



The *Lex Specialis* Principle and its Uses in Legal Argumentation. An Analytical Inquire

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Abstract

The *lex specialis* principle according to which special rules derogate from general ones lies in the core of the Western legal tradition. In the eyes of jurists and legal philosophers this principle is one of the most typical criterion against legal antinomies and has a plain and clear meaning. Most theories are concerned only with its interferences with the *lex posterior* and the *lex superior* principles. But this common view is unsatisfactory in many aspects. In fact, the *lex specialis* principle may be applied and it is often used to solve redundancy in law, rather than legal antinomies, and so it is a tool to prevent the simultaneous application of special and general compatible rules. This use is prominent in criminal law but it is widespread even in the other fields of law. Moreover, in every fields of law, the *lex specialis* principle is a device to coordinate and integrate special and general rules to obtain a more complete regulation of a certain matter: this use is essential for legal systems. In this paper there will be distinguished and discussed three very general topics: the *speciality* of law, *i.e.* the *genus-species* relationship among legal concepts; the phenomena of *total-partial antinomies* and of *concurrent and repetitive rules*; the *derogation* among special and general rules in the context of legal justification.

Keywords

Lex specialis principle, legal reasoning, legal concepts, antinomies, redundancies in law.

El principio de *lex specialis* y su uso en la argumentación jurídica: Una aproximación analítica

Resumen

La idea de *lex specialis* de acuerdo con la cual las reglas especiales derogan a las más generales es central en la tradición jurídica occidental. Los juristas y filósofos del Derecho presentan la *lex specialis* fundamentalmente como un criterio para resolver las antinomias jurídicas. Su significado a menudo es considerado sencillo y claro y la mayoría de las teorías se ocupan básicamente de sus interferencias con los principios *lex posterior* y *lex superior*. Creo que esta posición es insatisfactoria. De hecho, el principio *lex specialis* con frecuencia es empleado para resolver las redundancias en el Derecho, es decir, la aplicación simultánea de reglas específicas y generales compatibles. Este uso es patente en el Derecho penal, pero está también extendido en otras áreas del Derecho. Además, en todas las ramas jurídicas, nuestro principio sirve para coordinar e integrar reglas especiales y generales para obtener una regulación más completa de determinados asuntos: la vinculación de estas reglas constituye una herramienta fundamental de los sistemas jurídicos. Por tanto, en este artículo intento distinguir tres cuestiones: la especialidad del Derecho, es decir, la relación género-especie entre los conceptos jurídicos; el fenómeno de las antinomias total-parcial y las reglas concurrentes y reiterativas; la derogación entre reglas especiales y generales en el contexto de la justificación jurídica.

Palabras clave

Principio de *lex specialis*, razonamiento jurídico, conceptos jurídicos, antinomia, redundancias en el Derecho.

1. A typical tool of legal thinking

According to a plain belief, law may be conceived as nature in the guise of *genera* and *species*. In actual fact it is very common to portray as entities related *per genus and differentia* legal systems or laws, likewise legal concepts or rules. The *lex specialis* principle is a main appearance of this scenario. In short, as widely known, this principle envelops the idea that any special rule derogates from those more general, according to the Latin legal maxim *lex specialis derogat legi generali*.

On a historical view, this principle has been seen many times as an essential device to discover the real structure of law (Stein, 1966). To limit the discourse to the Modern Ages, first in the late Middle Ages and then in the Humanism period, the *lex specialis* principle has been frequently shaped according to predetermined systematic patterns. In these centuries, the idea that special rules derogate from general ones has been grown closely with the firm belief that laws and legal rules take root in previous entities and should reflect them.

In the current Western legal tradition the *lex specialis* principle seems not to be compromised with this background yet¹. As a matter of fact, essentialism towards special and general rules in actual legal practice is not completely disappeared. In many cases jurists and judges still show various essentialist attitudes in the application of the *lex specialis* principle. But these attitudes are fairly superficial and they seem to resemble, rather than a real deep ontology, preferences and value choices among alternative normative solutions.

Of course, between the *lex specialis* principle and essentialism in law there are no conceptual nor logical or necessary connections. The pure idea that special rules derogate from more general ones is compatible equally with essentialist or anti-essentialist concepts of law.

A small evidence of this circumstance is that, in the current legal practice, the *lex specialis* principle is ordinarily used to lawyers and judges that join anti-systematic legal doctrines or manifest skepticism towards any systematic view of law. Also legal thinkers that refuse any version of essentialism are acquainted with this principle and include it among the typical instruments of the legal toolbox.

In this analysis, I will approach the *lex specialis* principle from an analytical perspective². But the semiotic and constructive view here proposed may represent an explanation also of the alternative essentialist views.

2. The outline of the analysis

To give an outline of my analysis, first, in the next paragraph, I will sketch some uncontested points of legal doctrines and theories about the *lex specialis* principle. Then, in the further paragraphs, I will distinct and examine in particular three topics that many doctrines and theories usually mix up.

¹ Of course, there are significant exceptions. To give two samples, let consider for instance the discussion among Bulygin, Raz and Alexy about the concept of law and the features of legal concepts (Bulygin, Raz and Alexy, 2007): in the eyes of Bulygin (2007: 100-102), Raz's approach to (legal) concepts since profess the existence of certain natural conceptual features is vitiated by essentialism. Besides, consider all those essentialist approaches to special and general rules that have been developed in the past and still are proposed in the present on the grounds of natural law theories such as for instance the Aquinas practical reason conception (Pattaro, 2005).

² A preliminary draft of this paper has been presented at a seminar discussed at the Oxford Jurisprudence Discussion Group on May 17, 2012 (see <http://www.oxford-jdg.net/>). In this paper, I will seek to give a further clarification of some details of the analysis I did in my book (Zorzetto, 2010).

A *first* topic is the meaning of *speciality* in law domain and, on the opposite side, the *generality* that is to say the *genus-species* relationship among legal entities or, to be more precise, among legal concepts.

A *second* topic regards the *deontic relationships* among special and general rules and therefore two phenomena that are characteristic of our legal systems: *total-partial antinomies* and *concurrent and repetitive rules*.

A *third* topic is the *derogation* among legal rules and in particular among special and general rules in the context of legal justification.

Each one of these topics refer to a fundamentally distinct relationship: first, the *genus-species* relationship is a correlation among the semantic content of rules and hence their *legal concepts*; rather, legal antinomies and redundancy or recurrences in law primarily depend on the relationships among the *deontic modalities* of legal rules; finally, derogation requires a correlation among *legal rules* in legal reasoning. Each of these relationships belongs to a different domain: respectively the domains of legal *semiotics*, of *deontic logic* and of *legal justification*.

The prime operative consequence of this very abstract analysis is that no special rules necessary either conflict with those more general or derogate from them.

A special rule A may conflict with a general rule B and derogate from this second rule B, according to the *lex specialis* principle, but it may also be compatible with a more general rule C and concur with it.

For example³, a rule such as *everyone has the right to use his language in procedures before authorities performing a public function* is more general than a rule such as *the parties and other participants in the proceedings may use their language at hearings and during other oral proceedings before courts*. The former is also compatible with the latter, since the latter is a specification of the former and concurs with it to regulate the matter in more detail. On the other side, the latter is also special with regard to a rule that provides that *in all proceedings before courts everyone must use the national language of the State*. There is an obvious conflict between these rules and to solve such antinomy we can use the *lex specialis* principle.

