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Legal Validity: An Inferential Analysis

Giovanni Sartor



**EUROPEAN UNIVERSITY INSTITUTE**  
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**GIOVANNI SARTOR**

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**ABSTRACT:**

I will argue that the concept of (valid) law is a normative notion, irreducible to any factual description. Its conceptual function is that of relating certain (alternative sets of) properties a norm may possess to the conclusion that the norm is legally binding, namely, that it deserves to be endorsed and applied in legal reasoning. Legal validity has to be distinguished from other, more demanding, normative ideas, such as moral bindingness or legal optimality.

**KEYWORDS:**

law

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# Legal Validity: An Inferential Analysis\*

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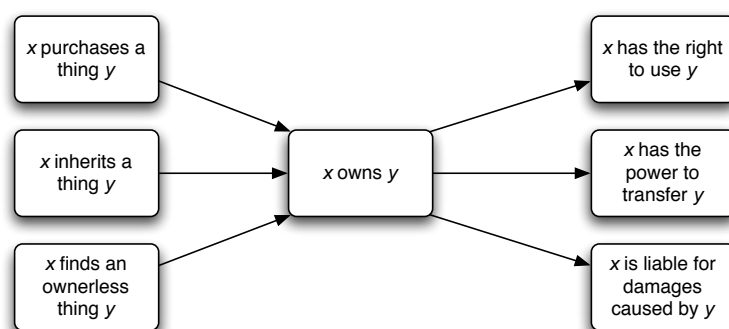


Figure 1: Alf Ross's representation of the concept of property

## 1 Introduction

The debate on legal validity characterises the history of legal thought: For centuries legal thinkers have been wondering whether the validity of a norm<sup>1</sup> depends on its cohering with the dictates of reason (as for natural law theorists), on its being issued according to legal empowerments (as for legal positivists), on its being endorsed and applied by officers and citizens (as for legal realists), or on a combination of the above and other requirements. However, even a superficial examination of the validity debate reveals a perplexing puzzle: It is not easy to understand what the dispute is about, and it is even doubtful whether it addresses any genuine problem. Does the validity controversy only concern the *definition* of the meaning of the term *valid*, namely, the description of the current usage of this term, or the stipulation of a new meaning for it? If this is the case, why not simply admit that this term is polysemous, namely, that it can legitimately be used in different senses in different contexts and theoretical frameworks?

Linguistic approaches to legal concepts have been vigorously criticised by Ronald Dworkin, who has stated that legal concepts have an interpretative nature, namely, that they need to be understood and developed by considering how they can contribute to legal practice and to the values that inhere in it (see esp. Dworkin 1986 and Dworkin 2004). While agreeing with Dworkin's criticism of linguistic-definitional approaches to legal concepts, I will not refer to his notion of an interpretative concept, since for my purposes it is sufficient to point to the fact that legal concepts mediate normative preconditions and normative conclusions: A legal concept is the bridge between the preconditions for qualifying an entity as an instance of the concept and the ensuing legal consequences (see Ross 1957). For instance, as Alf Ross observed, the concept of ownership mediates between the preconditions for becoming the owner of a thing (purchasing it, inheriting it, etc.) and the normative consequences following from owning a thing (having the right to use it, the power to transfer it, etc.), as you can see in Figure 1.

According to this analysis, a terms expressing a legal qualification appears to have an *inferential* meaning. This meaning is determined by inferential links determining what preconditions justify applying the term and what consequences follow from such an application.<sup>2</sup> In general the

<sup>1</sup>In this contribution I will use the term *norm* in a very broad sense, as covering any kind of normative proposition, namely, any proposition expressing normative information (rules, principles, values, etc.).

<sup>2</sup>On inferential theories of meaning, see, among the others: Dummett 1973, 454, Brandom 2000 and Boghossian 2003. I have discussed this view as applied to legal reasoning in Sartor 2007a. Note that by speaking of preconditions and consequences of a concept, I do not assume temporal priority or posteriority: The preconditions constituting a legal category are usually contemporary to the initiation of the category's instantiation and so are the category's



inferential *meaning* of a legal qualification *Q*—intended as *Q*'s *conceptual function*—is given by two sets of links:

- a. the links stating what preconditions determine the qualification *Q* (*Q*-determining links), and
- a. the links stating what consequences are determined by possession of the qualification *Q* (*Q*-conditioned links).

