these rules the case of Judy, who stole a bracelet during night time. If this is all, both rules are applicable and will be applied, leading to the inconsistent conclusions that Judy is both punishable with maximally four and six year of incarceration. By adding the rule that if two rules conflict in a particular case there is an exception to the more general rule, it becomes possible to make an exception to the general rule about theft. The inconsistency is then avoided, because this more general rule, although applicable, is not applied anymore, and only the conclusion that Judy is punishable with six year of incarceration can be drawn. As this example illustrates, the addition of the 'conflict rule' (and the information that the rule about theft during night time is the more specific one) prevented the rule conflict from leading to an actual inconsistency.

## 4.8 Intermediate summary

A legal system was defined as an exhaustive set of CLCP's, in combination with its underlying materials. Such a system is consistent in the sense that it does not attach incompatible legal

[11] This list is not exhaustive.

consequences to a case. Logical tools can be helpful in constructing such a consistent system from the potentially conflicting underlying materials. One technique in this connection is the avoidance of conflicts within the underlying materials by limiting their applicability. In this connection both the ordinary and the scope conditions of rules play a role. A second technique is to allow exceptions to rules, because exceptions make it possible that an applicable rule that is involved in a rule conflict is not applied to a case. Logic cannot detail how exceptions will be used to this purpose, but it can make clear which possibilities are available to legal decision makers. The maxim 'more is less' plays a role in this connection. It indicates that the addition of more rules to a conflicting rule set can avoid that the conflicts lead to incompatible legal consequences.

# 5 Rule conflicts between distinct normative systems

Rule conflicts between distinct normative systems can exist between distinct legal systems and between legal and non-legal systems (Glenn 2014). Examples of conflicts between distinct legal systems would be conflicts between:

- the national law of two countries, such as France and Argentina;
- national law of a country and a personal (religion-based) legal system, such as a conflict between German and Canon law;
- national and international law, as when a Polish rule violates the freedom of religion as protected by the European Convention on Human Rights.

The typical case of a conflict between law and a non-legal system is a conflict between law and morality.

The question that needs to be addressed in this section is how logic can help us in dealing with conflicting rules from separate normative systems.

## 5.1 Separation

According to Raz (1979, p. 28-33), law claims authority, and this claim involves two things. First, law provides us with reasons for action, and second, these reasons exclude other reasons. With this last point, Raz means that according to the law, reasons for deviating from what the law prescribes should in principle be ignored. It is true that law makes exceptions to this principle, for instance by sometimes allowing conscientious objection, but the starting point is that the law not only provides reasons for action itself, but also takes away the reason-giving force of norms from other systems. *From the legal point of view* it is in principle irrelevant if what the law prescribes conflicts with morality, or with some other legal system In this way, a legal system separates itself from those other systems.

The separation becomes visible in the necessity to add subscripts to legal judgments. For instance, it is not the case anymore that Giovanni ought not steal *tout court*. If normative systems become separated, the judgment must be that morally, or legally, Giovanni ought not steal. In this example the subscripts distinguish between the legal and a non-legal (the moral) point of view. However, it becomes also possible to distinguish between different legal points of view. For instance, according to Dutch law the creditor of a contract can claim specific performance from her debtor, but according to English law she cannot. According to the law of Spain it is allowed to charge an interest for a money loan, but according to the Shari'a it is not.

If the legal and other judgments are subscripted, seemingly conflicting judgments are logically not inconsistent. If a debtor is, according to Dutch law, obligated to provide specific performance, while

according to English law he only has to pay damages, there is no incompatibility or inconsistency involved.

## 5.2 Fusion through practical reason

Legal norms have as their aim to guide human conduct. If a debtor must, according to applicable Dutch law, perform his contract, this is normally a reason for this debtor to specifically perform his contract. If this same debtor can, according to equally applicable English law, restrict himself to paying damages, this takes away the reason which the debtor had to perform the contract. Logically there is no incompatibility between the Dutch law obligation to perform specifically, and the English law permission not to perform specifically. From the standpoint of the agent who must decide whether to perform, there is a dilemma however.

The norms from the two legal systems which are from a logical point of view separated because of their being subscripted nevertheless cause a dilemma for the agent who sees in the norms of both legal systems reasons for action. Practical reason – the reasoning involved in deciding what to do – joins again what the legal systems separated. Although from a logical point of view it is not necessary, legal systems nevertheless try to avoid the dilemmas resulting from intersystematic rule conflicts.

## 5.3 Avoidance of conflicts

The easiest ways to avoid the dilemmas from intersystematic rule conflicts is to make sure that such conflicts do not occur. Scope conditions have as their main function to do just that. If the criminal law of countries only applies to cases that occurred within the territories of these countries and if multiterritory cases are rare, there will be few situations in which rules from more than one territorially defined legal system conflict. However, nowadays multiterritory cases are not rare anymore.

Scope conditions influence the applicability of rules. However, it seems to remain possible that rules from different systems are applicable to one and the same case and would, if applied, lead to legal consequences that pose a dilemma for the agent who wants to comply with her legal duties. Private international law (PIL) is there to prevent the dilemmas that might result from intersystematic rule conflicts. It does so by indicating which legal system provides the rules that a legal decision maker should use to deal with a case. PIL is part of the various legal systems and it may therefore be different from one system to another. If it were, there would be little gained by the existence of PIL. If Dutch PIL says that a contract case is governed by Dutch law, while English PIL says that it is governed by English law, the dilemma of the contract party who wonders whether to perform specifically is not taken away. However, large parts of PIL have been created through international conventions, with as result that the PIL of legal systems is harmonized in the sense that the PIL of different systems identifies the same rules as those governing a case (see also Section 5.4 on incorporation). For example, Article 3 of the Convention on the law governing transfer of title in international sales of goods would, if it were in force, make local law decisive for the correct procedure for the transfer of title in sold goods.

