CHAPTER XIII

DEROGATION*

Derogation, besides commanding, permitting, and authorising, is a specific function of the norm. It exists when the validity of another norm is repealed. It plays an important part in the sphere of a positive legal order but can also arise within the sphere of a positive moral order where, however, it will hardly be taken into consideration because of the much greater stability of this normative order. Within a positive moral order, a norm ordinarily does not lose its validity by derogation, but either by the expiration of time for which it is valid according to its own or another norm's stipulation, or by the fact that it no longer is obeyed and applied and thus has lost its efficacy and thereby its validity, efficacy being a condition for validity. These ways of losing the validity must be distinguished from losing it by derogation, since derogation is the repeal of the validity of a valid norm by another norm. Unlike other norms, derogation does not refer to a certain behaviour, but to the validity of another norm. It does not establish an *ought* but a *non-ought*. The derogating norm, that is, the norm that repeals the validity of another norm according to which a certain behaviour ought to take place, should not be confused with a norm according to which the omission of this behaviour ought to take place, and the norm that repeals the validity of another norm according to which the omission of a certain behaviour ought to take place, should not be confused with a norm according to which this behaviour ought to take place. According to a norm whose function is the derogation of another norm, neither a certain behaviour nor the omission of a certain behaviour ought to take place. The derogating norm repeals the *ought*, and that means, the validity of another norm according to which a certain behaviour or the omission of a certain behaviour ought to take place. Consequently, a derogating norm cannot exist by itself but only in relation to the norm whose validity it repeals, and in this sense it is a dependent norm.

Derogation is a problem of the sphere of validity of norms, especially of the temporal sphere of validity.[1] A norm is valid for a certain space

and for a certain time. It has a spatial and a temporal validity. The derogating norm terminates the temporal validity of another norm. Derogation affects the validity of a norm and not the act of its creation; only the former can be repealed, not the latter. Since derogating norms do not prescribe a certain behaviour, and since they cannot be obeyed and applied like other norms, they also cannot be violated. If it has fulfilled its function, that is to say, if the norm to which it relates has lost its validity, then also the derogating norm, in regard to the norm whose validity it repeals, will lose its validity. Its validity in respect to the norm, whose validity it has repealed, also cannot be repealed; it is not able to be derogated in relation to this norm. The attempt to repeal the validity of a norm which has derogated the validity of another norm in regard to this norm, by means of a derogating norm, would be without effect. The norm whose validity was terminated by the first derogating norm would not regain its validity by the second derogating norm. If the validity of a norm prohibiting marriage of Catholic priests is repealed by a derogating norm, and if the legislator, in order to revalidate the repealed norm, would issue a norm repealing the validity of the derogating norm, he could not achieve his goal. A norm, whose validity has been repealed by a derogating norm, can only be revalidated by a norm of the same content as the repealed norm. As a matter of fact, it can never be revalidated since the new norm is different from the one which was repealed, even though it has the same contents.

The situation is different, when the effect of the derogating norm does not take place immediately after it has been established, but at a later date. If, e.g., the derogating norm stipulates: the validity of the norm stipulating... terminates after six months; then, the validity of this derogating norm can be repealed in the meantime by another derogating norm. Derogating can occur under two different circumstances: either in case of a conflict between two norms, or without such a conflict. The norm-creating authority may hold that the validity of a norm is unwanted and, therefore, may wish to terminate its validity. It can do so by an act of legislation, whose meaning is derogation. In this case, derogation is the sole function of a positive norm. This is not doubted by anyone. For instance, a valid norm is that all men shall serve in the military who have reached the age of 21 years and who have been found physically fit. The legislator can terminate the validity

of this norm by a legislative act whose sole function is the repeal of the validity of the said norm. By this norm, military service of qualified men is not prohibited. No definite behaviour is prohibited or ordered. The legislator, however, can also for some reason or another create a norm whose contents are identical with those of an already-existing norm. In this case, derogation of the validity of the first of the two norms is possible. If so, only the second norm remains valid. If the validity of this second norm is repealed by a derogating norm, the derogation does not have the effect of revalidating the first norm.