These links constitute *Q*'s inferential meaning, in the sense that they determine what inferences lead to *Q* and what inferences depart from it. For instance, we can say that:

- a. ownership-determining links contribute to constituting the notion of ownership by establishing that ownership is acquired under certain preconditions, while
- b. ownership-conditioned links contribute to constituting the notion of ownership by establishing that ownership entails certain consequences, namely, the rights and duties of owners.

I will not consider here the merits and limits of an inferential approach to legal concepts, but I will rather take it for granted and consider how it affects legal argumentation. Consider, for instance, the recent debate about torture, where the absolute prohibition of torture has been questioned with regard to the so-called “war on terror” (for a critical review of this debate, see Waldron 2005). A lawyer who wants to establish that the law permits inflicting pain on detainees for extracting information has two strategies for showing that this is the case. On the one hand, the lawyer may take a restricted view of the *preconditions* for applying the concept of torture (arguing, for instance, that inflicting pain on detainees does not amount to torture, when no permanent physical damage is caused), while accepting that any torture is forbidden. On the other hand, the lawyer may take a restrictive view of the *consequences* of qualifying an act as torture (arguing, for instance, that that certain kinds of torture, like inflicting pain but no permanent physical damage, are not forbidden), while accepting that any act inflicting pain on detainees for extracting information is torture. A lawyer who, on the contrary, wants to establish that the law always forbids inflicting pain on detainees for extracting information will reject both such contentions, claiming both that every way of inflicting pain for the purpose of an investigation qualifies as torture and that all kinds of torture are forbidden.

The double face of legal concepts—one face being precondition-oriented and the other being consequence-oriented—explains why legal debates make sense even in situations of apparent conceptual disagreement, and why they cannot be overcome by conceptual stipulation: When we are discussing the preconditions for applying a concept we view the concept's consequences as fixed relatively to our debate (and thus our debate concerns establishing what kinds of entities will be covered by the concept and thus will come under its consequences, for instance, determining what preconditions make it so that one becomes the owner of something and has the ensuing powers, or what preconditions make it so that one has tortured another and incurs the ensuing liabilities); when we are discussing the consequences of a certain concept we view the preconditions for applying such a concept as fixed (and thus our debate concerns determining what normative qualifications apply to the entities covered by the concept, for instance, determining what rights one has over one's properties, or what legal liabilities follow from torturing). Moreover, when characterising the preconditions or consequences of a legal concept, we usually

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consequences (for instance, the making of an agreement, having all elements required for a valid contract, determines immediately the formation of that contract, which immediately determines the initiation of the contractual rights and duties of the parties).

implicitly commit to the endorsement of such a concept, namely, to the view that the concept applies to the legal system we are examining, so that the concept's constitutive inferences hold in that system (on the distinction between the mere possession of a legal concept and its endorsement, see Sartor 2007b).

The preconditional side and the consequential side of a legal concept need to be separately considered as pertaining to different issues: The issue of under what preconditions one acquires ownership of a piece of land is different from the issue of whether an owner of a piece of land has a certain right (for instance, the right to construct a building); the issue of what preconditions constitute a certain crime is different from the issue of what punishment is provided for that crime, and so on. However, there is a connection between the solutions to these issues: The preconditional and the consequential side need to be adapted to each other, within the limits of an admissible legal interpretation-construction. On the one hand, when establishing what *preconditions* determine a certain legal qualification, we need to consider what consequences follow from such a qualification, and frame the preconditions so that they only cover situations where the consequences are appropriate (if a very harsh penalty is foreseen for a certain crime, one should usually narrow as much as possible the preconditions constituting such a crime). On the other hand when establishing what *consequences* follow from a legal qualification one should try to make such consequences appropriate to the qualification's preconditions (if a crime is characterised through preconditions that are satisfied in situations which do not represent a serious social evil, one should try to restrict the legal consequences following from such a crime).

It must be noted, however, that the preconditional and the consequential sides of legal concepts are not always susceptible to debate in the same way: While both sides of certain concepts (for instance, contract or ownership) are equally controversial, other concepts are characterised in such a way that only their preconditional side is likely to be subject to debate, while their consequential side is usually uncontroversial. Consider, for instance, the concept of nullity of a contract, or the concept of unconstitutionality of a law: Usually we argue whether preconditions for nullity are satisfied or whether a statute violates the constitution, taking for granted what a declaration of nullity or of unconstitutionality would entail). In the following I will argue that the concept of legal validity falls within the latter category, namely, that its consequential side is uncontroversial, while its preconditional side is highly debatable. In particular, I will claim that the invariant consequential side of legal validity concerns entailing the legal bindingness of the norms qualified as valid, and that this entailment provides the normative anchorage of the debates on legal validity. Consequently, I will argue that the preconditional side of this concept depends upon its consequential side, namely, that certain features of a norm entail the norm's legal validity on the basis of their ability to justify the norm's legal bindingness (through the mediation of legal validity).

