Substitution of Legal Statement and Identification of Law

Juan José Iniesta Delgado
Facultad de Derecho, Universidad de Murcia
Murcia, España
jiniesta@um.es

Abstract. Substitution is a type of normative changes produced by legal statements named substituting statement. However, this form of modification is not only a combination of derogation and incorporation of legal statement. Temporal affects grant difficulties to determine the effects of this type of legal modification.

1 Introduction

My interest in studying legislative changes a study which I have been involved with through the development of a research project at the University of Murcia in the area of philosophy of law– is due to the need to establish a theoretical base in order to elaborate and improve computer tools which are useful in enabling the identification of Law.

It needs to be said at the outset that one of the main difficulties an investigator finds when he tries to identify the entities which make up part of a specific legal system is precisely their dynamic nature[1]; these legal entities find themselves subjected to constant changes and the new provisions affect the previously elaborated ones. In this way the identification of Law converts itself into a problem of temporal delimitation: what was at one time Law, may no longer be so at later moment in time.

We can define legislative change as the production of a legal corpus which includes a statement which modifies another legal statement or other legal corpus; this modification may consist either in the suppression of one or several legal statements or the inclusion of one or several legal statements.

It's easy to understand the specific problems this type of legal production represents when it comes to the identification of law. Firstly, it's important to determine what these *modifications* consist of, only so is it possible to state explicitly how a computer programme can help to identify Law. It is equally important to differentiate it from other cases where there is no real alteration, although these may be presented by teaching as cases of changes, with the consequent dysfunction when the time comes to identifying the true identity of Law.

Before beginning an analysis of normative change, it needs to be made clear and in order to avoid future confusion that what some authors have referred to in their works as the *addition* and *subtraction* of legal norms may in principle be similar to the arguments set out here. Concretely, Carlos ALCHOURRON and Eugenio BULYGIN speak of the sum of norms which correspond to an act of normative production[2] and go on to state that the whole or sum of the resulting norms after the normative production is not equal to the sum of the whole of the previous norms before production. But this has little to do with the hypothesis that I am analyzing here. Among other reasons, because these authors talk of *norms* while I refer to

statements. They understand norms in the sense of propositions or meanings of statements[1], like combinations of meanings or as logical consequences of these meanings and combinations of meanings. So that each time there is normative production and new meanings are incorporated to the system of meanings, the number of norms turns out to be altered in an uneven proportion to the number of norms furnished.

But I am not talking about meanings or of meaning-norms, but rather I'm speaking of statements, since I consider that it is these which effectively form part of Law.

Up to now we have indicated that change is produced when one of the statements which is incorporated in Law through the produced legal corpus alters the set of statements which belong to Law up to that moment –without taking into account its own inclusion.

This change may be due to the fact that the *modifying statement* does away with one or several legal statements, either because the modifying statement adds one or various legal statements (distinct in themselves), or else, at the same time does away with and adds one or several statements[2] . Each one of these operations has been assigned a specific name: *derogation*, *incorporation* and *substitution*.

It is precisely the aim of this paper to report on the peculiarities the last operation displays, fundamentally with a view to it simplifying the computerized process of identifying Law. In this way it could be considered that even though it is more appropriate to express it as a combination of operations of repeal and incorporation, there exist some aspects which go beyond the simple conjunction of these operations.

2   Substitution

Substitution is produced when modifying intervention means the replacement, in the core of a specific set of laws, of a statement, which we shall call the *substituted statement*, for another which we shall call the *substitute statement*. The said change is produced by means of the issue of a *substituting statement*, which in this case operates as a modifying statement.

For example:

(N1): article 6 of legal corpus X: "Those who purchase an imported car shall be liable to pay a 10 % tax on the purchase price".

(N2): "Article 6 of legal corpus X is drafted with the following text: 'Those who purchase an imported car shall be liable to pay a 5 % tax on the purchase price'".

In this example (N2) would be the *substituting* statement, (N1) would be the *substituted* statement, while the statement 'Those who purchase an imported car shall be liable to pay a 5 % tax on the purchase price' will be the *substitute* statement.

2.1   Types of Substitution

Depending on the structure of the *substituting* statement we can distinguish two classes of substitution which we shall respectively call *complete substitution* and *partial substitution*.

Complete substitution is produced when the substituting statement mentions and contains the substitute statement which occupies the place of the substituted statement, which was only mentioned. Complete substitution can be *symmetric* or *asymmetric*.