However, the *lex specialis* principle in itself does not necessary involve any conflict among special and general rules and it does not operate only as a criterion to solve legal antinomies. Although legal scholars and legal philosophers do not usually stress this point, in many relevant cases, the *lex specialis* principle is used to solve or prevent instead the simultaneous application of special and general rules, when they are compatible and hence would concur. This use of the principle is of the utmost importance in criminal law but it is evident and it permeates the legal reasoning even in the other branches of law.

The distinction I mentioned above among special and general legal concepts, deontic modalities and rules is a first step to shed light on the pervasive and diverse uses of the *lex specialis* principle actually existing in legal practice. Looking into these uses can be a main route to make a more realistic description of a legal system as it is and to comprehend the real functioning of legal reasoning.

³ See the art. 62 of the *Constitution of the Republic of Slovenia* and the art. 102 of the *Civil Procedure Act (Zakon o pravdnem postopku, or ZPP)*.



3. The common perspective on the *lex specialis* principle

A positive criterion against legal antinomies

Legal scholars and legal thinkers use to draw a common picture of the *lex specialis* principle⁴.

According to the mainstream in legal practice and the general theory of law, the *lex specialis* principle is neither an inner feature of every legal system nor a logical principle. Rather, it is just a positive rule whose existence depends on the normative choices of the legal authorities (*i.e.* legislators and/or legal interpreters). In the eyes of jurists and theoreticians, the *lex specialis* principle is mostly a traditional and implicit rule that is independent by all its expressed formulations in legal texts. In actual fact, its origin and nature are disputed: there is no consensus for instance on its customary nature. But, in spite of this detail, as I said above, there is wide agreement that it is a historical tool to make laws and legal rules consistent. In short, it represents one of the most typical criteria against legal antinomies together with the hierarchical and the temporal criteria, currently known as the *lex posterior* and the *lex superior* principles.

In particular, the *lex specialis* principle is considered a rule feasible to prevent or to solve conflicts among legal rules within one and the same legal system and hence to delimit the material sphere among different laws and legal rules (these days the *lex specialis* principle has a paramount importance for instance relating to the conflicts among international laws, international humanitarian law and human rights law)⁵. The content or the meaning of the principle is generally described as plain and clear and in point of fact it is assumed without giving any clarification. In the opinion of legal philosophers, the application of the principle to real cases is not genuinely interesting unless in particular circumstances. Thus, most theories investigate only the possible interferences existing between the *lex specialis* principle and the other main criteria mentioned above: the *lex posterior* and the *lex superior* principles. In spite of that, the concrete application of the *lex specialis* principle very often causes a serious concern among lawyers and judges: in any fields of law, there are remarkable disagreements about the special and the general nature of rules and their derogating force.

⁴ During the XIX century, many legal scholars and philosophers have developed significant legal theories about the *lex specialis* principle. Even though the interest towards the theme is gradually decreased since the second part of the last century and especially these days, the contemporary literature about the *lex specialis* principle is very extensive just the same. Here I can recall only few works. A fair map of the logical issues involved in the *genus-species* relationship is given by the analysis of García Máynez (1959) and Klug (1996: 57). Relating to the general theory of law, the common approach to the *lex specialis* principle is paradigmatically described in the analysis, for instance, of Kelsen (1962: 339; 1991: 106-114 and 123-127), Ross (2004: 129-130) and Engisch (1970: 255-274). With regard to Italian analytical approach some main studies on the *lex specialis* principle are, for instance, the works of Gavazzi (1959: 62 and 81); Bobbio (1967: 303-322; 1993: 209); Tarello (1980: 313, 336 and 382); Carcaterra (1990: 167; 1994: 177), Chiassoni (1999: 277, 286-287, 344); Pino (2006: 160-161); Ferrajoli, (2007: 689, 690, 691 and 909); Barberis (2011); Guastini, (2011: 117). Among Italian legal scholars some remarkable theories have been developed by Frosali (1971); Mantovani (1966); Pagliaro (1976: 217); Modugno (1979: 507); Irti (1999). With reference to the Spanish and the South American analytical legal theory see for example the studies of Llorca (1981); Aguiló Regla (1995); Nino (1996: 243-244); Manero (2005); Martínez Zorrilla (2007: 148 and 151); Guarinoni (2001; 2006); Ochoa (2003); Rodilla (2009: 255-314); Tolosa (2010: 103-123); Ferrer and Rodríguez (2011: 135-167).

⁵ See e.g. Sassol (2007); Prichard (2007); Schabas (2007).

The extensional approach to speciality

To examine in detail the common picture of the principle, both in legal practice and in legal thinking, special and general rules are seen as entities correlated, as they are logical classes or geometric sets. To represent the relationship existing between special and general rules it is common to speak indifferently of circles or circumferences and these figures are also drawn but normally without explaining the meaning. There the *genus-species* relationship among rules is simply reduced to a formal inclusion. In this respect, the fundamental semantic bases of this relationship is totally ignored unless in few analyses. The point of view of the analyses is so merely extensive without regard to the intensive dimension of the *genus-species* relationship. This means that legal language is figure out as a formal language and that legal rules and legal concepts are conceived as perfectly defined and exactly determinate as classes and sets are in logic and mathematics. As a consequence, many analyses handle the *lex specialis* principle with a rudimentary semiotics based on a rough distinction between logical syntax and its rules of interpretation, albeit this distinction does not apply to legal language that it is not of course a calculus.

Moreover, legal scholars usually talk about the *lex specialis* principle embracing a broad concept of (special and general) rules. It is uncontested that a rule may be special when correlated with another one in the same way as a species is related to a genre. But in law it is not clear-cut which elements are precisely the correlatives. In legal practise, but also in many theories the genus and the species (*i.e.* the common element and the special difference) are not well identified. In particular, there is no inclination for distinguishing among rules, their elements (the legal concepts of each rule) and the singular concrete situation to which a rule may be applied. Speciality as generality seems to be conceived as a property of two opposite and correlated rules, considering each rule as a whole abstract entity. But, in depth, only certain elements of rules rather than the rule itself are relevant in the eyes of legal scholars. In addition, the relevant elements are various and variable according to the circumstances: in many cases it seems relevant the entire class of situations regulated by the rule but on the other hand only the subject or the conduct or a temporal or spatial requirement has the utmost importance. Finally, sometimes it comes to play directly the concrete situation to which rules refer.

Two unexplored issues: conditions and reasons of derogation

Furthermore, lots of theories about the *lex specialis* principle purely affirm that, on the strength of it, special rules derogate from those more general. Obviously, this is a tautological explanation that leaves open at least two main issues: on one hand, which are the *conditions* to apply the principle; on the other hand, which is the *reason* of the derogation according to it.

Of course, a first necessary condition to apply the *lex specialis* principle is the reciprocal speciality and generality of rules. But, as I said above, it is very common to argue that derogation comes to play when there is a conflict between the special and the general rule. In this view the inconsistency of rules is another condition to apply the principle. Usually this idea is ambiguous because it might be interpreted as a logical assumption but also as a sociological thesis. However, in any case it is misleading, since on the grounds of logic special rules may be compatible with general ones and on a sociological perspective derogation is a remarkable phenomena even when rules are compatible.



Rather, there is another condition to apply the *lex specialis* principle not overt in legal thinking: the application of the principle depends on the *previous identification of distinct rules*. In fact, considering that according to the principle a special rule derogates from one more general, the correlative rules in hand must be identified and ranked in advance in a certain order of lower/higher generality. Yet, if this is true, the *lex specialis* principle cannot be a device to identify (special and general) rules. It is able to come to play when the works of interpreting and identifying rules has already been done.

