LAW’S NORMATIVITY: LEGAL VALIDITY AND AUTHORITATIVE LEGITIMACY

Abstract: The normative character of law poses difficulties within positivist legal theory, which seeks to conceptualise law as having no necessary moral content. A legal positivist must explain the binding nature of the source of legal validity. However in the absence of moral or other non-legal claims on action, explaining the acceptance of this binding character is problematic unless it is presupposed. Adopting a positivist perspective, this paper seeks to explain the relationship between legal validity and law’s normativity. It argues that the normative import of legal validity lies not in its source, but in its development and process, its persistent existence. This approach adopts the Hartian pedigree-based conception of legal validity, but identifies the distinctive normative quality of this validity as an integral aspect of the process itself, grounded in, and augmented by, its development over the life of a legal system. The term ‘authoritative legitimacy’ is invoked as a means of encompassing normative inputs into law apart from legal validity. In section 3 examples of such contingent normative inputs are introduced using the example of socio-economic rights adjudication.

Keywords: Jurisprudence, law, normativity, “legal validity”, positivist

Laws, like sausages, cease to inspire respect in proportion as we know how they are made.

INTRODUCTION

The above aphorism, commonly but erroneously credited to German statesman Otto Von Bismarck, is most likely the work of the American poet and lawyer John Godfrey Saxe. It articulates quite effectively the disillusion that legal subjects are wont to feel when seeking the ultimate source of law’s validity. This legally valid character is recognized in the minds of most legal subjects as a reason for action, it has a value-laden dimension. In other words it is a normative input. However, after reaching the end of a well-worn jurisprudential path of rules validating rules validating rules, the wellhead of
this legal lineage seems either conceptually elusive, or perhaps oddly lacking. It would appear self-evident that at the end of this chain, the integrity of which has been meticulously preserved and traced, something distinctly legal and set apart from the ignoble mess of human affairs must reveal itself. Moreover, positivist approaches to explaining law’s apogean validity are faced with somewhat of a riddle. The agents of a positive legal system must consider legal validity as binding, yet without reference to morality, or non-legal claims on action, how can the ultimate source of legal validity be accepted as binding unless it is already binding?1 Thus, the recurrent and oft-cited problem of circularity arises.

This paper is concerned with the relationship between legal validity and law’s normativity. I contend that the normative import of legal validity lies not in its source, but in its development and process. The Hartian pedigree method of identifying what is and what is not legally valid remains an accurate conception of the validation method, but the distinctive normative quality of legal validity becomes an integral aspect of the process itself, grounded in, and augmented by its development over the life of a legal system.

Working from this premise, the positivist quandary intimated above takes on a slightly different complexion. Although a positivist explanation of legal validity demands the agents of the positive legal system view legal validity as binding their actions, under a process-based explanation of the normativity of legal validity the wellhead of legal validity need not have some inherent, pre-legal binding character. If the normative quality of legal validity is drawn not from source, but from process, this implies that at the inception of a legal system, with its attendant source(s) of validity, legal validity in and of itself actually has little normative sway. It is not, in fact, anywhere near as significant a value-laden reason for action as in a developed legal system. Thus, the position in this paper also relies on acceptance as a necessary explanatory factor of law’s apogean validity. However, this process-based explanation of the normativity of legal validity does make the circular logic of an ability to bind, necessarily premised on acceptance of that binding character, less

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perplexing. It could be submitted that this so called ability to bind arises from the normative status of legal validity, and if this status develops only as a legal system matures, the initial acceptance of a source of ultimate validity is not an acceptance of something binding *because it is binding*, but rather must be understood as a more conscious societal act of acceptance of a shared task. That task is to respect a shared conception of what should be considered legally valid in the interests of achieving a societal end - being the kind of society its members want it to be. It could be argued that there may be an onus to accede to participation in this joint endeavour, and that this is itself a value-laden reason for action. However, if present, this is a moral onus. In the context of the taxonomy that will be considered in section 1, it is an authoritatively legitimate source of normativity.