---

[1]Meaning-norms are abstract entities and their existence (if it is possible to talk of such a thing, as it is pretty unusual to talk of the existence of propositions) is timeless. [2], ibid. p. 61.

[2]Which corresponds to the three ways in which a normative system may be changed according to Bulygin: 1) the introduction of new norms; 2) the derogation of existing norms (through new norms) and 3) the substitution of existing norms for others; [4]

Complete symmetric substitution is produced when there is the same number of substituted statements as substitute statements. An example can be found in the first section of the final provision number 18 of LO 1/1996 of 15th June, one of whose statements modifies article 1330 of the Civil Code, substituting one statement for another.

Complete asymmetric substitution is produced when there are either more substituted statements than substitute statements, or there are less substituted statements than substitutes. An example of the first case can be found in another statement of the same section of the above mentioned final provision, which modifies article 996 of the Civil Code, substituting the two statements of the previous draft for only one statement in the new draft. An example of the second case constitutes the first paragraph of the final disposition of L 7/2003, which modifies article 1056, paragraph two of the Civil Code, substituting the only statement which formed part of the said paragraph for five new statements.

Partial substitution occurs when the substituting statement mentions the substituted statement and identifies certain changes in the expressions or the punctuation marks contained in the said statement. Depending on the nature of the changes partial substitution can be *by elimination* of an expression or punctuation mark, *by integration* of an expression or punctuation mark or *by replacement* of an expression or punctuation mark. The substituting statement does not contain, in this case, the substitute statement, in contrast to what happens in complete substitution. Instead it either contains certain expressions of the substituted statement, or of the substitute statement, or both of them.

Partial substitution by elimination is produced when the substituting statement does away with or eliminates words, expressions or punctuation marks of the substituted statement. Partial substitution by integration consists of including words, expressions or punctuation marks in the substituted statement. Partial substitution by replacement occurs when words, expressions or punctuation marks of the substituted statement are changed for other different ones.

Examples of all these types of partial substitution can be found in the second section of the final provision number 18 of the quoted L 1/1996. So there is partial substitution by elimination when it is noted "at the end of the final paragraph of the same article 171 the phrase 'or Guardianship, according to whichever applies' is included"; there is partial substitution by replacement when it states that "in articles 323 and 324, the words 'tutor' and 'tutors' will be substituted respectively for those of 'guardian' and 'guardians'".

It needs to be pointed out that partial substitution may be produced by two types of substituting statements depending on the way through which the substituted statement is identified:

1) If the substituted statement is designated individually by the substituting statements, this is called the *nominative substituting statements*. This is the most common case.

2) If the substituting statement does not individually designate the substituted statement but rather this is identifiable due to its belonging to a set of statements that possess certain specific characteristics, it is called a *nameless substituting statement*. For example, when the substituting statement refers to the replacement of a term for another in all clauses which make reference to it.

2.2 The Interpretation of the Substituting Statement

2.2.1 Forms of Substituting Statement

As and how we have just seen, the substituting statement can adopt diverse forms which give rise to the diverse forms of substitution previously mentioned; and even within each one of these types different expressions are used to indicate the production of the indicated effect. When we are dealing with complete substitution, the substituting statement usually begins

with expressions such as "the articles... shall be drafted in the following way..." or "the law... shall be modified in the following terms...". When it's the case of partial substitution, the terminology is much more varied; for example partial substitution by replacemen is often expressed by "this word '...' shall be substituted for the word '...'; partial substitution by elimination through "the words '...' shall be eliminated" or "the words '...' shall be removed', even, the expression "they are derogated' has come to be used, quite unsuitably, to refer exclusively to specific expressions of a legal statement.

2.2.2   Legal Theory of Substitution

Any of these statements can give rise to a normative modification, in so far as it affects in some form the substituted statement. As regards the basic modifying operations –eliminate and include– only abolishment changes the other legal statements (inclusion only alters other legal corpus). We can, then, state that the alteration which a substituted statement suffers consists in its derogation.