With regard to the second issue mentioned above, it is ambiguous whether the reciprocal speciality/generality of rules represents not only a necessary condition to apply the *lex specialis* principle, but also the precise reason of derogation. Roughly speaking, the crucial alternative is if, according to the *lex specialis* principle, special rules derogate from those more general on the strength of their speciality or if they can derogate instead in virtue of other reasons. For instance, other features that might be relevant are the spatial or chronological sphere of application, the occasion of the promulgation, the pertinence to a certain *sedes materiae* or branch of law, the authority from which the rule belongs to, the favour for a certain category, the severity of punishments, etc.

The qualification of fact and the choice of rules

According to many theories, special rules exclude those general and this exclusion is presented as a feature of a special rule in itself. This view is misleading since it does not distinguish between two functions of rules: a rule is of course a prescription but it also gives a qualification to certain (abstract or concrete) situations. Any special rule necessarily refers to a rank of situations comprehended also by all more general rules. In virtue of the logic inclusion, special and general rule give multiple and compatible descriptions of the single situation or class of situations to which they refer. Then, considering their discipline, special and general rules may be compatible prescriptions or not depending on their deontic modalities. In both cases, there is the problem of derogation, that is to say the issue of which rule should be applied. This latter issue is logically distinct by the former sketched above, although there is place for derogation only when multiple qualifications can coexist. In fact, only since a same situation or class of situations may be qualified by more than one rule (*i.e.* multiple qualifications) it makes sense to search and choice the rule (more or less special or general) that has to be applied⁶. In this perspective, a deficiency of the common view is not to stress this point and to put derogation in its proper place: derogation and not speciality is a phenomenon that pertains to the external justification⁷.

4. The speciality and the generality of rules

An inquire in intensional logic

Thus, what is meant by “special rule” or “general rule”? In which sense legal scholars and legal philosophers require that certain rules are “special” or “general”? On which requirements is it possible to qualify a rule as “special” or “general”?

⁶ This point is correctly stressed for instance by Papa (1997).

⁷ From this view, a suitable clarification of the *lex specialis* principle's structure and functions belongs to the analyses of Wróblewski (1967); Lazzaro (1971); Bulygin (1982; 1991; 1992); Comanducci (1992: 60-64); Moreso and Navarro (1996); Navarro, Orunesu, Rodríguez, Suar (2000); Moreso (2002).

Here a term with the term 'rule' leads to a positive prescription determined by legal interpretation and, hence, one of the possible meanings of a written legal statement such as, for instance, a paragraph or a section of a statute or a sentence in a judicial decision.

'Special' and 'general' are correlative terms and predicate adjectives denoting a *genus-species* relationship among certain entities. In its form this relationship is isomorphic to inclusion among mathematical sets and logical classes. This is evident in logic as in the modern natural sciences, where the *genus-species* relationship has a systematic application. But this is invariably indisputable in ordinary languages and also in law.

Legal texts and legal provisions often explicitly qualify themselves as "special" or "general". An interesting sample is the article 6 entitled *Special rule on defence* of the *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* according to which *In the case of maintenance obligations other than those arising from a parent-child relationship towards a child (...), the debtor may contest a claim from the creditor on the ground that there is no such obligation under both the law of the State of the habitual residence of the debtor and the law of the State of the common nationality of the parties, if there is one.*⁸ The speciality of this rule, however, does not root in the auto-qualification of the legal statement in which it is expressed, but in the circumstance that the rule gives to a specified category of debtors a determined power of exception that it is presumed all the other debtors do not have.

In many analyses about the *lex specialis* principles it is not clear-cut if speciality and generality are properties of rules rather than of the legal statements in which rules are expressed. As yet I think I am able to show that speciality and generality are properties neither of rules nor of legal statements.

First, these predicates cannot pertain by nature to texts, sentences, statements, words or signs giving that speciality as generality are opposite and correlated conceptual properties, *i.e.* logical-semantic features of concepts. In fact, the concept of color differs the concept of red, even though the word 'color' does not share a common sign with the word 'red'.

But, in addition, speciality as generality is none a character of legal rules considering a rule as a whole entity. To show this point it is useful to recall our ordinary intuitions. Though rules are not objects, in the same way as the speciality of an object belongs to its features and not to the object in itself, the speciality of a rule is related to its features and not to the rule as a whole. For instance, star apple is a special fruit giving that it has a star-shaped cross section: this specific difference is the relevant feature that makes star apple a special fruit. Equally, rules concerning dogs *ceteris paribus* will be special with regards to rules concerning animals since the concept of dog is special with regards to the concept of animal.

Speciality as generality are features related to the content of legal rules that hence precisely pertains to their conceptual components. Legal concepts that compose rules and not rules themselves are the pivotal terms of the *genus-species*

⁸ Available at http://www.hcch.net/index_en.php?act=conventions.text&cid=133. (Date of access: August 31, 2012).

relationship⁹. Saying that a certain rule is “special” or “general” is a tautology, although legal scholars never say so.

In this view it becomes crucial inquiring the conceptual relationships existing among legal concept and the real task is to individuate which legal concepts are relevant and count as common elements or specific differences. Of course, this inquiry may be extremely complex considering the nature of legal language.

While there is an evident relation between two rules such those ones that provides that *the right of property shall be inviolable* and that *no person shall be ordered to surrender his property except where required in the public interest*¹⁰: there is no doubt in fact that the latter rule is special with regard to the former given that the concept of property links them. Instead, it is not obvious whether a rule according to which *a third person can be called by a party in guarantee in the first defensive response* is special or not relating to a rule according to which *the guarantor is suited at the first hearing on demand of the parties and with the authorization of the judge*. In this case, the speciality is a variable of the structure of the process.

These samples show that it is logically possible to identify a rule A as “general” with regard to a rule B, or to classify saying that the first denotes a certain genre and the second a species. Conversely, it is impossible to identify any special rule without assuming *ex hypothesis* that it refers to a species of a pre-determinate genre regulated by another rule. In this perspective, the speciality/generality of law and legal rules is not a pure logical-syntactic issue, but entails also in depth a semantic approach. To comprehend speciality/generality is a task that requires an intensional inquiry as in logic so in law. Formal inclusion is based on an ordered construction of concepts or inferior and superior classes¹¹.

⁹ This thesis that the *genus-species* relationship pertains to the semantic content of legal rules so their legal concepts can be explained using two common models of legal rules. On one hand, it can be used the categorical model and the distinction of R.M. Hare (1952; 1967) between the *phrastic* and the *neustic*. According to this model, the speciality of rules may depend on the propositional content of rules, the *phrastic*, and/or on the *neustic*, that is to say, its deontic modality. On the other hand, it can be used the hypothetical rule model, according to which a rule may be special on the strengths of the concepts of its antecedent (the descriptive part of the rule) and/or of its consequent (the effects or the sanction in legal parlance) as well on the strengths of its deontic modality. Legal concepts in my perspective are the basic elements of rules conceiving a rule as a prescription, that is to say, a semiotic and normative entity -on this topic see Scarpelli (1985 and 1969). A concept is a legal concept since it is a part of a legal rule. Legal concepts may belong to ordinary languages or other linguistic contexts (e.g. the discourses of jurists and judges, the legislation process, politics, ethics, natural sciences or other sciences such as economics, etc.). Every legal concept may be relevant to speciality according to certain previous assumptions.

