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PERMISSIVE NORMS AND NORMATIVE SYSTEMS

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I.

It is a well known fact that permissive norms are not very popular among legal philosophers. A great many of them tend to think that permissive norms have no independent status; so they accept only one type of norms, viz. mandatory norms, that is, norms establishing obligations or prohibitions.¹ The tendency to dismiss permissive norms as little important is at least partially grounded on the conception of norms as prescriptions or directives for conduct. Indeed, a permission, e.g. a permission to smoke in the class room, does not seem to be capable of guiding our behaviour in a straightforward way, for it is perfectly compatible both with smoking and with non smoking, i.e. the omission or forbearance of smoking. Here the difference with mandatory norms is very clear: a mandatory norm excludes certain actions and so is incompatible with them. And yet permissions like mandatory norms do usually refer to actions or states of affairs which are a result of an action and this reference seems to be of a similar kind, though it is not easy to characterize it. In a very loose sense they are also prescriptive, though they do not prescribe any particular action. Nevertheless permissive norms are normatively relevant in an indirect way as I shall try to argue in this paper. Though in an important sense they are parasitic upon mandatory norms, they

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of norms) is true if and only if the system A contains no norm prohibiting p. Therefore for the permittedness of p no permissive norm is needed: p is permissible in virtue of the mere fact that it is not forbidden. From this it follows that in principle all actions are permitted, unless they are prohibited by some norm. Hence it seems that it would make no sense to issue a permissive norm: to permit an action that is not prohibited would be quite pointless, for such a permission would ~~xxx~~ produce no change in its normative status.

III

In order to elucidate the view according to which a permission is mere absence of a prohibition I shall consider a simplified theoretical model in form of a game similar to that devised by D. Lewis.⁴ The game is played by two players called Rex and Subject. (The existence of more than one subject would make no difference; the case of a plurality of norm authorities will be considered later.)

Rex has illimitable competence to regulate Subject's actions by means of norms. This means that he can change the normative status of Subject's actions by performing normative acts like commanding or permitting. At the beginning of the game all actions of Subject are permissible: he is free to do or to omit any action that lies within the scope of his (physical) possibilities. But if Rex commands that Subject should do p, the action p turns to be obligatory and its negation (-p) prohibited. Therefore the actions of Subject can be divided into two classes: the class of permissible actions (the sphere of permissibility) and the class of prohibited actions, which are all those actions whose omissions are commanded. To the class of commanded actions belong not only those that

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the former norm if it is more just or convenient, then the competence of the norm authority is limited: it is only competent to replace a norm by a more just or convenient one, but has no competence to issue norms which are less just or convenient than the existent ones. But without the rule "lex posterior" there would be no competence at all and so there would be no possibility of normative change emerging from acts of authority.⁵

IV

An especially interesting case arises when Rex prohibits p (by commanding $\neg p$) at a time t_1 and then on a later occasion t_2 permits p . In such a case we would say, according to the rule "lex posterior" that p is permitted from the time t_2 , even if it was prohibited during the interval t_1-t_2 . The permission granted at t_2 cancels the previously given prohibition. So even if it seems to be pointless to permit an action which is not prohibited, it is by no means pointless to cancel or derogate an existent prohibition by granting a permission. This fact already shows that permissive norms play at least one important role, viz. that of cancelling or derogating prohibitions which could not be possibly performed by mandatory norms.⁶ (We shall see presently that this is not the only function of permissive norms.)

It is interesting to observe moreover that the permittedness of p from t_2 on is not due to mere absence of prohibition or Subject's original "freedom", but is the result of a normative act carried out by Rex. Is there any difference between the original, purely negative permissibility (for which no act of the norm authority is needed) and this supervenient or positive permissibility which stems from certain acts of authority?

It could be argued⁷ that the fact that the permissibility of an

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a higher authority has bestowed on an action.

Suppose now that Subject is very fond of hunting and this activity has not yet been subject to any norm. Subject is free to hunt or not to hunt whenever he wants. If some day Rex decides to prohibit hunting on Sunday, from this moment on hunting on Sunday will be prohibited, but it still is permissible on all other days of the week. Imagine now that one day Minister decides to prohibit hunting on Monday and Tuesday; the result is that hunting is prohibited now on Sunday, Monday and Tuesday, but it is still permissible on other days of the week. Now being afraid that Minister, who strongly dislikes hunters, should prohibit it altogether, Subject asks Rex to permit him to hunt at least once a week and Rex in a rapture of generosity decides to grant the permission to hunt on Saturday. What effects/causes this act of permitting and in what way the permission to hunt on Saturday can be said to be different from the permission to hunt on Friday?