In so far as the substituted statement is concerned, it can, therefore, be said that substitution is the equivalent of derogation. This explains why the substituting statement has to meet the following necessary requirements as part of a legal theory of derogation, in order that the elimination of the substituted statement can be produced:

1. There is a substituting statement which mentions the substituted statement.

2. The substituting statement is powered to derogate the substituted statements.

The situation of a statement substantial enough to "is powered to derogate" is linked to the possible relationship between the modifying and modified statements in so far as they are integrals of the same system. The relations that can give rise to a situation "is powered to derogate" are:

a When the derogate provision is higher in hierarchical rank than the statement which is going to be derogated.

b When the derogate provision is of the same hierarchical rank to the statement which is going to be derogated, providing the following condition is met: the derogate provision must have been produced by an authority which is powered to produce legal statements which come under its territorial and material terms of reference corresponding to the legal corpus to which the statement, which it is intended to derogate, belongs.

c When the derogate provision is of inferior or equal hierarchical rank to the statement it is intended to derogate, providing the following conditions are met:

   • there is, at the moment in which the derogation takes place, a legal statement that meets one of the conditions that gives power to derogate the statement which it intends to derogate.

   • this statement grants to the derogate provision power to derogate.

d The substituting statement is a legal statement at the time substitution should occur.

e The substituted statement is a legal statement at a moment prior to the production of the substitution.

As regards the substitute statement, it is finally incorporated into the set of laws belonging to the same legal corpus to which the substituted statement belonged. That is, as regards the substitute statement, substitution is the equivalent to incorporation. It is necessary, therefore, that certain necessary requirements need to produce themselves for the incorporation of the substitute statement:

1. There is a substituting statement which mentions substitute statement.

2. The substituting statement is powered to incorporate statements to the receiving legal corpus.

3. The substituting statement is a legal statement at the time when substitution should take place.

4. The receiving legal corpus is a legal statement just prior to substitution taking place.

If the substituting statement meets the requirements in order to be able to derogate the substituted statement, it will also necessarily meet the requirements to incorporate the substitute statement. Given the receiving legal corpus is the same as where the substitute statement can be found, we can say that if the substituting statement is powered to derogate a statement of this legal corpus of laws, it will also have it to incorporate statements. On the other hand, if the substituting statement is a legal statement at the time of derogation, it will also be so at the time of incorporation. If the substituted statement is a legal statement just before its substitution, the set of laws to which it belongs will necessarily also be a legal corpus.

It needs to be pointed out that the derogation of a statement which has to be substituted, it is essential for the incorporation of the substitute statement is produced, hence the effects of derogation and incorporation are necessarily linked. The incorporated legal statement enters to form a part of the legal system under the condition that it occupies the place of the substituted statement in such a way that if the said statement does not abandon the legal system, the substitute statement does not meet the conditions to belong to Law.

In this way, the substituting statement has two joint meanings: on the one hand, it qualifies a statement (the substituted one) as not legal, and on the other, it qualifies another statement (the substitute one) as legal. Put another way, the substituting statement jointly has the meanings of derogate provisions and of incorporating statements[3].

2.2.3 Another Interpretation of the Substituting Statement

Interpreting substitution without attending to the composition of the basic modifications, although this may appear attractive, is all the same flawed. In this case, the aim is not to see substitution as the sum of derogation and incorporation, but instead as a normative modification with its own substantiveness. Substitution would be the change to the text of the substituted legal statement. The substituted statement, according to this interpretation, is not derogated but rather only a part of its text is altered. There is, therefore, no substitute statement. The word substitution (an expression which suggests the exchange of one element for another) does not refer here to the affected statement (which it would be incorrect to call the substituted statement) but rather to the elements of this statement (words or even punctuation marks).

---

[3][5] p. 96.- considers that substitution consists in the end of belonging to the Law of one norm, which differs from derogation, because at the same another norm begins to belong to the law. I believe that this interpretation is not correct, because the derogation of a legal statement may or may not coincide with the inclusion of another norm in a legal system and no necesarily, we are before a case of substitution.

This explanatory model is essentially devised for the case of partial substitution. In fact, in complete substitution the scheme of the substituting statement reflects exactly the elements of substitution which form a part of the initial explanation: both the substituted statement and the substitute statement appear mentioned in it, in such a way that it is clear to appreciate the change whereby one element abandons the legal system and the entrance of a new one. On the other hand, in partial substitution the substituting statement seems to only expressly mention the substituted statement, and hence apparently confirms the thesis that in this case there is no substitute statement. It would, therefore, appear easy to conclude that the substituting statement does not derogate the substituted statement, but only alters its text.

However, I believe that beneath this form of understanding substitution there lies a confused concept about language. Two different entities can both have the same name and despite this still remain two separate entities, even in the case where one of them occupies –to a certain extent- the place of the other[4] . Let's think of a couple who have a son whose name is Peter; but which dies only a few months after birth. Time passes and they have another son who they also call Peter. Obviously, the usual way to express this situation is that the second son has the same name as the first deceased son; nobody would seriously try to explain this situation in the following way: Peter has been modified.