¹⁰ See the art. 73.

¹¹ A very useful device to elucidate the *genus-species* relationship in the domain of law is the strict implication as defined by Lewis (1918; 1950). This form of implication fits in the intensional logic approach, rather than in the extensional logic approach that prevails in contemporary formal logic and mathematics, and it demonstrates that the *genus-species* relationship, in logic as well as in every other domain, included the law, is of a semantic nature. For this reason and given that legal rules are a semiotic object and that their truth-value is problematic, the strict implication notion seems to me the best logic tool to examine the speciality and generality of law. See Zorzetto (2010), Ch. 2 and Appendix: the same structure of Lewis' strict implication is shared by many others logical relationships, such as, for instance, the formal implication of Russell, the intensional implication of Klug, the L-implication of Carnap, the generalized conditional of Quine, the rigid implication of Pasquinelli, the logical consequence of Geymonat. As the historical studies of Bochenski demonstrate, also a form of implication conceived by Diodorus Cronus and described by Crisippus presents the same structure of Lewis' strict implication. This implication is even useful to explicate some logical schemes formulated by medieval and contemporary logicians such as Petrus Abelardus, William of Champeaux, Reichenbach and Toulmin.

Legal concepts, basic assumptions and disagreements

This basic analysis has three important corollaries.

A first corollary is that speciality as generality is not an inner feature of legal rules or laws but it is a variable involved in the previous assumptions of all those who use rules. Hence it largely depends on the assumption of legal interpreters, jurists and judges. An open inventory of some common assumptions might encompass for instance human intuitions about reality, common sense ideas, positive moral considerations, conceptions on the nature and the functions of law, legal doctrines held in certain branches of positive law or legal institutions, legal policies, moral values, hypotheses about purposes or *ratios* of legal rules, ethical or moral values and so on. The construction and conceptual linkages among legal concepts and in particular the *genus-species* relationships lie upon all these factors.

A second corollary is that all the disagreements about the special/general nature of legal rules, that so often characterize legal literature and jurisprudence, are caused, at bottom, by different basic assumptions of interpreters. The assumptions mentioned above are the real origin of the disputes about the speciality insofar they represent the route along which interpreters shape legal concepts and the conceptual linkages among rules. Most disagreements among legal scholars seem to be irresolvable, since these diverse assumptions are normally undeclared in the discussions.

The “fulcrum” of speciality and the relevant legal concepts

A third corollary of my analysis is that a legal rule may be special or general with regard to its antecedent: the hypothetical or the “A”, the “B”, a rule can be special when its antecedent A involves a specific difference. But, a legal rule may be special or general also with regard to its consequence: the sanction or the punishments or the effects in legal parlance, in the model represented by the symbol “B”. Besides, a legal rule can be special or general even considering its ontic modality.

Let us consider the following examples.

Example 1¹²

General rule: *During the period* provided for in Article 42, the consumer has a right to withdraw from the contract.

Special rule: The consumer may exercise the right to withdraw *at any time before the end of the period* of withdrawal provided for in Article 42.

The second rule is special and the first is general, because of the second specifies a feature of the right stated by the first. The italics above illustrate that the key-concept on which the *genus-species* relationship is based is here the concept of duration. When we interpret the expression “*during the period*” its ordinary meaning the specification given by the special rule seems wholly superfluous (redundant in legal parlance). But then it is not so in legal discourses. To understand correctly speciality in law we have to take into account that legal language has its own rules that may be different from the rules that govern ordinary discourses.

¹² See the articles 40 and 41 of the *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*.



*Example 2*¹³

General rule: *A person who takes the life of another shall be sentenced for murder to imprisonment for ten years or for life.*

Special rule: *A woman who kills her child at birth or at a time, when, owing to her confinement, she is in a disturbed mental state or in grave distress, shall be sentenced for infanticide to imprisonment for at most six years.*

It is apparent that the second rule is special and the first is general. That depends on the *genus-species* relationship existing between the two crimes (and concepts) of murder and infanticide. In fact, if we examine the main clauses of the two rules, we see that a woman in a disturbed mental state or in grave distress is a person; then, killing is a way to take a life; that a child is another person; finally, that the second rule gives relevance to a certain moment of the action, near to the birth and the time of the confinement, while for the first rule the moment of the action makes no difference.

As the italics added to the text illustrate, in this case, as the two crimes are related from genre to species, then so too are the rules. It does not matter whether the two sanctions are different. But, of course, this is not a logical necessity. Speciality is here uncontested since we have the habitual pattern to conceive criminal law as a system of crimes rather than of punishments. There when classifying penal laws as special or general it appears absolutely obvious that the crimes' characters are not those of punishments. However, it is equally obvious, once we think of it, that also punishments may be classified in genera and species. This is particularly evident in those legal systems such as the Italian, Spanish, Slovenian and Swedish legal systems, where the punishments are explicitly classified in penal codes or criminal general acts.

Example 3

General rule: Persons that have a physical disability have the right to be *exempted by military service.*

Special rule: Persons that have a physical disability have the duty to perform a *substitutive civil service* in accordance with their individual capabilities.

In this case, the second rule is special towards the first relating to their effects or consequences. Speciality depends on a double factor: the particular linkages existing between the concepts of exemption and substitution, on one hand, and the concepts of military and civil services, on the other hand.

Example 4

General rule: Parents *are free* to have their children vaccinated.

Special rule: Parents *have a duty to* vaccinate their children.

General rule: Not hunting deer *is permitted.*

Special rule: Hunting deer *is forbidden.*

¹³ See the sec. 1 and 3, of Ch. 3, Part 2, of the *Criminal Code of the Kingdom of Sweden.*

With reference to these rules the *fulcra* of the *genus-species* relationship are the deontic modalities. The provision that parents are free to give a vaccination to their children is general compared with the provision that parents have a duty to vaccinate their children because *in deontic logic ought implies –as a necessary albeit non-sufficient condition– a positive permission*¹⁴. Equally, *the prohibition to do an action whatever it is* (in my example the action of hunting deer) *implies –as a necessary albeit non-sufficient condition– a negative permission, that is to say, the faculty of not doing that action*. When special and general rules are so related then they are necessary consistent and the special one is a logical implication of the general one.

Example 5

General rule: Religious and other beliefs *may be freely professed in private and public life*.

Special rule: *No one shall be obliged to declare his religious or other beliefs in public university entrance examinations*.

The first rule is more general than the second one and the latter might be considered even a specification of the former, giving relevance not only to the material sphere of each rule but also to their deontic modalities. Of course, according to the first rule it is relevant the private and public life in general, rather than the context of public university entrance examinations, specifically points out by the second rule. This reason of speciality is plain. But, over and above that, the reciprocal speciality and generality between these rules could be justified on the strength of another distinct assumption: that to be free is equivalent to be unruled. This is a disputable assumption if truth be told. However, the second rule is a specification of the first general one (*i.e.* refers to a more specific and equally facultative course of action) assuming that to be free means that there is neither a duty nor a positive permission.

Categorization and systematization

Finally, speciality as generality in law depends mostly on implicit categorizations and the conceptual connections constructing among legal concepts in legal practice. Logic leaves open to draw possible alternative and even conflicting *genus-species* relationships among concepts. This means that any legal concept may become the *fulcrum* of a *genus-species* relationship. Which concepts are relevant is a variable of previous not logical assumptions.