Of course it must be noted that I break little new ground with this approach. The thrust of my analysis will centre on an attempt to taxonomise law’s different normative inputs. My core distinction between *legal validity* and what I term *authoritative legitimacy* parallels some of the insights articulated in much greater detail by Professor Fallon in his consideration of different breeds of legitimacy in a constitutional context. Moreover, some of my conclusions relating to the actual sources of authoritative legitimacy upon which legal systems tend to be founded are reminiscent of the oldest themes of political theory. Notwithstanding these caveats, I endeavour to offer a particular explanation for the normativity of law within which the distinct normative status of legal validity can be firmly grasped and accounted for. In section 3 examples of authoritative legitimacy as contingent normative inputs in contemporary legal decision-making will be introduced, and in so doing it is hoped that the distinctive normativity of legal validity may be cast into sharp relief.

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1. LAW’S NORMATIVE QUALITY

Notwithstanding a legal subject’s theoretical perspective, law will always have some quotient of normativity. This will apply for the positivist and natural lawyer alike even in respect of the most egregiously unjust system of rules. Crudely articulated, for the positivist, a rule’s status as law will not depend on its congruence with morality, and can have some normative quality purely by virtue of its legally valid character. For the natural lawyer however, a rule cannot successfully purport to be of legal character without some degree of conformity with moral standards, and so when faced with an unjust rule purporting to be law, the natural lawyer is not posed a problem of legal normativity, as it is not law at all. My approach is a positivist one in the sense that it does not require of a rule any minimum moral content in order for it to be considered a legal one. I separate the moral quality of a law from its legally valid character, treating it as only one aspect of the broad normative input that is authoritative legitimacy. However, natural law approaches do evince, and possibly owe their inspiration to, the yearning for a wellhead of legal validity worthy of its perceived calling that I intimated above.

From the above stated perspective, when speaking of law’s normativity it is important to note that this is a broad term, of which content-dependent morality of law is but one subset. I contend that in a developed legal system, the normative status of a rule rests on a number of legs, which for my purposes I will divide into two categories, legal validity and authoritative legitimacy. Authoritative legitimacy is a broad, somewhat catch-all concept, within which distinctly moral authority is one input. While a legally valid rule will have legitimacy, it will not necessarily have authoritative legitimacy. I invoke the term authoritative legitimacy as a means of encompassing normative inputs into law apart from legal validity. These are qualitative sources relevant to what is good law in particular instances. They may be sources of technical knowledge, moral principles, or sources relevant to the law’s effectiveness in achieving a goal it is perceived it could and should pursue in particular circumstances. The use of the word ‘authoritative’ in this

3 This quintessential natural law claim, that an unjust law is “no law at all”, is classically credited to St. Augustine. Ibid. p. 1801
way invokes a knowledge-based definition of authority rather than a control orientated, force based conception of authority.

In an exhaustive examination of constitutional legitimacy Fallon identifies the same core distinction upon which I ground my analysis, however he further divides what I term authoritative legitimacy into sociological legitimacy and moral legitimacy. Fallon holds that a strong conception of sociological legitimacy could be ascribed to a government institution, legal decision or provision where “…the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward.” Weak sociological legitimacy more appropriately describes mere public acquiescence to legal authority, as this does not necessarily preclude reasons of self-interest.

Fallon defines moral legitimacy as applying when “legitimacy is a function of moral justifiability or respect-worthiness.” He further elaborates that moral legitimacy has tended to be expressed in terms of ideal theories and minimal theories. Ideal theories seek to elucidate the conditions under which a particular legal system or government would be perfectly justified, while minimal theories aim for the less ambitious goal of identifying a minimum threshold above which such structures deserve respect in the absence of feasible alternatives. While Fallon engages in a comprehensive appraisal of the different instantiations of these positions, for the purposes of the present discussion this brief overview must suffice.