Two distinct statement are also two distinct entities. The statement 'those who purchase an imported car must pay a tax levy of 5% on the purchase price' is a distinct statement to the statement 'those who purchase an imported car must pay a tax levy of 5% on the purchase price', although both are denominated article 6 of legal corpus X. No matter how we formulate the second statement, we could mention the first one and say that we change it for the second, or rather we could mention the first and indicate that where it says 5% it should read 10%; we will have two different statements, although each with the same denomination.

On the other hand, we run the risk of finding incongruent situations. Let us consider what would occur if a derogate provision indicated the derogation of a statement at a specific time and before that moment arrived, in which the corresponding derogate effect should come into action, the statement which is going to be derogated is substituted. If we understand that the substituted statement continues to belong to the legal system, that is, the previous statement continues to be the same but with a distinct text, we will have to admit that the said statement must be derogated when the time for the derogative effect arrives, even though the said statement has been substituted during this time. And even taking into account that the intention to substitute were a legislative will, after the intention of derogate. On the other hand, if we admit that the substituted statement is no longer a legal statement, the derogative effect of the provision could no longer take place, as one of the conditions which dashes the expectation of derogation will have been produced: the statement which is going to be derogated would not be a legal statement at the time of its derogation.

We can also observe that it is incorrect to state that in partial substitution the substituting statement only mentions the substituted statement; the substitute statement is also mentioned. Let us look carefully at, according to the basis of this presentation, a substituting statement of the type 'in article 6 of legal corpus x the expression 5% shall be substituted for the expression 10%' could be interpreted with the following meaning: 'article 6 of legal corpus x is substituted by an enunciative statement with the text of article 6 of legal corpus x changing the expression 5% for the expression 10%'. It is therefore clear that the substitute statement is not contained within the substituting statement, but is mentioned in it. If it were not even mentioned, then the first requisite needed for the completion of the normative incorporation

---

[4]Waismann has paid particular attention to this problem and has assembled a series of examples from pathological psychiatry. Nonetheless, for our purposes the following example will serve our needs even though it isn't as showy. [6]

theory essential for incorporation to produce itself would not be met; just think it would be impossible for the substituting statement to declare it legal, because for a statement to qualify another in some way it is necessary for it to be metalinguistic with respect to the other, and to do so it is absolutely necessary that it mentions it.

Anyway, it is at this point when semantics and logic come in to play with respect to an analysis of identity and the conditions for this, in which a profound debate about how far it is possible to consider that an entity continues to be the same despite its changes and when does it convert into a different entity[7]. Nevertheless, in linguistic terms, none of the notions of identity admitted is able to support the idea that there has not been substitution of one statement for another distinct one. Identity is either syntactical or semantic. Neither of these identities can be found among the substituted statement or the substitute statement, if there is no identity, then there is necessarily diversity of entities.

None the less, it needs to be stressed that the lack of formulation in the substitute statement produces more than a certain degree of difficulty. In which ever of the other hypothetical cases of normative incorporation (incorporation properly said or complete substitution), the text of the statement which is classified as legal is contained in the incorporating or substituting statements. Instead, with partial substitution, the substituting statement does not contain the text of the statement which establish it as belonging to Law; its own formation is left to the work of interpretation through a type of guesswork, a fact which reveals not only terrible legislative technique, but also its lack of responsibility. There are already quite enough problems in their own right when it comes to identification of Law without having to complicate it with absolutely unnecessary guesswork and crossword puzzles, especially as it is always possible in cases where partial substitution is employed to fall back on, at least, complete substitution, which although not exempt of complications, is not as disastrous as the other.

The vices of partial substitution are not in the least unknown to the legislator. Tax law, a field noted for its extreme sensibility towards the exact identification of law, has produced a number of rules about how to articulate normative modifications. In so far as it concerns us here, special mention needs to be made of the second paragraph of article 4 of L.1/1998, of 26th February, concerning the Rights and Guarantees of the taxpayer: 'the laws and regulations which modify tax laws shall contain a complete list of all the derogated norms and the new wording of the resulting modified norms'. In the said provision we can find two diverse orders, one referring to the derogative process and the other to substitution. The second of them, serves to prescribe that all substitutions which are made to laws and regulations concerning tax law shall be complete substitutions. It aims to repeal ill-fated partial substitutions, "sparing the taxpayer the time consuming and absurd task of recomposing texts interlining the modified line, word or paragraph"[8].