Moreover, whenever the basic assumptions are shared in the legal community the speciality/generality of the rules will be solidly embedded in legal reasoning and there will not be disagreements about it. To the contrary, if the basic assumptions of the interpreters are controversial, the special/general nature of rules will be a contested matter and it is openly argued in legal reasoning. In this view, the consensus and the divergences present in the legal practice about speciality may reveal the existence of stable, rather than instable systematics inherent to the legal rules of a certain legal system.

¹⁴ See e.g. Ray (1926), Blanché (2008), Poggi (2000; 2004).

5. The *lex specialis* principle and the deontic relationships among special and general rules

“Prima facie” conflicts and “total-partial” antinomies

A leitmotif in the legal thinking about speciality is that the *lex specialis* principle is a positive rule available to solve and prevent the so-called *total-partial antinomies*. The expression, I borrow of course from Alf Ross (2004: 129-130), is currently used to indicate such *prima facie* conflicts between special and general rules that are not genuine in the eyes of the interpreters and are able to be removed simply using the *lex specialis* principle.

Of course, a total-partial antinomy occurs when the deontic modality of a more general rule A is opposite to, or in contradiction with the deontic modality of a less general rule B (the special rule). A simple example of total-partial antinomy is the following one: a general rule that states that *a party may avoid a contract for mistake of fact* conflicts with the special rule that states that *a party may not avoid a contract for mistake of fact if the risk of the mistake was assumed or should be borne by that party according with the circumstances*.

Nevertheless, speaking of *total-partial antinomies* or of *prima facie* conflicts is a metaphor. On one side, no logical relationship can exist to some extent though not entirely. On the other side, no logical opposition or contradiction can appear or disappear in virtues of a legal rule. Logical inconsistencies exist or not according to the rule of logic and not of law and they regard the intension and not the extension of concepts, propositions or prescriptions.

In this perspective it is misleading to draw a line between such *prima facie* or superficial legal antinomies repealing by derogation and such real legal antinomies that create practical dilemmas in the concrete application of rules. The logical relationships existing between the special and the general rule are identical in either case. The *lex specialis* principle may be used *ex ante* or *ex post*, and the choice between the two alternatives is a matter of argumentative strategy and not a matter of logic.

Inconsistencies and redundancies in law

As I said at the beginning, the analyses about the *lex specialis* principle are focused on legal conflicts among special and general rules and debate in particular the possible combinations of the principle with the *lex posterior* and *lex superior* criteria. This approach is unsatisfactory since *total-partial antinomies* and derogation among special and general rules are two phenomena independent one each other.

When we consider legal antinomies as a logical issue related to the deontic modalities of rules, and not to the application sphere of rules, as I explained above, special and general rules may be compatible, opposite or inconsistent or, even, unrelated according to their deontic modalities indeed.

Of course, special and general rules will be compatible if their deontic modalities are identical. They are necessarily compatible also when the terms of the *genus-species* relationship are the deontic modalities on their own, as in my examples above on vaccination and hunting.

Besides, special and general rules may be incompatible: this happens when, for instance, one prohibits and the other permits or one obligates and the other does not obligate.

Finally, they may be also irrelative: we have this situation, for instance, when one states a special power (viz. to *non liquet* in case of obscurity of law) with regard to a general duty (viz. to render sentences motivated on evidence).

In actual fact, an important characteristic of legal systems is the co-existence of concurrent and repetitive rules not logically inconsistent. There is no doubt that one of the main functions of the *lex specialis* principle is to solve or prevent legal antinomies among special and general rules, but nevertheless when a special rule is compatible and purely repeats what is stated by a more general one it becomes a criterion to solve or prevent a redundancy in law. This latter phenomenon is no less crucial than the former.

When a special rule is compatible with a more general one there is a redundancy because the first tells something just told by the second and, conversely, the second tells something just told by the first. This happens when the deontic modalities of rules are identical but the rules have diverse extent (it is allowed to play; it is allowed to play soccer)¹⁵. But we have a redundancy even when the deontic modalities are compatible, albeit not identical and a rule is more specific than another. So, to play soccer is allowed; players should play soccer in compliance with the rule of the game; players, except goalkeepers, may not touch the ball with the hands or arms during the game, etc. In this view, specifications are fruitful redundancies¹⁶.

There are several examples of this use in our legal systems.

Let us consider for instance the following rules of Italian contract law: *an agreement is void if it is contrary to a mandatory rule; an agreement that limits or releases debtor responsibility in case of gross negligence or fraud is void*. These rules are compatible and the second one, compared with the first, is a special rule, because an agreement that limits or releases debtor responsibility in case of gross negligence or fraud is contrary to the mandatory rule of article 1229 Italian Civil Code.

In some branches of law, such as criminal law, special and general rules are typically construed as compatible rules. In fact in criminal law, the same action (viz. killing her own child by a mother) is often qualified as a crime (viz. infanticide) by a special rule and as a different crime (viz. murder) by another more general rule. In all these situations special and general rules are concurrent rules and a main problem is in fact whether they must be applied together or not; going back to my example, the problem is whether the mother must be incriminated only according to the special rule that punishes infanticide or also to the general rule that punishes murder. Of course, both common law and civil law legal systems have dealt with this problem and have principles and doctrines to solve it, such as the double jeopardy doctrine and the *ne bis in idem* principle. It is the conjunction of such principles and doctrines with the speciality connection, not the speciality relationship by itself, which makes of the infanticide rule an attenuation rather than an aggravation of the punishment for

¹⁵ If the rules have the same extent we have two identical rules or one rule, recurring two times. But this phenomenon is distinct from speciality, since a special rule by definition cannot have the same extent of the general rule regarding a species of a genre.

¹⁶ See e.g. Lazzaro (1985); Nino (1996, pp. 246-248; 1989, pp. 85-101); Ross (2004, pp. 132-133); Tarello (1980, pp. 151-152).



murder. In other branches of law the result of a speciality relationship can be quite different.

Redundancies in law and legal certainty

Thus, approaching the *lex specialis* principle as a pure criterion against legal antinomies is a simplistic habit. The description of the principle made by legal scholars and legal philosophers is, all things considered, not a realistic description of its uses in the current legal practice. The *lex specialis* principle comes into play even when special and general rules are compatible or thought to be so. Its uses are significant in particular when the redundancy seems to be a deficiency of law or when the special rule provides a discipline that in the eyes of the interpreters is not only less generic but also more suitable than the general rule.

In legal text there are often syntactic or linguistic indicators that mark conceptual links between special and general rules and are a sign of the presence of concurrent special and general rules. These traces of redundancies may increase or decrease legal certainty, according with the circumstances.

Let us consider two examples of public law and contract law.

Example 1. Along park lanes dedicated to bicycles and running often there are notices prohibiting the entrance of dogs; sometimes we can find notices that prohibit the entrance of dogs on a short leash.

Example 2. Italian Civil Code says, at art. 1439, that a contract may be voided for fraud if without the deception of one party the other would not have concluded the contract. On the other hand, a statute on franchising contracts says that if one party gives false information, the other party may void the contract according to art. 1439 Civil Code, and is entitled to damages if any occur (viz. art. 8 of L. n. 129/2004).

These examples show the extreme complexity of legal classifications.