## 2 Legal Bindingness

To clarify the notion of legal validity we need to start with its *consequential side*, namely, with *legal bindingness*, and must examine the role of the latter concept in legal decision-making and more generally in legal reasoning. Legal decision-making is aimed at providing solutions to single cases, solutions that may be coercively enforced upon their addressees (in case they do not spontaneously comply). Similarly, legal reasoning by officers and citizens, even outside a disputational framework, aims at establishing normative determinations that are to be implemented by the concerned individuals and, if necessary, publicly enforced. In many cases legal reasoning

can be performed without taking a reflexive attitude: One just uses the facts and norms that come to one's mind, without further thoughts. Consider, for instance, the reasoning of a police officer who stops a car exceeding the speed limit: On the basis of the rule establishing the speed limit and of the fact that the car is running at a higher speed, the police officer concludes, without any further ado, that the car is breaking the limit, and acts accordingly.

In other cases, however, we need to reflect critically on the premises from which we derive a legal conclusion. This reflection leads to questioning the *justification* of these premises. Do these premises represent appropriate grounds for adopting a legal determination? Can we (are we entitled to, and must we) use these premises in arguments supporting a legal conclusion? A factual premise—for instance, the proposition that a judge has accepted a bribe from a certain company—can be justified by considering the strength of the evidence supporting it (as compared to the evidence against it) and the correctness of the procedure through which the evidence was obtained or contested. A normative premise—as the *deontic* norm<sup>3</sup> that one is forbidden from corrupting judges, or the *constitutive* norm<sup>4</sup> that giving money for obtaining a public decision beneficial to oneself amounts to corruption—can be justified by appealing to various grounds, such as its enactment according to certain procedures (as for a legislative norm), its shared endorsement and application (as for a customary norm), or its importance with regard to legal and political values (as for a general legal principle).

When a norm passes this justificatory test (the reasons supporting its use as a premise of legal reasoning outweigh the reasons against it), we can conclude that the norm may and must be used in order to come at appropriate legal conclusions.<sup>5</sup> This judgement can be synthesised by saying that the norm at issue is *legally binding*: by saying that a norm *n* is legally binding we mean that a legal reasoner should indeed take *n*'s content into account whenever it is relevant, giving it the weight it deserves.<sup>6</sup> Thus the legal bindingness of norm *n* having content *c* entails *c* itself (as a defeasible premise of legal reasoning, see Sartor 2005, chap. 12): for example, the legal bindingness of Art. 64 ter of the Italian Copyright law, saying that users are permitted to make a backup copy of their software, entails that indeed users are permitted to make a backup copy of their software.

The legal bindingness of a norm does not entail that the norm always dictates the solution of every case falling within its apparent scope: A legally binding norm may be defeated (on defeasibility, see Prakken and Sartor 2003), in particular cases, by prevailing exceptions or incompatible principles (for instance, public safety may override, under certain conditions, freedom of speech). Moreover, a legally binding norm is not to be applied to cases falling outside its temporal and spatial application domain (for instance, cases taking place before the norm enters into force, or

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<sup>3</sup>By a *deontic norm* I mean a norm establishing deontic qualifications, namely, obligations, prohibitions or permissions.

<sup>4</sup>By a *constitutive norm* I mean a norm establishing non-deontic qualifications, namely, conferring a certain status or other legal quality on a certain entity, as the quality of being a legal person, a citizen, a literary work, etc.

<sup>5</sup>In principle we do not need to distinguish whether we may or we must use a certain norm in legal reasoning: since optimal justification requires the use of all relevant information, we must use any relevant information (any information making a difference with regard to the outcome) that we are allowed to use. Thus I would reject the distinction between must- and may-sources of law (see Peczenik 1989), though disregarding certain relevant data can entail a more serious defect in a legal decision than disregarding certain other data (for instance, not considering a piece of legislation may be worse than not considering a precedent).