Since the derogating norm stipulates neither the *ought to* of a certain behaviour, nor the *ought to* of the forbearance of a certain behaviour, but the *non-ought* of a certain behaviour, it cannot be expressed like other norms in an imperative or ought-sentence. The imperative or ought-sentence can express the idea that a certain action or omission ought to take place, but it cannot express the repeal of the *ought* established in another norm. Suppose the legislature were to formulate the following norm: "Men who have reached the age of 21 years and who have been found physically fit ought *not* to serve in the military." That norm would not repeal the validity of the norm prescribing that qualified men ought to do military service, but would establish a separate norm in conflict with the former. The derogating norm, however, does not conflict with the norm whose validity it repeals. To formulate the derogating norm in a manner which is logically correct: "men who have reached the age of 21 years and who have been found physically fit, non-ought to do military service" is, however, linguistically impossible. Therefore, derogating norms assume the form of assertions such as "the norm according to which men who have reached the age of 21 years ought (etc.)... is hereby repealed."

The function of such an assertion is, however, not a descriptive one, as the sentence seems to indicate grammatically, but the function is a normative one, namely, that of repealing the validity of a norm. Norms sometimes assume the grammatical form of assertions. For instance: a criminal code provision, "persons convicted of larceny are punished by imprisonment" is, according to its grammatical form, an assertion describing a fact; according to its function, however, it is a norm directed to the judge, prescribing punishment by imprisonment of all persons convicted of larceny.[2]

The norm whose validity is repealed by a derogating norm can be a general or an individual norm. A good example of the latter is a court's decision which has the character of an individual norm, repealed by the decision of a higher court which does not substitute its own judgment. The norm whose validity is repealed can be one which is established by an act of will consciously directed at the creation of a norm, or it can be one created by custom. The derogating norm, however, cannot be established by custom.

A norm may lose its efficacy and thus also its validity by custom if it is continuously not obeyed and not applied, whereby no norm prescribing certain behaviour is created.

Custom may also create a norm which prescribes the omission of an act which was prescribed by an up-to-now valid norm: or custom can establish a norm which prescribes a certain action whose omission was prescribed up to now by a valid norm. In such a situation, no conflict of norms results, since the custom which creates the new norm implies the fact that the up-to-now valid norm is continuously not obeyed and not applied, and, therefore, loses its efficacy and thus also its validity. In both cases, therefore, no derogation of the up-to-now valid norm takes place, but the loss of validity is caused by the loss of efficacy.

In contradiction of a wide-spread opinion in the field of jurisprudence,[3] the question whether norms exist which cannot be derogated must be answered in the positive if the question means: whether there are norms whose validity – according to their own meaning – cannot be repealed by a derogating norm, and if the question does not mean whether not every norm may lose its efficacy, and thereby its validity, and be replaced by another norm regulating the same subject matter in a different way.

The latter is without doubt the case but derogation does not enter the picture. A norm can exclude its derogation by another norm, but it cannot prevent the loss of its validity by loss of its efficacy. Without doubt, a norm, especially a legal norm, cannot only relate to specific conduct but it can also affect its own validity. It can, for instance, prescribe to be valid for only a certain length of time, for only a certain space, or for only certain persons. It can prescribe to be valid for an unlimited time, for an unlimited space, and for all persons until another

norm formulated by the same authority becomes valid which is in conflict with the first one. It can provide that it may be repealed only in a certain manner prescribed by itself or by a norm of the same order. There is, therefore, no reason to assume that it cannot provide that it should not be repealed by another norm. Norms which, according to the belief of man, are issued by God are said to be incapable of being repealed, that is to say, they cannot be repealed by norms which are established by man. A democratic constitution can provide that it shall not be superseded by a monarchial constitution. If a norm *A* is valid stipulating that its validity cannot be repealed and if nevertheless a norm *B* is established stipulating that the validity of norm *A* is terminated, and a norm *C* regulating the subject matter regulated by norm *A* in another way, norm *A* remains valid. Consequently, there exists a conflict between the provision of norm *A* concerning the unrepealability of its validity and the provision of norm *B* concerning the repeal of its validity, and in addition a conflict between norm *A* with respect to its other provisions and norm *C*. These conflicts can be solved only in the way of norm *A* losing its efficacy and therefore its validity as the result of norm *C* becoming effective.