It is important to see that the special prohibition against the entrance of dogs on a short leash spell out that putting a leash, albeit short, on dogs is not a relevant characteristic that allows their entrance in park lanes. The leash and its length do not justify a different and opposite regulation. The *ratio* of the special prohibition is easily individuated and it is to keep safe cyclists and runners from the risk of tumbling on leashes and dogs. We can say that in this case the co-existence of the special and the general rule helps to solve a possible hard case.

On the contrary, the special rule on voiding franchising contracts seems unhelpful and produces uncertainty, since according to its ambiguous content we are unable to say how it should be precisely coordinated with the general provision of article 1439 Italian Civil Code. In fact, although we know that giving false information is a sort of fraud and a contract concluded because of fraud can be voided, we are left without guidance as to many others details. For instance, do we have or not to perform a counterfactual test as required by the general rule of art. 1439 and, hence, verify whether in case of true information the party would not have concluded the contract? Moreover, only if damages occur there may be a right to damages; as a consequence, in order to make the provision sound have we to conclude that the contract may be voided even if the party would have concluded it anyway?¹⁷

¹⁷ Consider that Italian Civil Code distinguishes between the case in which in absence of fraud the contract would not be concluded at all, and the case in which in absence of fraud it would have still be

Redundancies in law and logical deduction

Redundancies in law have paramount importance. To produce special rules in presence of more general rule may be not superfluous. General rules are not irrelevant in legal reasoning when there are more specific rules. To fail to think of this would be naïve.

Let us consider the following constitutional rules (Articles 15 and 16 of the *Constitution of the Republic of Slovenia*): Human rights and fundamental freedoms provided by this Constitution exceptionally may be *temporarily* suspended or restricted *during a war or state of emergency*; Human rights and fundamental freedoms may be suspended or restricted *only for the duration of the war or state of emergency, but only to the extent required by such circumstances*.

The second rule is special towards the first and compatible with it, given that it specifies the conditions and circumstances in which human rights and fundamental freedoms may be temporarily suspended or restricted. The first general rule above is itself special and compatible with a third more general constitutional rule such as: *human rights and fundamental freedoms shall be exercised directly on the basis of the Constitution and shall be limited only in such cases as are provided by the Constitution*. The former rules represent in fact a specification of this last rule.

These examples can help to understand an important aspect of speciality of law. As to the content of these rules, the two former special rules, though logically compatible and thus logically repetitive or redundant, have however a great importance from a legal perspective. While the *genus-species* relationship is logical-semantic in nature, however we should not confuse the domains of logic and concepts and their rules and relations with the domain of law and its rules. The content of special rules is not the result of a pure logical operation. In the domain of law we cannot purely derivate special from general rules by logical deduction. The existence or inexistence of legal rules is not simply a logical-semantic matter, but belongs to material activities and historical-political processes, that is to say, finally, human choices and decisions. It follows that a legal system that does not contemplate the two special rules I mention above would be very different from a legal system that does contemplate them.

6. The derogation among special and general rules

The “lex specialis” principle as a meta-rule of legal justification

My previous examples show that derogation and antinomies are logically independent of each other and speciality, in itself, does not requires or entails derogation. When we speak of derogation between special and general rules we do not deal with their legal concepts or the deontic modalities of rules, but we consider rules as reasons of action in the domain of legal justification.

The phrase “rule A derogates from rule B” means that if the first rule A, not the second rule B must be applied. If rule A derogates from rule B, only the rule A enters the chain of legal justification to justify the solution of legal cases; whilst the second rule B is excluded from the process of justification. Using the syllogism model, we can say that derogation among rules concerns the selection of the major

concluded but with a different content. Art. 1439 It. Civ. Cod. provides a right to void the contract for the first case, while art. 1440 It. Civ. Cod. provides a right to damages for the second.

premise of the syllogism (the so-called external justification, as opposed to the internal justification, that is to say the subsumption process).

In short, derogation is an answer to the question which rule must be applied? Or which rule has to be chosen among all those that may qualify the situation in hand. This is true relating both to the concrete cases decided by the courts and to the abstract cases invented by legal scholars.

That a first rule derogates from a second rule depends on the existence, in a legal system, of a third meta-rule on legal application. In a legal system there can be many different meta-rules that state that a certain kind of rules derogate from another. According to these meta-rules, a rule can derogate from the others for many different reasons. The *lex specialis* principle is only one of these meta-rules and its characteristic feature is that the reason of derogation is the *genus-species* relationship.

According to the *lex specialis* principle any special rule derogates from all those one more general, precisely *on the strength of its higher speciality/lower generality*, and not –albeit most theories argue the opposite– *on the strength of its inconsistency*.

There, the usual way of presenting the *lex specialis* principle is incomplete and misleading.

It is incomplete because it ignores one side of the matter: all the uses in which a redundancy rather than an antinomy is open to debate. It is also misleading because it confuses two alternative and distinct reasons of derogation (speciality and inconsistency).

As a result, the common view about the *lex specialis* runs the risk to surreptitiously increase judicial discretion in the selection of rules to support outcomes reached on other grounds. In this respect, it is important not to forget that, which rule ought to prevail, whether the special or the general one, is not decided by logic and it is not a plain consequence of speciality.

To the contrary, the choice of the rule that must be applied depends on the meta-rules on the application of law that exist in each legal system. In this, each legal system makes its own choices.

The criterion “lex generalis derogat speciali” and other clauses

From all this, it can be said that special rules derogate from general ones but it can also be said that certain general rules shall derogate from special rules and prevail on them according to the opposite criterion *lex generalis derogat legi speciali*.

For instance, the article 2672 of the Italian Civil Code provides an unless clause for those provisions of special statutes that impose a transcription in real property registers of acts different from those enumerated by the Code and of all the other provisions not inconsistent with Civil Code rules on transcription: this means that the Civil Code general rules derogate from and prevail with respect to the inconsistent special provisions of other statutes.

On the other hand, it can also happen that certain special and general rules must be applied together rather than derogate each other. Consider for instance clauses such as these: “Notwithstanding ...”, “These articles are

without prejudice to...” or “Irrespective of the provisions of paragraphs... of this article”.

Clauses such as these are embedded meta-rules regulating the application of law and they can be included in general as well as in special rules. In both cases they impose to interpreters to put together some special and general rules in order to achieve a consistent combination among them.

Sometimes legislation contemplates complex versions of the *lex specialis* principle. Consider a relevant example with broad application in international law, art. 2 of the *Annex 2 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes*:

The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the “DSB”), consulted with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

This provision clearly shows that the *lex specialis* principle is part of positive law, where it may function equally as a criterion to solve or prevent antinomies and as a criterion to connect and unify special and general rules in order to achieve a more complete regulation of a certain matter.

The “lex specialis” principle in criminal law

As I remember above, in many legal systems the *lex specialis* principle is used to solve the concurrence of crimes. For my purposes, it is significant that its formulation changes in each legal system.

For instance, the Italian penal code states at art. 15 that *unless the contrary is stated, special statutes or provisions derogate general ones, when the same matter is regulated by more than a criminal statute or provision of the same criminal statute*. Italian criminal lawyers interpret this article as an instance of the *lex specialis* principle¹⁸.

First, it is important to note that it contains an unless-clause (*unless the contrary is stated*) that leaves open the possibility that other provisions might provide different criteria. Both the Italian Penal Code and many other Italian criminal statutes contain numerous rules and clauses that exclude derogation or state different reason of derogation such as the typology of punishments or the competent legal authority (viz. federal, national, local, European authorities, etc.).