<sup>6</sup>See Sartor 2000, where this requirement is described as a *doxastic* obligation. This cognitive obligation should not be understood as the duty to take the behaviour indicated in the norm, which would not make any sense for permissive or constitutive norms. For instance the legal bindingness of the norm "Everybody is permitted to express his or her opinions" does not mean that we are obliged to express our opinions, nor does the legal bindingness of that the norm "If one is born to Italian parents, one is an Italian citizen" mean that if one is born to Italian parents, one has an obligation to be an Italian citizen."

outside the territorial competence of the authority issuing it).

### 3 Legal Bindingness an Evaluative Property

Legal bindingness is an evaluative property, and in particular a deontic one<sup>7</sup> since to say that a norm is legally binding means that we have the obligation to take this norm into account in legal reasoning. Thus, if morality is understood in a sufficiently broad way, legal bindingness appears to be a moral property. Let us assume indeed that morality is concerned with telling us what practical determinations we, as rational beings, are justified in making, all things considered (from an impartial perspective, giving the proper weight to all reasons and interests that ought to be considered, taking a benevolent attitude, etc.). From this perspective, determinations on legal bindingness appear to be a particular kind of moral determinations, namely, those moral determinations concerning what norms we should adopt in norm-governed publicly-coercible determinations.

To establish whether a norm is now legally binding we should consider the merits of its present coercible application, given its current features, and in particular given its social-institutional history until now (an history including, for instance, the fact the norm was stated though a Parliamentary deliberation, a contract, or a judicial ruling, or was endorsed and practised by certain section of the population). As we will see in Section 8, we must distinguish the issue of establishing what norms are now legally binding (what norms we should now apply in our legal reasoning), from the issue of establishing what norms we should make legally binding (what norms we should endow with features ensuring their legal bindingness, so that we may be justified in coercively applying them in the future). The fact that one is bound/entitled to endorse and coercively apply a norm does not entail that one was required to make that norm legally binding (or is now required preserve its bindingness): It may be that a currently binding norm should not have been selected (its choice may have been suboptimal, or even utterly wrong) and should be abrogated (deprived of its bindingness) as soon as possible.

Since the legal bindingness of a norm also depends on its current institutional-historical features and on the relevance of these features in the present social setting, in determining what norms are legally binding, we have to take into account the specific context in which and for which a norm has to operate, namely, a certain political community, characterised by a certain ongoing practices, certain shared expectations and evaluations, certain past decisions taken according to certain procedures, and so on. The issue of determining whether a norm is legally binding remains an issue pertaining to morality (in the broad sense just specified), but it is an issue whose solution depends not only on moral values, but also on particular and contingent factual and social parameters.

### 4 Validity (Legality) as an Indefeasibly Sufficient Precondition for Legal Bindingness

The main contention I will advance is the following: The concept of *legal validity* provides a sufficient condition for *legal bindingness*; to say that a norm is legally valid *strictly entails* that it is legally binding (a strict entailment, as opposed to a defeasible one, does not admit exceptions). This leads to the conceptual model of Figure 2, where the concept of legal validity provides a

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<sup>7</sup>I use the term *evaluative* in the broad sense, to cover both the deontic qualification of something as obligatory, forbidden or permitted, and the qualification of something as good or bad.

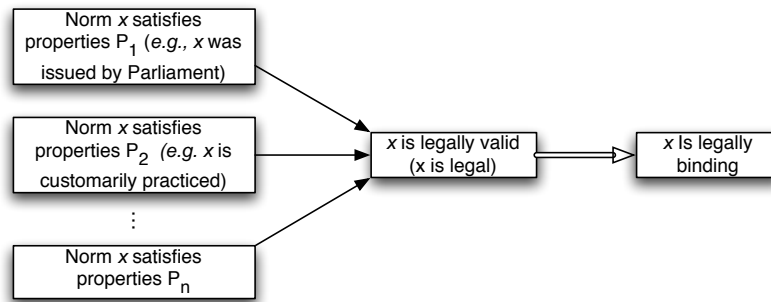


Figure 2: The inferential representation of the concept of legal validity

bridge connecting the fact of a norm having certain features and the conclusion that the norm is legally binding (the double-stroked arrow indicates strict entailment, while the single-stroked arrows indicates defeasible entailment).