The principle of the force of law of a judicial decision, too, indicates that there are norms which, according to the meaning of this principle, are not to be derogated; for a judicial decision which has the force of law is an individual norm whose validity cannot be repealed by another norm.

Another question is whether and to what extent the principle of force of law of judicial decisions is actually established within a certain legal order. It does not exist in the strict sense of the term if the legal order does not completely exclude the possibility of a procedure by which the judicial decision can be attacked, if such a procedure is always, but only under specific conditions, possible; or if a judicial decision can be repealed by an act of legislation. Then the principle of the force of law of a judicial decision exists only in a relative and not in an absolute sense, and in practical effect means hardly anything other than that the execution of the judgment is possible. Even an executed judgment, one, for instance, which prescribes a prison term or the death penalty, can be repealed. In other words, the validity of an individual norm which prescribes putting a person in prison for the term of one year,

or to kill a person by hanging, can be repealed by another norm, even if the punishment has already been served. This of course will not have the effect to undo what has been done, namely, the served prison term or the execution. The function of the repeal is to strip the actions concerned of their character of punishment, without qualifying them as crimes. It must be kept in mind that the individual norm whose validity has been repealed is still valid up to its repeal; that is to say, that its validity is not affected by its execution.

The Roman jurisprudence made a distinction between "abrogatio" (or obrogatio), meaning a complete repeal and "derogatio" meaning a partial repeal. Regelsberger, speaking of the formula: "*lex posterior derogat priori*" states[4]:

> The new legal norm can repeal the old one in whole or in part. Its content can be limited only to the repeal or it can regulate the same facts. In the latter situation, an expressed repeal is not necessary insofar as both norms cannot be applied together.

That which is repealable is, however, not the legal norm but the validity of the legal norm. By complete repeal is meant the repeal of its validity, i.e., its specific existence; but the sphere of validity can have different dimensions. A norm can be valid for an unlimited period of time or for one year only; it can be valid for the whole State or only for a single province, and it can apply to all persons or only to a certain class. Thus, the sphere of validity can be restricted or expanded. The restriction or expansion of the sphere of validity has the effect of changing the content of the norm. The content of the norm can be changed not only with respect to its personal, temporal, or territorial sphere of validity, but also with respect to its material sphere of validity. The material sphere of validity of a norm is that conduct which the norm prescribes and the conditions under which it ought to take place. A norm which is valid for all forms of larceny can be replaced by one which is valid only for a certain form of larceny. A norm which prohibits murder by prescribing the death penalty for murder can be replaced by one which prescribes only a prison term for life.

By partial repeal of a norm is meant the partial change of the content, i.e., of its sphere of validity. The changed content of a norm does not cause the norm to continue to exist as a partially repealed norm, but the result is that the validity of the norm is repealed by a derogating norm, and that in its place another norm is substituted whose content as com-

pared with the first one is only partially different. According to the traditional view, partial derogation of a norm is defined as the partial change of the content whereby the norm continues to exist. Let us assume the following legal norm: larceny shall be punished by imprisonment for a term of from one to three years. Let us also assume that the punishment is changed from six months to five years; according to the traditional view the first norm continues to be valid except that some of its content was changed. Let us assume another example. A norm is valid:

> If two persons who are older than 21 years old enter into a contract and if one of the parties does not fulfill his contractual obligation, upon the action of the other party a civil execution ought to be directed against the property of the first one, for the purpose of repairing the damage.

Later, by another norm, the age is reduced to 20 years. According to the traditional opinion the first norm is still valid, only with changed content. This situation occurring within a legal order is presented in analogy to the partial change of a physical object which, in spite of this change, retains its identity. A house still is the same house even though its front windows are enlarged.