The permissibility to hunt on Friday is what we called negative permission: it is the remainder of Subject's original freedom which has not been suppressed yet by normative regulations issued by Rex or Minister. Therefore this negative kind of permissibility vanishes as soon as the action in question is prohibited by an act of norm authority (either by Rex or by Minister). But the permissibility to hunt on Saturday is not a merely negative permission; it is a permission granted by Rex which stems from an act of authority. This is what we have called supervenient or positive permission. This kind of permission does not yield to a prohibition issued by Minister, because he is a lower authority and so lacks competence for derogating norms given by Rex. Even if the act of permitting to hunt on Saturday does not derogate any norm (there was ex-hypot-

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sive act does not derogate any existent norm, it rejects the prohibition of p and so p cannot be prohibited by a hierarchically lower authority.

But a norm authority can also withdraw a prohibition without rejecting it, i.e. without permitting the hitherto prohibited action. Such an act of withdrawal cancels a norm without replacing it by another norm of an opposite modality. In contradistinction to rejection such an act of withdrawal only makes sense regarding an explicitly formulated norm; so it can be characterized as a derogation of a norm formulation, rather than derogation of a norm.¹⁰ The concept of abrogation introduced by Alchourrón and Makinson¹¹ is apparently intended as a reconstruction of the same notion:

"For when we abrogate a subset D of A , we merely drop it from the code, leaving $A-D$ intact even if it implies some of the regulations in D . But when we derogate D , forming $(A \perp D)$, then no element of D is implied by any $B \in (A \perp D)$."¹²

But if abrogation is mere withdrawal or dropping of D , then it is not true that "derogation coincides with abrogation just when no element of the set D rejected is implied by the complement $A-D$."¹³, for in the case of an abrogation nothing is rejected, not even D .¹⁴ The main difference between derogation of a prohibition (which implies rejection) and withdrawal or abrogation of the same prohibition is that the former transforms a prohibited action into a positively permitted one, whereas in the latter case the action in question becomes negatively permitted. This means that if Rex withdraws his prohibition to hunt on Sunday, it implies no restriction to the competence of Minister, who can prohibit the very same action on a later occasion. This as we have already seen would not be possible if Rex issued a permissive

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Sunday, or he ought not to drink while he works and he ought to work every day, except on Sunday.

It is clear that the permission to drink on Sunday is not a mere absence of a prohibition (negative permission) which would yield to any act of authority, but a normative or positive permission that stems from an act of Rex and whose effects Minister cannot change.

The introduction of an exception into one of the two norms (N2 or N3) in order to avoid the indeterminacy of Subject's obligations is, of course, not automatic but requires a decision. The problem cannot be solved by application of the rule "Everything that is not prohibited is permitted", for this rule simply cannot be applied. Is it prohibited not to work on Sunday? Not necessarily, for if we introduce an exception into N2 the result is that Subject may not work on Sunday. But we cannot say either that it is permitted not to work on Sunday, for if the exception is introduced into N3, then Subject must work on Sunday, but he may drink while he works on that day. What is wrong with the normative system of our example is that obligations of Subject are not clearly determined and so the sphere of negative permissibility is not determined either, even if positive permissions are clearly stated.

VII

To sum up: permissive norms are in an important sense system dependent: it is only in a dynamic perspective of a hierarchically structured normative system (with a plurality of norm authorities of different level) that changes in the course of time as a result of different normative acts carried out by norm authorities, where the concept of a permissive norm becomes really fruitful. The fact that legal systems belong to the kind of systems in question explains why permissive norms play a much more important role in legal

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no rejection of such norms and hence it is not a derogation but a mere withdrawal. To say that in the case of abrogation "only explicitly rejected items are considered as eliminated" as Alchourrón and Makinson do sounds strange, unless the term "rejected" is used in a loose, non-technical sense.

- (15) It is a noteworthy fact that the pair of concepts negative and positive permission behave in exactly the same way as weak and strong permission, introduced by von Wright 1963. Cf. Alchourrón-Bulygin 1984².
- (16) Which is an adaptation of an example discussed by Hilpinen in Hilpinen 1981.