If we assume that the *law* just is the set of all legally valid norms, then we can say that legal validity and *legality* (intended as a norm's participation in the law, rather than as an action's compliance with legal obligations) coincide. Consequently, legality too strictly entails bindingness, so that the view must be rejected that legal norms may fail to be legally binding in legal reasoning and practice (as argued, for instance, by Hart 1983). This view can take two forms: (a) a stronger one, claiming that legal validity is irrelevant to legal bindingness (the fact that a norm is valid is no ground for concluding that it is binding); (b) a weaker one, claiming that legal validity only defeasibly supports legal bindingness (the fact that a norm is valid provides only a defeasible or *pro-tanto* ground for concluding that it is binding, a ground that can be overridden by arguments to the contrary). In the following I will try to rebut both claims.

Let us consider the first, stronger, claim. It seems to me that the claim must be rejected since by completely separating legal validity and legal bindingness it makes legal validity irrelevant to legal reasoning. In fact, according to this claim, the legal validity of a norm does not say anything about the norm's bindingness in legal reasoning; it gives us no ground to conclude that we must apply it. Thus, as indicated in Figure 3, legal bindingness has to be directly inferred from the properties of the norm at issue, which may be different from the properties determining legal validity, and no logical connection exists between the concept of validity (legality) and the concept of bindingness (though some overlap is possible). Consequently, a legal reasoner interested in establishing whether a norm is legally binding should consider whether the norm satisfies the properties which directly determine legal bindingness, without paying any attention of legal validity.

Let us now consider the second, weaker, claim, namely, that though in general (defeasibly) legally valid norms are legally binding there may be some legally valid norms which exceptionally fail to be legally binding. According to this idea, a two-step approach is required for establishing legal bindingness (as indicated in Figure 4): First we establish whether a norm is legally valid and then, if this test is positive, we determine whether the norm is legally binding. In particular, the first test establishes whether there are sufficient reasons for concluding that the norm is valid, reasons which outweigh the reasons for denying the norm's validity; the second test considers whether there are reasons preventing the valid norm from being binding. If a norm fails the second test, we conclude that it is valid but not legally binding, and we are consequently legally justified in disregarding it. Thus, for instance, a law ordering racial discrimination (or

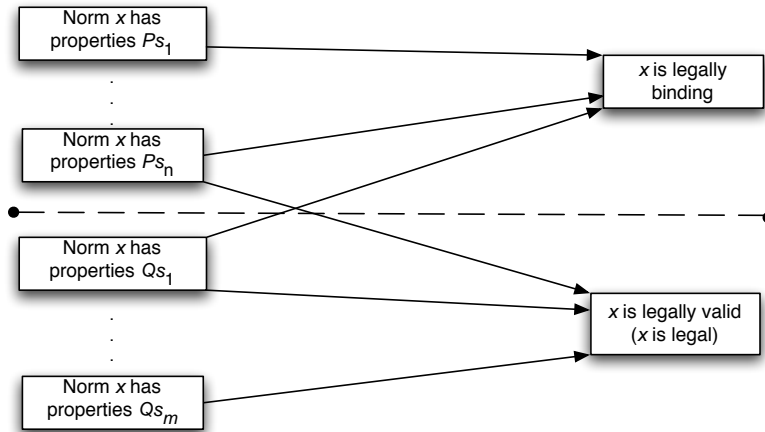


Figure 3: The view (here rejected) that validity and bindingness are inferentially unrelated

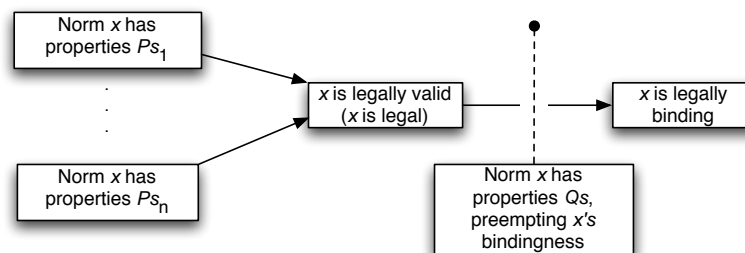


Figure 4: The view (here rejected) that validity only defeasibly support bindingness