2. A VALUE-LADEN PROCESS

The normativity of legal validity in and of itself is a contested topic. I adopt a Hartian perspective and contend that legal validity has a normative content

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5 Ibid. p. 1795, Fallon notes the reliance of his use of legitimacy on Max Weber’s formulation, which describes legitimacy as “…an active belief by citizens, whether warranted or not, that particular claims to authority deserve respect or obedience for reasons not restricted to self-interest.”

6 Ibid. p. 1796
for “those who normally are the majority of society”.

It is a value-laden reason to obey a rule. Hart argued that this means individuals will criticize deviations from the standards of law while at the same time using these standards to justify their own actions; in other words, people hold a “critical reflective attitude” towards law. However, as intimated above, this demands an explanation of this normativity.

My position has much in common with that of Sean Coyle in his reading of Hart. Gerald Postema criticises Hart’s rule of recognition by arguing that in separating an individual’s reasons for accepting the rule from moral reasons for acceptance, Hart makes it impossible to account for the normativity of law. Coyle in turn counters this charge by emphasising the difficulty of maintaining this rigid separability at anything other than a very high level of abstraction from the reality of the use made of the rule of recognition by officials. He argues that the actual crafting of legal decisions can only be reliant on clarity provided by the rule of recognition at a fairly removed level, and in reality such decisions take place in the context of previously determined judgments, principles, and moral considerations, the respective influence of which will necessarily depend on the personal reflective attitude of legal subjects. He submits that:

Hart’s suggestion of asymmetry between a widely accepted practice of recognition on the one hand, and the moral views of participants towards that practice on the other, is thus in no way meant to deny the intimate connectedness of the texture of the practice to the reflective attitudes of those participants...

I find Coyle’s characterization of Hart’s position convincing, and feel it goes some way to explaining the distinct normativity of legal validity. His analysis of the extent to which the application of a standard of validity in legal decision

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8 Ibid.


11 Coyle, “Practices and the Rule of Recognition.” P. 438
making engenders a process through which non-legal standards bleed into what legal validity must be interpreted as being, and what it subsequently becomes, echoes much of my position regarding the continuous input from authoritatively legitimate sources over the course of the evolution of a legal system. While Coyle interestingly conceptualizes this process as a bottom up approach to a rule of recognition, my position might describe this normative bleed as a lateral process, whereby over the life of a legal system the very characteristic of legal validity acquires a particular ability to reassure individuals that are subject to legal decisions of the propriety of those decisions.

People are to some extent reassured of the propriety of a binding determination purely because it is a determinably valid legal one, with all the attendant checks and safeguards, procedures, protocols and appeals that have silted up over many years of (generally) sensible, earnest and sombre adjudication by officials versed in what should constitute validity. This long line of people trained in the determination of human disputes have gradually settled, and continue to settle, a body of knowledge regarding what the legal ‘right’ is in different contexts. In making a legal determination at a particular point in time officials draw upon the established standards of legal validity, as well as looking to sources of authoritative legitimacy when appropriate. Legal validity provides the determinacy of law, as well as the assurance of the panoply of legal concepts elucidated above, while suitable sources of authoritative legitimacy conservatively shape and influence the manner in which some of these concepts are brought from a level of great generality, to the maximum specificity of a single social interaction. It is not a case of non-legal normative standards being bluntly shoehorned into law. Rather the utilization of very distinctly legal processes is subtly and necessarily influenced by sources of authoritative legitimacy, and this manner of use, over time becomes established as an aspect of legal validity. Thus, it is when considering legal validity as a progression, a chain in its entirety, that we can identify this continuous lateral normative input. However, when legal validity is invoked as a normative force at a particular point in time, its normative character stands very much distinct from other normative inputs of
authoritative legitimacy. It is in this sense that a lateral normative bleed occurs.