¹⁸ See e.g. Conti (1959); Pagliaro (1961); De Francesco (1980); Romano (2004); Masera (2006); Gatta (2008: 169).

Second, we can compare art. 15 of the Italian Penal Code with art. 8 of the Spanish Penal Code: *Los hechos susceptibles de ser calificados con arreglo a dos o más preceptos de este Código, y no comprendidos en los artículos 73 a 77, se castigarán observando las siguientes reglas: 1ª. El precepto especial se aplicará con preferencia al general. 2ª. El precepto subsidiario se aplicará sólo en defecto del principal, ya se declare expresamente dicha subsidiariedad, ya sea ésta tácitamente deducible. 3ª. El precepto penal más amplio o complejo absorberá a los que castiguen las infracciones consumidas en aquél. 4ª. En defecto de los criterios anteriores, el precepto penal más grave excluirá los que castiguen el hecho con pena menor*¹⁹.

The task of both the Italian and Spanish statements above is to regulate the redundancies among criminal rules; however they say something different. Saying that *los hechos son susceptibles de ser calificados con arreglo a dos o más preceptos* as does the Spanish Penal Code is in fact another way to approach the matter of redundancy in law. Under this respect, the *legal drafting* of the Spanish Penal Code is better than the Italian one: while the Italian version uses the *a b g o s* expresso “*sa e atter*” to el t the relevant rules among which judges have to select the right one, the Spanish one refers explicitly to its purpose, that is regulating the phenomenon of multiple qualification of actions by criminal rules.

Now, both Italian and Spanish statements express meta-rules on application of law. But art. 8 of the Spanish Penal Code enumerates explicitly four criteria: *i*) the *lex specialis* principle; *ii*) the principal/subsidiary criterion (usually, this criterion is e be e legal state e ts cla ses s ch as “Except where otherwise state”, “less the sa e acto s p she b article. ...” or “respect ve w th the other prov s o s o th s article or paragraph ...” a so o); *iii*) the incorporation criterion, which typically involves a reasoning such as this: killing a man has a greater offensiveness than damaging his clothes, hence murder prevails on damages; *iv*) the criterion of the measure of punishments, that major crimes prevail on minor ones.

Art. 15 Italian Penal Code states the *lex specialis* principle as a general rule adding an unless open clause.

However, we do not have to exaggerate this difference in legal texts. The four criteria enumerated above are in fact widely used in Italian criminal law, as in many other countries, albeit not expressly formulated in penal codes or statutes as in Spain.

Therefore, it is important to see that all these four criteria may be applied to special and general rules; but while the *lex specialis* principle may be applied only if there is a *genus-species* relationship; the other three criteria may be applied whenever criminal rules interfere.

In fact principal/subsidiary rules, incorporated/incorporating rules and minor/major severe rules may be correlated from *genus* to *species* and, hence, refer to a genre and a species, but they may also overlap solely in a certain extent and, hence, rule each one a different species. Typical examples of the latter rules are rules such as *hunting deer is prohibited* and *hunting in natural parks is prohibited*; or *every citizen has the right to vote* and *women have the right to vote*. Legal scholars a e th s st ato “b lateral or rec procal spec al t”. Th s s a slea g oto , as

¹⁹ See e.g. Bacigalupo (1999: 570); Ruiz Sanz (2003); Palma Herrera (2008); Prieto Sanchis (2002) and the historical analysis of Matus (2001a: 295-371; 2001b: 357-400).

inclusion and interference are two distinct logical relationships: the first is represented by two circles one wholly included in the other; while the second is represented by two circles each of one overlaps the other only to a certain extent.

All of this is well known and obvious. But it is important to see that if the principal rule is also special with regards to a subsidiary more general one, then the principal/subsidiary criterion produces the same result as the *lex specialis* principle. On the contrary, if the principal rule is more general than the subsidiary one, then the principal/subsidiary criterion operates in the opposite direction than the principle *lex generalis derogat speciali*.

Furthermore, the incorporation criterion can be construed as a sort of *lex specialis* principle and, conversely, our principle is sometimes conceived as the incorporation criterion. Many legal scholars assign a “scale of crimes” based on the values and goods protected by criminal rules and thus classify criminal rules according to their degree of offensiveness. In this perspective, as seen above, murder normally includes or absorbs damages and bodily harm; equally, to make another typical example, rape or sexual assault normally includes or absorbs violence.

Consider that in a well-ordered criminal system punishments should be proportionate to criminal offensiveness to values protected by criminal rules. In such case the *lex specialis* principle in the sense of incorporation criterion turns to coincide with the criterion of major/minor punishment.

7. Some argumentative uses of the *lex specialis* principle

An agenda for further research

Most legal practitioners currently use the *lex specialis* principle in ways rather different from a criterion against antinomies or redundancies in law I illustrated above. In this last paragraph I will present other two main uses of the principle.

A first use is known as the *ejusdem generis* rule and is typical in particular of common law legal culture. Yet, as the name reveals, this rule is original of Roman law tradition and these days it is widespread also in civil law legal systems, albeit ignored by current continental theories about the *lex specialis* principle. In this use the *lex specialis* principle is a lexical argument and it applies directly and openly to legal concepts.

The second use of the *lex specialis* principle is less evident but has great importance in legal reasoning. The principle is frequently embedded in complex argumentative schemes in which the idea that special rules derogate from those more general is combined with other traditional legal arguments.

The following points are mere sketches and hints that require further studies.

The doctrine of “ejusdem generis”

When the *lex specialis* principle is used as the *ejusdem generis* rule, the idea that *lex specialis derogate generali* turns into the idea that *generi per speciem derogatur* (i.e. species derogate from genus). This was the medieval and most philosophical interpretation of the Latin legal maxim (Stein, 1968; Talamanca, 1977).



The idea is that *generi per speciem derogatur* applies generally to criminal statutes and other general acts or to private acts such as contracts. This is a conceptual scheme used mainly when there are definition and series of words in a legal text.

In a common perspective it is a rule of construction of legal texts: *where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated (In re New Castle County De, Appellant v. National Union Fire Insurance Company of Pittsburgh, 2000; Garner, 1999).* According to the doctrine of *ejusdem generis*, this rule is *an instrumentality for ascertaining the correct meaning of words when there is uncertainty. Ordinarily, it limits general terms which follow specific ones to matters similar to those specified; but it may not be used to defeat the obvious purpose of legislation. And, while (...) statutes are narrowly construed, this does not require rejection of that sense of the words which best harmonizes with the context and the end in view (In re United States v. Powell, 1975; In re Gooch v. United States, 1936).* Courts sometimes consider it as *one phase of the application of the broader rule under the maxim noscitur a sociis which is defined The meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it (Broom's Legal Maxims)* and, hence, apply it *where the general words precede the specific terms, when it is manifest that such particular terms have reference to subjects embraced within the meaning of the general words (In re Spartan Airlines Inc., 1947).*

This version of the *lex specialis* principle represents a lexical legal argument in the genuine sense that regards legal lexicon. Considering it a literal or a textual canon, according to the common view, is slippery. In reality, it is an argumentative scheme to determine the specific content of those legal concepts that are expressed in general in legal statements and especially in legal definitions. There it is important to repeat once more time that even in this version the *lex specialis* principle does not regard words and signs, single terms or syntagmas. The idea that *generi per speciem derogatur* is indeed a rule to shape the conceptual relationships among legal concepts. In short, concepts and not linguistic terms are, properly speaking, the species and the genus.