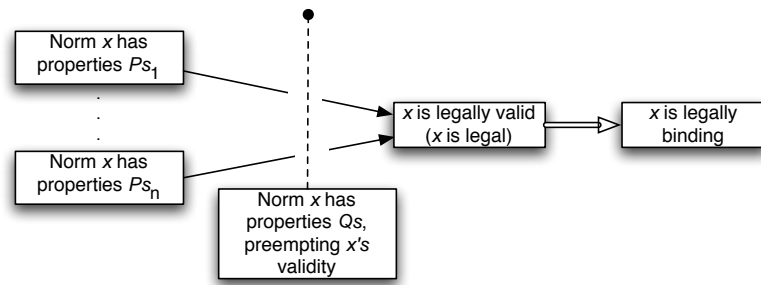


Figure 5: The view (here adopted) that validity strictly entails bindingness

permitting torture) would possibly pass the test of legal validity (being established by the Parliament, and on this account belonging to the law) but would fail the test for legal bindingness. I believe that even this attempt at distinguishing validity and bindingness cannot hold up against criticism. Firstly, it is at odds with the way in which the concept of validity is usually understood: How can we affirm that a norm is legally valid but still refuse to adopt it in making legal determinations?<sup>8</sup> Secondly, this distinction presupposes that there is a practicable criterion for separating reasons against validity from reasons against bindingness (so that we know whether to consider them in the test for legal validity or in the subsequent tests for legal bindingness). It seems to me that no such criterion is available; consequently, all legally acceptable reasons against the legal bindingness of a norm are relevant to the test for legal validity (according to the conceptual model represented in Figure 5): Such reasons aim at preventing the norm from being legally valid, rather than at breaking the link between validity and bindingness.

## 5 Legal Validity As an Evaluative Concept

By strictly entailing legal bindingness, legally validity (legality) too appears to be a evaluative concept, which pertains to morality (in a broad sense): By qualifying a norm as legally valid (with regard to a certain context), we entail that it is legally binding, which means that it can, and must (if relevant), be used to support or attack legal conclusions, that it has a role to play in legal reasoning, i.e., in the reasoning meant to establish norm-governed publicly-enforceable conclusions.

To show that the recognition of legal validity is indeed an evaluative attitude, let us consider three persons holding quite extreme positions: a religious fundamentalist, endorsing a “divine” rule which he believes to be coercively enforceable in any political community (for instance, a rule imposing, under the threat of severe punishment, certain attitudes with regard to family and religion); a political terrorist implementing the decision of a “people’s committee” she views as expressing the new superior law of her community, to be coercively enforced by the organised revolutionary movement, the rightful representative of the people (for instance, the decision to assassinate certain political or economic adversaries); the follower of a dictator, who endorses any decision of the latter as a legally binding expression of the people’s will (consider, for in-

<sup>8</sup>This approach, when publicly practised, seems to produce self-defeating legal decisions, namely, legal decisions that, by their own terms, cannot stand scrutiny (Alexy 1992): what are we to make of a judicial decision motivated by explicit disregard for valid law? A legal reasoner would prefer to argue (and think) that the unacceptable norms do not belong to the law, rather than arguing that morality requires disregarding legally valid norms.

stance, Carl Schmitt's 1934 idea that Hitler "as supreme master-judge immediately creates the law").

These three people view certain norms (stated in religious texts, revolutionary decisions, dictatorial commands) as legally valid, and consequently every one of them qualifies certain norms as binding law, which must be coercively enforced in his or her community. They are, I believe, wrong in their judgements on the validity of the norms they endorse. However, they are not wrong because they fail to understand the conceptual role of legal validity, as a bridge between a norm's having certain features and its legal bindingness: They perfectly understand that in qualifying a norm as legally valid they imply that it is to be applied and coercively enforced, and they commit themselves to reasoning and acting accordingly. Instead, they are wrong because they fail to appreciate what preconditions justify the legal bindingness of a norm (through the mediation of its legal validity). In fact, by considering their preferred norms as legally valid (and thus viewing them as legally binding and acting accordingly) they impair certain fundamental values (human life, individual and collective self-determination, etc.). The first two of them, the religious fundamentalist and the political terrorist, are also wrong—unless the religious or secular revolution they seek is already underway—for failing to understand that the coercive enforcement of norms can produce stable social results only when such norms are, or at least can become, shared patterns of a common practice.<sup>9</sup> But these criticisms pertain to a failure to appreciate what reasons are able to determine the legal validity of a norm, they do not concern any failure to understand how legal validity works in legal reasoning and decision-making.