However, this analogy is faulty. A norm, especially a legal norm, cannot be changed like a physical object. If the content of a norm is changed, that is to say, if a legal norm begins to be valid whose content is partially different from the content of another legal norm, two possibilities exist: either the first legal norm remains valid and unchanged so that the two legal norms are in conflict with each other, or the first norm is repealed by a positive, derogating legal norm, a third norm; so that only the second norm is valid whose content is partially different from that of the first one. In no case does the first norm continue to exist with changed content, as the theory of partial repeal states. Even if one assumed, in conformity with the traditional theory, that the second legal norm brings about the change of the first norm by derogation, the first norm does not continue to be valid with changed content but the second one remains the only valid norm. This is also true if the second norm is formulated as follows: "the minimum age of the contracting parties determined in the first norm is reduced from 21 years to 20 years", for this is only a short form for the entire norm partially changed. This follows also from the fact that even according to the tra-

ditional theory, if the content of the second norm is not different from the first one, the latter becomes invalid by derogation through the second one; and if the validity of the second norm is repealed, the first one with the same content is not revalidated. Therefore, by partial repeal is meant either no repeal at all, or there is a complete repeal not of a legal norm but of the validity of the norm.

However, it is possible to repeal a single legal norm which is part of a statute composed of several legal norms. This can be done in two ways. One is to repeal the validity of one of the single norms without issuing a new single norm regulating the same subject matter in a different way. The other is to repeal the validity of a single norm of the statute and, at the same time, to issue another single norm regulating the same subject matter in another way. In both cases the single norms of the statute which are not repealed continue to be valid. In both cases it is possible to say: the statute continues to be valid, but with a changed content, because of being without the repealed single norms. Since the validity of a statute which consists of several legal norms is nothing more than the validity of these norms (not a separate validity), this process does not mean a partial repeal of the validity of the statute, but a total repeal of one of the legal norms whose aggregate forms the statute. In the second case, too, the statute does not continue to be valid with the new legal norm which took the place of the repealed one. The new legal norm exists side by side (parallel) with the statute which is reduced by the repealed norm. That is also true if the new legal norm is formulated in the following way: the provision of the statute, Title..., Section... (cited) providing... (text of provision), is hereby repealed; in its place the following provision shall apply... (text of new provision). This formulation is faulty, because the legislator has been misled by the erroneous theory of partial repeal.

Suppose the civil code establishes a minimum age of 20 years at which a person has capacity to contract (to do business), or the criminal code fixes an age of 16 years at which a person assumes full criminal liability, and this age is changed by a later statute, in a sentence similar to this one: "the minimum age of twenty years at which a person has full capacity to contract as defined in Title... Section..., is hereby reduced to 18", or: the age of 16 years at which a person assumes full criminal liability is hereby increased to 18 years of age. In such a case, it is said

that both codes continue to be valid with partially changed contents. This is, however, an erroneous conclusion. The provisions changing the age determined in the two codes are actually only a short form for a new civil or criminal code with partially changed contents. This can be better understood if it is assumed that the validity of the statutes, changing the age of capacity to contract, or the age of criminal responsibility, were repealed; for then the old civil code and the old criminal code would not become valid, unless by the repeal of these statutes the codes were intended to be revalidated. If this is intended, an express declaration of this intention is required by a correct legal technique.

The distinction between *abrogare* and *derogare* is based on the well-known section of Cicero's *De Re Publica* (3,22): "*Huic legi nec abrogari fas est, neque derogari in hoc aliquid licet, neque tota abrogari potest.*" Obviously, this section relates to a statute composed of several legal norms. But the rule, *lex posterior derogat priori*, is applicable not only to the relations between statutes but also to the relation between single legal norms, and "*derogare*" means not only partial but also total repeal. This writer, therefore, is using the word "derogation" in the sense of repealing the validity of a norm.

Derogation is required if norms stand in conflict with each other. It can also take place if there is no conflict between norms; thus, if the validity of a legal norm is repealed and no new one takes its place, or if a new legal norm is created which has the identical contents of an already valid norm, derogation may take place.

A conflict between two norms occurs if in obeying or applying one norm, the other one is necessarily or possibly violated. The conflict can be bilateral or unilateral. It is bilateral if in obeying or applying each of the two norms, the other one is (possibly or necessarily) violated. The conflict is unilateral if obedience or application of only one of the two norms violates the other one. The conflict is a total one if one norm prescribes a certain behaviour which the other one forbids (prescribes the omission of the behaviour). The conflict is a partial one if the content of one norm is only partially different from the content of the other one.