Hybrid argumentative schemes

In addition, many arguments used in legal practice are a combination of the *lex specialis* principle with others traditional legal arguments. In actual fact the *lex specialis* principle is used together and appears jointly with typical legal arguments such as, to give some samples, the *a contrariis* argument, the rule from principles, the *ratio legis* rule, the mischief rule, the golden rule, the reasonable rule, the intention of legislator rule and so on (*In re Rodgers v. United States case*, (1902), Supreme Court of United States, No. 137, 185 U.S. 83).

Thus, the common argument according to which *it is unreasonable to have two rules that say the same thing so as the more specific one says truly something different* is but another formulation of the *lex specialis* principle when special and general rules are compatible one each other. This argument has various names (maybe, the most common names are the economic argument and the reasonable legislator canon). According with a certain view it expresses an essential feature of a rational legislator (Nino, 1989). What is more important is that, on one hand, it applies to rules able to exist or occur together without any conflict; on the other hand, it requires a further justification, since we can ever ask why to repeat a certain rule would be unreasonable. Still in legal texts, as in common discourses, sometimes

repetitions are far from unreasonable and to the contrary they seem perfectly justified. Moreover, in many significant circumstances anaphora is a deliberated strategy to structure legal texts (this is patent for instance especially in European legislation, as the numerous repetition within the *Treaty on European Union* and the *Treaty of on the Functioning of the European Union* reveal: *inter alia*, viz. articles 24 and 31 TUE, and 20 and 21 TFUE²⁰).

Sometimes the *lex specialis* principle merges into a peculiar version of the *a contrariis* argument. According to two common arguments, *every general legal rule should be applied only to the genus and not to its species, unless a special rule states the contrary and everything that is not explicitly permitted by a special rule should be considered as implicitly forbidden*²¹. These arguments are internally contradictory strictly applied. According to the first argument, general rules should not be applied in any case, unless an express rule provides the converse. But, this patently denies the generality as it is: in virtues of generality, general rules apply necessarily to a genre including all the species. The second argument entails that any species would be regulated as opposed as the genre and hence every other species too. This argument represents a general stop to generality in law. But it is unfeasible giving that opposition is a two-terms relationship, while the species of a genus may be uncountable and in logic are infinite in number.

However, the two arguments above mentioned are closed to another common argument: it is widespread the belief that *when a special rule seems incomplete, in order to fulfil the discipline of the species general rules might be applied but not directly, instead by analogical reasoning*²².

This thesis is fallacious. In fact, the analogical reasoning is able to run according to two genres or to a genre and a species of another genre, but not with reference to a genre and its species. As it is well known, the analogical reasoning consists in the determination of a remarkable similarity between two entities that

²⁰ Art de 24 TUE “1. (...) The co o oreg a secr t polc s s bject to spec c rles a procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excl e . ” Art de 31 TUE “1. Dec s o s e r th s Chapter [i.e. Specific provisions on the common foreign and security policy] shall be taken by the European Council and the Council acting unanimously, except where this Chapter provides otherwise. The adoption of legislative acts shall be excluded.” Art de 20 TFEU “2. Ct zes o the U o shall e jo the r ghts a b e s bje ct to the t es prov e or in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States; (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State; (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language. These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and b the eas res a opte there er .”; Art de 21 TFEU “1. Ever ctze o the U o shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and co t o s la ow the Treat es a b the eas res a opte to gve the e ect”.

²¹ See e.g. Tribunal of Rome, Sez. V, decree 6-22 July 2011; Tribunal of Varese, ordinance 20 December 2011; Tribunal of Rome, Sez. V, decree 8 February 2012; Tribunal of Catania, Sez. I, decree 24 February 2012; Tribunal of Como, Sez. Cantù, ordinance, 2 February 2012; Tribunal of Palermo, Sez. Bagheria, ordinance 30 December 2011. All these decisions concern civil mediation and in particular the issue whether private agreements on usucaption concluded ahead of a mediator may or not be presented for transcription in the real property official registers. The first two decisions are available on-line at <http://www.101mediatori.it/pagina/sentenze> (Date of access: August 31, 2012); all the others are on-line available at <http://www.progettoconciliamo.it/giurisprudenza/1,320,1> (Date of access: August 31, 2012).

²² See e.g. Mandrioli and Carratta (2012: 315, 326, 320).



under all other respects are assumed as distinct and unrelated. Even though this last assumption often remains unexpressed, it is an essential feature of analogical reasoning, because it is the bases on which the reasoning starts. Only upon this assumption the identification among many differences of a relevant similarity makes sense and this identification is the core of analogical reasoning. So, if this is true, the fundamental bases of analogical reasoning lacks when we have a genre and its species. Obviously, between a genre and its species there is no a broad bundle of differences but an identified common element and a specific difference.

A last striking argument related to speciality of law concerns the authentic interpretation, *i.e.* the interpretation of the “special” that precedes what has to be interpreted. In an opinion, this kind of interpretation would be done only with regard to special provisions and not to those general²³. Expressed so broadly the argument is spurious because of neither the generality nor the speciality itself preclude or contribute interpreting authentically a certain legal provision. However, the thesis in hand catches a glimpse of truth. It can be amended saying that when we have a generic statement, each of the possible interpretations that concerns only a particular species rather than the whole genre to which the statement refers, does not represent, in the actual fact, a genuine interpretation of the original statement and to the contrary it makes explicit another more specific rule (a special rule). This is another evidence of the circumstance that speciality can be bound up to specification and derogation, and it is logically distinct from inconsistencies in law.

To conclude, a close analysis of the *lex specialis* principle gives two main lessons. First, its role as a criterion against legal antinomies is not the sole one existing in legal practice and, maybe, it is not the most common and remarkable one. Second, the *lex specialis* principle represents a pervasive, albeit implicit scheme of reasoning when taking into account its overlappings and combinations with the other traditional legal arguments constructing legal reasoning.

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²³ On February 2011, the Italian legislator had introduced a provision (art. 2, 61° paragraph, Law n. 10/2011) to give an authentic interpretation of the art. 2935 Italian Civil Code, never modified since the promulgation of the Code in 1942. This article states a very general rule about prescription: in fact, it regulates the expiry of claimants in a generic manner without portraying any distinction among any kinds of claims. On the other hand, the authentic interpretation of the legislator dealt with a specific kind of contracts relationships: it considers only banking operations related to a loan account. The article quotes that “Ilor alle operazioni bancarie regolate in conto corrente l'art. 2935 del codice civile si interpreta nel senso che la prescrizione relativa ai diritti nascenti dall'annotazione in conto inizia a decorrere dal giorno dell'annotazione stessa. In ogni caso non si fa luogo alla restituzione di importi già versati alla data entrata in vigore della legge o verso e del presente decreto legge”. The Tribunal of Brindisi-Ostuni, ordinance March 10, 2011, submits a constitutional issue with regard to art. 2, par. 61, Law n. 10/2011, denouncing conflicts to articles 3, 24, 101, 102, 104, 111, 117 of the Italian Constitution. Other seven tribunals submit the same issue to the Supreme Court. With the judgment n. 78 hold on April 2, 2012, the Constitutional Court has declared that the article 2, par. 61, Law n. 10/2011 does not comply with Constitution for two main reasons: because it conflicts with the principle of reasonableness and with the article 117, 1° par., of Italian Constitution, considered jointly with the art. 6 ECHR as interpreted by the European Court of Human Rights.

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