Nevertheless, the said prescription still only remains a recommendation for legislative technique, just as the situation had been up to then -article 16 of L. 230/1963, 28th December, at least in so far as the legislator is concerned[9].

3 Conclusion

The understanding of legislative substitution together with other modifications is important in any technological system whose function it is to provide information (both to judicial workers and to the general public) about the Law in force at any specific moment in time. The importance of the said understanding is maintained whether the changes introduced into the system are made by humans or articulated through semi or automatic management models of legislative change.

In this sense, it should be pointed out the appropriateness of normative change is guided

by a series of theoretical concepts which jurists use and concretely form an integral part of the definition of what Law is. On some occasions the said concepts are reflected in Law, (for example, in Spanish Law, the indication that the laws are amended by others), but in other cases they continue to operate as definable criteria in the mind of the jurist (for example, the consideration that derogation puts an end the legal existence of a norm).

Modifications to the computerized information system must be carried out in such a way as to make sure that the results achieved at the end concur as near as possible with those expected according to the theoretical concepts operational at the time.

When normative changes are introduced by humans, it is necessary and sufficient for the person to be aware of the criteria provided by the said concepts and that they use them to reach appropriate decisions. However, when changes are introduced through an automatic process, criteria based on theoretical concepts are not enough in themselves.They need to be transformed into formal algorithmic criteria.

In this sense, the project which we are developing within the sphere of the University of Murcia and which encompasses the process of substitution has a similar objective to that of the Norma–System project which was pursued in the CIRSFID at the University of Bolonia[10]. The task is to make explicit the said theoretical concepts in the most suitable way possible in order to convert them into criteria of a formal nature.

Our own approach differs form that of Norma-System in that the processing of modification is not done with respect to complete normative texts, but rather by taking the statement as the basic unit of the process of modifications, which can be defined as a textual unit with complete meaning.

The statement is a portion of text . Nowadays legal statements are portions of written text from which copies are made. Data bases collect and store copies of the said statements in a computerized medium. The main difficulty with this type of processing can be found when it comes down to delimiting and identifying the statements, as nowadays not all the statements are identified in statutes. Normally under the same identifiable sign (paragraph or article) a number of statements can be found.

The advantage , on the other hand , is obvious with regard to the processing of temporary effects. It allows the statute's temporals aspects to be processed separately, as well as advising of the vicissitudes regarding its application (indications concerning its temporal sphere of reference).

Anyhow, it is essential the identification of each statement, with respect to which a markup language is applied, such as XML in such a way that this enables identification through the use of a modifying statement.

What follows is an attempt to show explicitly how to understand one of the phenomena of normative change, substitution. This can be seen to be the integration of the other two normative modification phenomena, derogation and incorporation. As has been shown, it is necessary to set out explicitly these criteria in order to elaborate the formal criteria by which the computer system operates.

References

[1] Bulygin,E., 'Teoría y técnica de legislación' in *Analysis logico y Derecho*, Centro de Estudios Constitucionales, Madrid 1991, pp. 419 ss.

[2] Alchourron, C.E., Bulygin, E., *Sobre la existencia de las normas jurídicas*, Distribuciones Fontamara, Mexico 1997 , pp. 73 ss.

[3] Bulygin, E., 'Dogmática jurídica y sistematización del Derecho', ibid. p. 477.

[4] Guastini –*Distinguendo. Studi di teoria e metateoria del diritto,* ibid. p. 96.

[5] Waismann, F., *Los principios de la filosofía lingüística* translation by José Antonio Robles, Instituto de Investigaciones Filosóficas, Universidad Autónoma de México 1970, pp. 237.

[6] Waismann, F., *Los principios de la filosofía lingüística,* Ibid., pp. 227.

[7] Paso Bengoa, J.M. Del Jimémenz Jiménez, C., *Derechos y Garantías del Contribuyente. Comentarios a la Ley 1/1998*, CISS, Valencia 1998.

[8] FERREIRO LAPATZA, J.J., "Fuentes de Derecho tributario. Disposiciones derogatorias" en *Comentarios a la Ley General Tributaria y líneas para su reforma,* volume I , Instituto de Estudios Fiscales, Madrid 1991, pp. 275.

[9] PALMIRANI, M., *Norma-System*, Clueb, Bologna 2000, p. 137.