Examples of necessary (or unavoidable) conflicts of norms are:

I. Norm (1): Love your enemies.
Norm (2): Don't love but hate your enemies.

To obey norm (1) unavoidably violates norm (2) and vice versa.

II. Norm (1): Bigamy shall be punished.
Norm (2): Bigamy shall not be punished.

The application of norm (1) necessarily violates norm (2); the application of norm (2), the failure to punish for bigamy is necessarily a violation of norm (1).

In both examples I and II the conflict is a total one.

III. Norm (1): Murder shall be punished by death.
Norm (2): Murder shall be punished by imprisonment.

The application of either of the two norms necessarily violates the other; the conflict is only partial, and in all three examples, I, II and III, the conflict is bilateral.

Examples of conflicts of norms which are only possible (not necessary) are:

IV. Norm (1): All persons shall forbear to lie.
Norm (2): Physicians shall lie, if this will help their patients.

In obeying norm (2), norm (1) is necessarily violated; but in obeying norm (1) there is only a possibility of violating norm (2) (if a physician lies). The conflict is bilateral, but only in a partial way. It is a necessary one on one side, the side of norm (2), and a possible conflict on the other side, namely, the side of norm (1).

V. Norm (1): Larceny shall be punished.
Norm (2): Larceny from relatives shall not be punished.

The application of norm (2) (the failure to punish larceny from relatives) is necessarily a violation of norm (1); but the application of norm (1) is only possibly a violation of norm (2) (if larceny from relatives is punished). The conflict is bilateral, but only partial. It is a necessary conflict only on one side, namely, on the side of norm (2), and a possible conflict on the side of norm (1).

VI. Norm (1): In case of a certain behaviour the person who behaves in this way shall be punished.
Norm (2): In case of a certain behaviour the person who

behaves in this way shall only be punished if the judge considers punishment to be just.

The conflict is bilateral, partial and only possible on both sides.

VII. Norm (1): Murder is to be punished by death if the perpetrator is over 20 years of age.
Norm (2): Murder is to be punished by death if the perpetrator is over 18 years of age.

The application of norm (1) is not a violation of norm (2). The application of norm (2) is only possibly a violation of norm (1) (if the murderer who is less than 20 years of age, is punished by death). The conflict is only partial and unilateral, namely, on the side of norm (2).

There is no doubt that such conflicts between norms exist. They play an important part under the name of "conflict of duties" in the field of morality and in the field of law, especially, however, in the relationship between morality and law. The conflict between norms presupposes that both norms are valid. The assertions concerning the validity of both conflicting norms are true. Therefore, a conflict between norms is not a logical contradiction and cannot even be compared to a logical contradiction. Derogation repeals the validity of one of the valid norms. But in case of a logical contradiction between two assertions, one of the two assertions is untrue from the very beginning. Its truth is not repealed for it does not exist at the outset. Since the validity of a norm is its own specific existence, a conflict between norms cannot be compared to a logical contradiction. As far as a comparison can be made at all, it could be compared to two forces exerting their power on the same point from opposite directions. A conflict between two norms is an undesirable but possible situation, and occurs quite often.

The conflict can, but need not be, solved by derogation, and derogation will take place only if it is stipulated by a norm-creating authority. Just as the conflict between norms is not a logical contradiction, derogation solving the conflict is not a logical principle either; but it is the function of a positive norm, especially a positive legal norm, just as in the case where derogation takes place without there being a conflict between norms. Derogation is not the function of one of the two conflicting norms, but that of a third norm, which prescribes in case of a

conflict between two norms that one of the two or both shall lose their validity.

A conflict can arise between two norms of the same level or between a norm of a higher level and a norm of a lower level, whereby the acts by which the two conflicting norms are created differ in time, so that one is the earlier one and the other the later one.