Sylvie Delacroix grounds her view of law’s normativity on a similar vision of the significance of the process of law application, and the attendant reflection by legal subjects on the propriety and binding nature of that application. Linking the normativity of law with its ‘programmatic’ aspect, informed simply by the particular way a society wishes to live together, Delacroix argues that each time a legal action is assessed in light of this goal, law’s normative character is developed. She places importance on instances of such reflection on the part of both citizens and legal officials, contending that “these cases contribute to shaping the socio-cultural fabric enabling law’s normativity.” Delacroix’s genealogical explanation of the normativity of law shares many insights with the position this discussion seeks to enunciate. Both approaches are motivated by the riddle of laws unique normative quality, and the attempt to address its interaction with other normative inputs. This convergence of motivation will become particularly apparent in section 4.

3. AUTHORITATIVE LEGITIMACY IN PRACTICE

At this juncture it may prove beneficial to ground our discussion with some practical examples of sources of authoritative legitimacy at work in contemporary legal contexts. By appreciating the way in which law draws authoritative legitimacy from non-legal sources of many different sorts, the distinctive normative input of legal validity may be better understood.

Pertinent examples of this normative interaction are to be found in areas where the law is spurred to evolve in the face of new thinking, ideas, and worldviews. Whether changing to accommodate technological advances that present unchartered legal territory, or to give legal form to progressive social mores, law necessarily draws on sources of non-legal knowledge. At the same time it applies established standards of legal validity to the progeny of this

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interaction. We live in an era of rapid technological advancement, new ideas, and progressive social discourse, which means that many interesting examples of this type of legal development can be seen in our courtrooms and legislatures.

One particularly apposite illustration of this phenomenon is the development of the justiciability of socio-economic rights. Socio-economic rights have traditionally been thought of as standing awkwardly at the intersection between judicial competency and more technical legislative or administrative competencies. However, many jurisdictions have given socio-economic rights justiciable expression in their constitutions (particularly South Africa and India), and the development of these principles in the courts has demanded dynamic adjudication and legal development. Indian courts can appoint special commissions of experts to advise them on areas of technical expertise, or request a specialist body to submit a report ascertaining the facts at issue and outlining recommendations for possible solutions.13 Such mechanisms are not uncommon, and in many jurisdictions where litigants can invoke socio-economic rights, the workload of legal determination is effectively divided between conventional judges, and experts and adjudicators with specialist skill sets.

This is a striking invocation of non-legal expertise, and not merely in the backroom office of a legislative draftsman, but in the courtroom, the crucible of legal determination. Moreover, this is also an invocation of non-legal normativity. The law is drawing on sources external to its own doctrinal methods and principles in order to substantiate the authoritative legitimacy of legal determinations, while at the same time relying on the determinacy and normativity of legal validity. In these examples, it is sources of technical skill and knowledge that are being tapped for their normative value. Employing some of the categorisations considered in section 1, we might identify these as possible sources of both sociological and moral legitimacy.

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Even moving beyond the context of socio-economic rights, the encroachment of the expert witness and the scientific method into almost all fields of law is marked. Against this backdrop, legal validity casts a sharp silhouette. Let us take a snapshot of a moment in the chain of legal validity, that moment being the particular determination of legal rights and obligations on foot of an action adjudicated by one of our above mentioned Indian courts and commissions. At that moment, there are at least two distinct normative forces at play. One is the non-law umbrella concept of authoritative legitimacy, in this instance consisting of the technical expertise and knowledge available to the court in the guise of the commission of experts or specialist body. The other is legal validity, dependent only on the established legal validation methods of the particular system. This decision forms a new link in a chain of rules validating rules, and it owes its legal character to its place at the end of this chain. In this snapshot, the standard of legal validity draws upon its forbearers further up the chain for its normative force, thus drawing on the process of legal validation itself, rather than upon the wellhead of validity at the top of the chain. Now let us unfreeze the image and allow the chain to extend to the next legal determination, and the efforts made in our snapshot to reach the ‘right’ decision (not necessarily morally right, whatever we, or the society in question determines the correct aim, purpose, or function of law to be), become part of the normative contribution made by legal validity at its next invocation, and the one after that, and so on ad infinitum.