It is not easy to determine what goes on logically when PIL determines that the rules of a 'foreign' legal system govern a case. The ordinary conditions of local rules, for instance the Dutch rules for the transfer of real estate, do not mention cases in, for example, Belgium. If a Dutch judge were to apply Belgian law to determine whether the buyer of a house has become the owner through transfer of title, it cannot well be said that this judge is making an exception to the Dutch rules. Therefore the

most likely candidate for giving a logical account of what goes on in PIL are the scope conditions. The rules of PIL can be seen as giving scope conditions for local rules: the local rules are only applicable if rules from another legal system are not declared applicable instead.

## 5.4 Reference and incorporation

The choice of applicable law through PIL involves more than merely a limitation of the scope of the 'own' rules. It is also necessary to assign applicability to the 'foreign' rules that do not belong to the own system. Somehow these foreign rules should be made applicable without making them part of the own system. This can be done by means of a technique that will be called reference. A second technique, that avoids conflicts altogether, is to *incorporate* 'foreign' rules in the own system.

Foreign rules can be used in the own system through a technique which may be called 'reference'. The foreign rules are not incorporated in the own system, but their existence and content is considered by the own system as matters of fact that are relevant from the point of view of the own system. For example, Dutch family law may treat the fact that Islamic family law has a particular content as a fact that is legally relevant for the Dutch family law. Rules from Islamic law are then applied to cases that involve Muslims because the rules of Dutch family law refer to the rules of Islamic family law. Formally the case is governed by Dutch family law, but it is Islamic family law that determines the content of the Dutch law.

The ubiquitous references to good faith in regulations of contract law are also an example of reference, in this case from a legal system to a non-legal norms. By stating that contract parties ought to deal with each other in good faith, a legal rule makes non-legal standards for proper behavior legally relevant. More in general, the so-called 'open norms' are examples of reference.

Another example would be that a personal legal system declares territorial law relevant for dealing with cases where legal subjects that fall under the system of personal law live in a particular country. The Talmudic concept of the 'law of the land' would be an example of this construction.

And, finally, a plausible interpretation of how *soft law* operates is that the valid law of a system refers to soft law which is treated as a factual phenomenon that is legally relevant.

Reference avoids conflicts between the rules of the referring system and the rules of the system to which reference is made, because the content of the referring system is adapted to the content of the referred system.

In case of reference, the content of a foreign system is treated by the own legal system as a matter of fact that co-determines the content of the own law. In case of *incorporation*, foreign law becomes part of the own law. The typical example of this phenomenon is the incorporation of international law in a national legal system in so-called 'monist' legal systems. The Dutch legal system nicely illustrates incorporation. Provisions from international treaties ratified by the Netherlands and rules created by international organizations in which the Netherlands participate (in particular the European Union) automatically become part of the Dutch legal system (Art. 93 *Grondwet*). The foreign rules are not foreign anymore, except in the sense that they were not created by native Dutch legislative bodies. However, they are part of the Dutch legal system to the same extent as home-made rules.

Strictly speaking, incorporation is not a technique to deal with conflicts between rules of different systems, but a way to ensure that only one legal system is relevant. If EU regulations become automatically part of the Dutch national law, there is no need any more to pay attention to EU law, because the relevant rules are already part of Dutch national law. In the case of the EU one may even

ask whether there exists such a thing as the EU legal system. It may be argued that the EU only provides organs which can create (uniform) law that becomes part of the national legal system of the Member States. The same may be said about the provisions of human rights treaties: they create uniform human rights in different legal systems and it may be argued that there is no separate international human rights system. However, theoretically it is imaginable that some legal system incorporates part of a foreign legal system, while that foreign system has independent existence. The situation is then comparable to one country that uses the national currency of some other country.

## 6 Conclusion

The development of the internet, the rise of transnational law, the co-existence of different legal traditions and subtraditions, and globalization, they all make that the opportunities for conflicts between rules of different legal systems increase. One of the tasks of legal science is to deal with these possible conflicts and, as Glenn pointed out, the insights of modern logic are one place to look for assistance. Logic can nor should dictate a particular way of dealing with rule conflicts, but it can be of help by providing a conceptual framework that clearly defines when a rule conflict occurs and which tools are available to avoid these conflicts or to deal with them.

A conflict of rules occurs when it is possible that two or more rules attach incompatible legal consequences to a case. Within a single legal system, the possibility of rule conflicts is limited by adding scope conditions to the ordinary rule conditions. Mechanisms such as PIL extend this role of scope conditions to the relation between rules from different systems. Another limitation of the possibility for rule conflicts consists in the limitation of the powers of rule creating agents. Often it is impossible to create rules that conflict with already existing rules.

If there are actually conflicting rules, it becomes necessary to handle the conflict. By adopting a non-deductive logic for rule application it becomes possible to account for exceptions to rules. An exception to a rule makes that a rule which is applicable in a case should nevertheless not be applied. Then the rule does not attach its legal consequences to the case. One reason for making an exception to a rule is that application of the rule would lead to legal consequences which are incompatible with the legal consequences of another applicable rule. An important insight in this connection is that inconsistencies because of conflicting rules are prevented, not by removing information, but by adding more information in order to handle the rule conflict (more is less).

If a conflict occurs between rules of different legal systems, there is logically speaking no need to deal with the conflict. It is logically well possible that an agent ought to do X from the point of view of one legal system, and ought to refrain from doing X from the point of view of another legal system. However, an agent who is subject to incompatible prescriptions from different legal systems is burdened with a dilemma. Legal system often come to the assistance of such individuals by referring to the rules of other systems, or by incorporating 'foreign' law.

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