The authority which creates norms, especially the legislator, can at some point of time issue a norm which prescribes a certain behaviour, and at a later time it can issue a norm which prescribes the forbearance of precisely that behaviour. The constitution of a state can provide that all men regardless of their race shall be treated equally; later the legislator can pass a statute which grants certain rights or which imposes certain obligations only on persons of a certain race.

In the first case a norm can, but need not be valid, which stipulates that the earlier of the two conflicting norms loses its validity; and in the second case, a norm which stipulates that the latter of the two conflicting norms loses its validity. It should, however, be remembered that of the two conflicting norms in the second case, that is, the case of an unconstitutional statute, the so-called "unconstitutional" statute may, according to positive law, be valid, but its validity may be repealed in a special procedure provided for in the constitution, for instance, by the decision of a special court. Then no conflict of norms exists, for if the statute in question is valid, it must be considered to be constitutional, that is to say, the legislator must be considered to be authorized by the constitution to pass such a law. But a possibility exists of repealing the validity of this statute by a special procedure provided for in the constitution.[5]

It is possible that one and the same statute contains two norms which are in conflict with each other. Unless, according to positive law, the law-applying organ has a choice which of the two conflicting norms to apply, a norm can provide that both norms which became valid shall lose their validity.

So far, only conflicts between norms of the same normative order, especially a legal order, have been discussed. Suppose a conflict exists between norms of two different normative orders, such as conflicts between a norm of a legal order and one of a moral order, then the legal order can provide that the legal norm which conflicts with the moral

norm shall lose its validity, but the legal order cannot provide that the moral norm which conflicts with the legal norm shall lose its validity. By the same token, the moral order can prescribe that the moral norm which is in conflict with the legal norm shall become invalid for the sphere of validity of the legal order, but it cannot prescribe that the legal norm which is in conflict with the moral norm shall become invalid. Thus, derogation can only occur within one and the same normative order.

An insight into the nature of derogation has been blurred by the formula adopted from the Roman jurisprudence, "*lex posterior derogat priori.*"[6] This sentence is misleading because it creates the impression that derogation is the function of one of the two conflicting norms. This is wrong, because both conflicting norms refer to a certain behaviour but neither of them refers to the validity of the other. A derogating norm, however, essentially does not refer to a certain behaviour but to the validity of another norm, and, therefore, is a dependent norm which presupposes the validity of a norm which relates to a certain behaviour. The two conflicting norms are independent norms which can exist by themselves. Between a derogating norm and a norm which is being derogated no conflict exists, since by reason of the validity of the derogating norm the other norm becomes invalid. If derogation occurs in a case of two conflicting norms, one of the two or both will become invalid and thereby the derogating norm too will lose its validity in respect to the norm (or norms) whose validity has been repealed because it has served its purpose. However, if it is a general norm, it can also apply to other conflicts between norms.

The principle "*lex posterior derogat priori*" is incorrect also for the following reason: since derogation is not a logical principle but the function of a positive legal norm, it does not necessarily apply, but can apply only if it is positively stipulated; and even if stipulated, it does not apply in all cases of conflicts of norms.[7] It has been shown above that in conflict between a norm of a higher and a norm of a lower level, not the earlier one but the later one may lose its validity. If it is assumed that derogation is the function of one of the conflicting norms, one should state by analogy: "*lex prior derogat posteriori*" and not "*lex posterior derogat priori.*" Moreover, the fact is ignored that by derogation both conflicting norms may become invalid, or, stated on analogy to the for-

mula "*lex posterior derogat priori*", that each repeals the validity of the other.

An argument could be advanced against the assertion that derogation solving the conflict between norms, and especially the principle formulated in the sentence: *lex posterior derogat priori*, is not a logical but a norm of positive law, as far as legal norms are concerned. The argument is that a norm which regulates derogation, taking place when norms are conflicting with each other, is usually not present as an expressly formulated norm in a positive legal order. However, this can be explained by the fact that the legislator omits formulating expressly much which he silently presupposes and assumes to be self-understood. It is quite possible that the above-enumerated principles of solving conflicts of norms are so often applied by the law-applying organs as principles of interpretation, that their existence is taken for granted by the legislator. Thus, it is possible that the authority establishing the constitution takes it for granted that a statute passed by the legislator, which conflicts with the constitution, will lose its validity; or that the legislator in adopting a norm, presupposes as self-evident that a prior norm issued by him will become invalid if it conflicts with the later one; or that the legislator takes for granted that, in adopting a statute containing two conflicting norms, either both norms become invalid or that the law-applying agency has a choice of which one to apply. If this is the case, the principles of derogation are positive legal norms.