It must be stressed that it is not a case of the distinct normativity of the particular source of authoritative legitimacy invoked in our snapshot simply forming some awkward marriage with legal validity and thereby augmenting the normativity of legal validity. Rather, with each invocation, the distinct normativity of legal validity is developed by virtue of the process engaged in. That is, the determination, the invocation itself, and the care and attention given to seeking something that is thought, for whatever reason, to be the right thing within a particular social interaction and in light of all appropriate sources of authoritative legitimacy. Roscoe Pound’s observation is noteworthy in this context:
Judicial finding of law has a real advantage in competition with legislation in that it works with concrete cases and generalizes only after a long course of trial and error in the effort to work out a practicable principle. Legislation, when more than declaratory, when it does more than restate authoritatively what judicial experience has indicated, involves the difficulties and the perils of prophesy.\textsuperscript{14}

Here Pound points to the same process-based normativity that this paper seeks to grasp and apportion squarely to legal validity. While of course legislation carries the same legally valid character as judge-made, or precedent based law, the position adopted in this discussion implies that legislation freshly enacted and promulgated has less normative import than precedent based law. Nascent legislation, although legally valid and thus laying claim to the actions of individuals, will be challengeable in some manner in the courts of most developed legal systems. It is in the context of such a challenge that the brunt of a much longer chain of precedent based legal validity will be brought to bear on the recalcitrant individual in the form of the court’s determination of the legal validity of the legislation. Even if this decision involves merely a determination of constitutionality, an apparently clear example of the application of the wellhead of legal validity at the level of abstraction for which it was intended, this is effected by utilisation of often complex methods of interpretation and doctrinal principles, informed by a longstanding process of such determinations. An intuitive submission would seem to be that this application of a separate and longer chain of legal validity adds to the normative character of the challenged legislation, assuming it is upheld. This is the case notwithstanding both chains drawing on the same wellhead of legal validity.

Thus, although there are no gradations of legal validity, it is submitted that it does not automatically follow that there are no gradations of legal normativity, nor, consequently, does it follow that there are no variations of legal obligation. Such a statement may seem paradoxical on the face of it, however the converse “black and white quality of legal obligation”\textsuperscript{15} appears inaccurate in many contexts. For example, it seems commonsensical to assert that an

\textsuperscript{14} Roscoe Pound, \textit{The Formative Era of American Law} (P. Smith, 1950). P. 45

Irish Supreme Court determination of the constitutionality of an Act of the Oireachtas, although conceptualized within the system as no more than a check, leaving an already valid Act no more valid than it found it, does add value to the reason for action that is that validity. This added value is not an authoritatively legitimate value; it must be accounted for in legal validity. A process-based explanation of legal validity implies the variability of its normative character, and consequently of legal obligation. This is an idea that will be addressed in the following section.

4. MASTERY BY PROXY

The theoretical arc of our discussion now demands consideration of the implications of this view of the normativity of legal validity for the embryonic legal system, and consequently for the problem of circularity noted at the outset. What of the standard of ultimate legal validity at the point of its acceptance, prior to the process of application and development that will imbue it with the value laden, normative character of which so much has been said?

The implication of this process-based view is that initially, legal validity will have little inherent normativity. Rather, its normative status, and consequently its power to enjoin its subjects, is drawn almost wholly from sources of authoritative legitimacy. At the foundation of a legal order, assuming it does not involve a carry-over of legal validity from a previous regime, as could be argued to have been the case in some post-colonial states, law's normativity leans heavily on the latter of the two legs explicated in section 1 - authoritative legitimacy. Foremost examples of authoritatively legitimate sources in such contexts include political and ideological justifications, perceptions of shared obstacles that serve to galvanise a people, technical and practical factors, and possibly most significantly, popular consent. In situations like this the ultimate source of legal validity will usually find expression in constitutional terms. These conditions for legal validity depend on acceptance, and it seems apparent that the normative impetus for such acceptance does not come from the conditions themselves, but from the
sources of authoritative legitimacy towards which they must be generally viewed facilitative. Thus, the conditions are not accepted because they are binding, and then become binding because of that acceptance, their acceptance is best conceptualized as a conscious act of shared societal endeavour. That endeavour is shaped by whatever sources of authoritative legitimacy are at play. Thereafter, these conditions of legal validity begin to attract a normative status as they are particularized and applied in light of this common task, again and again over the life of the system.