In summary, it should be pointed out that the importance in legal theory is: that principles of derogation are not logical principles, and that conflicts between norms remain unsolved unless derogating norms are expressly stipulated or silently presupposed, and that the science of law is just as incompetent to solve by interpretation existing conflicts between norms, or better, to repeal the validity of positive norms, as it is incompetent to issue legal norms.

NOTES

 (This essay and the one following are reprinted without amendment from their original sources in English. – Transl.).

[1] Compare *infra* at pp. 264, 266.

[2] The law often makes the expression of certain words or phrases a condition to legal

consequences. It provides, for example, that a document is a valid will only if it is entitled "last will" or "testament." Another example is that for a marriage to be valid, the minister or member of a legally recognized religion must utter the words: "I hereby pronounce you man and wife". From the grammatical point of view, the words "last will" and "testament" are merely descriptive, and the words spoken by the minister are mere descriptions of a legal consequence. But at law, they are not mere descriptions or assertions, but conditions for legal consequences. J. L. Austin's statement in regard to the utterance of words and phrases as a condition to legal consequences is not quite correct when he states: "Even if some language is now purely descriptive, language was not in origin so, and much of it is still not so. Utterance of obvious ritual phrases in the appropriate circumstances is not describing the action we are doing, but doing it ('I do'); in other cases, it functions like tone and expression, or again like punctuation or mood, as an intimation that we are employing language in some special way ('I warn'; 'I ask'; 'I define'). Such phrases cannot strictly be lies, though they can 'imply' lies, as 'I promise' implies that I fully intend, which may be untrue." Austin, 'Other Minds' in *Logic and Language* (2nd series) Essays: ed. by Anthony Flew, Oxford 1955, pp. 146, 147. The words and phrases are not solely descriptive, but also something more. Description is not their essential legal function. Since they are assertions they can be true or untrue. For instance, the word "testament", which is an abbreviation for "this document is a testament", can be untrue if the objects disposed of in the document are not the property of the testator, because the instrument is not a valid will, or better, it has not the legal consequences of a testament. The minister's words, "I hereby pronounce you man and wife", are untrue if both persons to whom the statement is made are not of different sex, but either two males or two females of whom one is dressed as a woman or as a man respectively. For in such a case, the minister's words do not have the legal consequence which they describe.

[3] Regelsberger, *Pandekten, Systematisches Handbuch der Rechtswissenschaft*. pt. I. vol. 1, sec. 7, 1893, p. 109: "There is no law which cannot be changed. A legislator can make a change or the repeal of a legal norm very difficult by imposing conditions and limitations, but he cannot control the unchangeability of a legal norm, even for a limited period of time." There is no doubt that the legislator can "decree" that a norm shall not be changed, but the question is, what legal effect does it have if in spite of such a provision a norm is adopted which conflicts with it.

[4] *Ibid.* n. 3 at p. 110.

[5] Compare Kelsen, *Reine Rechtslehre*, (2nd edn., 1960), p. 275.

[6] According to Regelsberger, *op. cit.*, p. 110, the sentence is not according to sources but substantially agrees with the sources. "The new legal norm can repeal the hitherto existing one in whole or in part, its content can be limited to the repeal only, or it can regulate in a new way the same facts. In the latter case, no express repeal is necessary because both norms could not be applied together." However, there is no reason to assume that one norm repeals the other, just because two conflicting norms can't be applied together. Since the question, which of the two is the repealing one and which is the repealed one, is not answered, it follows that a positive regulation is necessary.

[7] Merkl, *Allgemeines Verwaltungsrecht* (1927) p. 211, "... the precept *'lex posterior derogat priori'* is valid only as a positive rule of law and not as a logical axiom as it is commonly understood."