This position alters the problem faced when legal officials identify the rule of recognition. Doyle pertinently notes that officials of a legal system cannot adopt Hart’s perspective as an external observer and observe the acceptance of the rule of recognition as a social fact, for to do so would mean they would neglect the internal perspective of the rule. From ‘inside’ the system, the rule must be viewed as binding and not merely a factual matter. If it were, Doyle argues, “it would cease to provide - in any meaningful way – for the unity of the system, as they would be free to change it at will. It would lose its normative quality.”16 This view is based on a classical interpretation of Hart’s pedigree approach to legal validity, implying a source-based conception of normativity. However, under a process-based view the ability of legal subjects to change the societal factual identification of the rule of recognition prior to enactment has no implications whatsoever for its normativity after enactment. It is not a matter of legal validity losing its normative quality; it has not yet gained it. Once the wellhead of legal validity is inaugurated by the appropriate systems of governance, its value-laden character immediately begins to accrue. For the maiden litigant standing in the maiden court of this system the legal validity of the court’s determination will not have the same normative import as for the litigant fifty years later. Make no mistake; the court’s decision will enjoin the individual purely by virtue of the processes carefully thought out in the formation of the court, the deliberation and subsequent enactment process applied to the ultimate criteria of legal validity, and, independently, the sources of authoritative legitimacy upon which the wellhead of legal validity rests, and which the judgment utilizes.

A further point that bears mention concerns the instinctiveness of our recourse to some external standard from whence conditions of legal validity can be drawn. There is a natural attractiveness to conceptualising an ultimate source of legal validity in such a way as to give it a binding character from the outset, or to explain this character as inherent to its existence, and its existence by reference to an acceptance of this binding nature. It could be submitted that this attractiveness stems from its facilitation of a sort of abdication of responsibility. If we identify the ultimate source of the validity of a legal system, thus lifting the mask of rules validating rules validating rules, it is discomfiting to find oneself staring into one’s own face. As McDowell pertinently notes: “If something utterly outside the space of logos forces itself upon us, we cannot be blamed for believing what we do.”  

The attribution of the ultimate criterion of validity to some externality, ultimately of our own creation, allows us to achieve mastery of ourselves, but by proxy. This proxy is an externality, whether God or grundnorm. It is a most effective way of avoiding the nihilism that can attend realization of the contingency of the wellhead of legal validity.

Delacroix’s genealogical explanation of law’s normativity embraces this contingency most refreshingly. Emphasising the tendency to abdicate responsibility for the truth of ethical judgments through the invocation of independent moral entities that establish the objective truth of those judgments, she contends that in doing so we fundamentally change the nature of our responsibilities when disputing the moral authority of law. Delacroix’s explanation of the ‘responsibility of authorship’ most accurately expresses the avoidance of responsibility that is achieved through the idea of mastery by proxy. We seek the attribution of the wellhead of legal validity to a source removed from our own muddled humanity, and this is a tall order for a positivist. The result is a conception of legal validity that demands its binding nature from the outset, and the circularity entailed by this approach.

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18 Ibid. p. 155
CONCLUSION

It is hoped that this paper has lent clarity to some of the most apparent value-imbuing aspects of the process of application, and consequent development of legal validity over the maturation of a legal system. Although no doubt at some junctures this discussion has raised further, more searching questions, rather than offer definitive answers, the value of directing such questions to process rather than source appears clear. An apposite note on which to conclude comes courtesy of an opportunity the author recently had to question the drafter of a constitutional document. This effort at constitutional revision ultimately proved ill fated, however the drafter believed that this was fortunate. After all, he noted, it would have taken the courts fifty years to get the new one right.