My contention that legal validity is a evaluative concept does not contradict the indisputable fact that law has an institutional dimension, so that legally valid norms are mainly to be found in (reasonable interpretations of) the outcomes of institutionalised sources (legislation, precedent, custom, and so on), identified according to shared validity-conferring meta-rules. However, the stable higher anchorage of the concept of validity is to be found in its single evaluative consequence (legal bindingness), rather than in its diverse, usually factual, preconditions. In this regard we must distinguish two reasoning processes: the unreflective application of validity-conferring norms in our everyday reasoning and the critical inquiry about such norms and the outcomes of their application.

It is true that in everyday legal reasoning, we usually move from the fact that a norm is embedded in a certain social practice—for instance, it was stated by a legislator or adopted as a custom by a large segment of the population—to the conclusion that this norm is valid (the inferential link for deriving this conclusion being provided by a meta-norm having the form "If norm *n* has institutional or historical properties *Q*, then *n* is legally valid"). So, this process appears to be fact-driven, in the sense that social facts are the independent inputs and validity the dependent conclusion: Once we have ascertained that a norm has the required features (for instance, that it was enacted by Parliament) we conclude that it is valid. However, the justification for the ultimate validity-conferring norms, as well as the ground for rejecting their outcomes in particular instances, has to be found in moral considerations: We need to appeal to moral values in order to establish what features of a norms—like its democratic legitimacy (as for parliamentary acts), its epistemic credentials (as for doctrinal or judicial opinions), its correspondance to people's expectations (as for customary norms), its being chosen by the involved parties (as for contracts)—can make it legally valid, within what limits.

Thus we can conclude that the consequential side of the concept of legal validity—namely, the fact that it strictly (indefeasibly) entails legal bindingness—shapes its preconditional side:

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<sup>9</sup>This criticism does not apply to dictatorial decision, which can indeed become (and have in many cases become) shared rules of action for the dictator's subjects.



We need to construct the preconditions of legal validity in such a way that the validity of a norm can only be derived when the norm at issue can be assumed as legally binding. This has two implications. On the one hand, certain factual features of a norm (like the fact that it is customarily endorsed, or has been enacted by Parliament) are able to ground the norm's validity on the basis of their ability to justify its legal bindingness. On the other hand, the features of a norm (like its extreme injustice) that are incompatible with its legal bindingness prevent its validity (if validity, strictly entails bindingness, then non-bindingness strictly entails non-validity), even when the norm satisfies the factual preconditions that usually determine validity.

## **6 Are All Legally Binding Norms Legally Valid?**

In the previous section I considered the entailment going from legal validity to legal bindingness, and I concluded that this is a strict entailment: Every legally valid norm is also legally binding. Now we need to consider whether the converse entailment also holds: Is every legally binding norm also legally valid? A positive answer to this question would lead us to conclude that legal validity and legal bindingness are (inferentially) equivalent; we can infer the one from the other. Thus they can be seen as two names for the same conceptual box: Any norm which satisfies conditions for legal validity can also be seen as satisfying conditions for legal bindingness. In a previous contribution (Sartor 2000) I have argued that the two notions can indeed be seen as identical on the basis of a sufficiently broad notion of legal validity (somewhat at variance with the common use of the term *legally valid*). Here I will develop a different approach: I will argue that the normativity of legal validity can be preserved even if legal validity is distinguished from legal bindingness (in the sense that although all legally valid norms are legally binding not all legally binding norms are legally valid), and I will provide a rationale for making such a distinction.

Since I have the objective of finding such a general rationale, I will not consider the fact that some legal systems give a limited extension to certain uses of the term *legal norm*, an extension which only covers certain specified kinds of norms (for instance, legislation and general administrative regulations), to the exclusion of other kinds of norms (like administrative acts concerning specific individuals or judicial decisions). These particular characterisations of legality can actually be explained with regard to specific purposes, but these are irrelevant to our general concerns. For instance in affirming that administrative acts concerning specific individuals do not belong to the law, we may simply be intending to exclude issues relating to the interpretations of such acts from judicial remedies only available for "violations of law" (e.g., appeal to the Italian Corte di Cassazione). Similarly, I will not consider the fact that legal doctrine usually applies the term *valid* only to those norms not having defects that may determine the future termination of their bindingness. For instance, an annulable, but not yet annulled, administrative regulation can be characterised as "invalid" in this sense, even though it is still binding (and will continue to be binding until annulled by the competent authority). This too can be explained with regard to specific purposes (for instance, admitting the judicial remedies made available against "invalid acts") which are not relevant here, where the term *valid* is used in its more general and abstract sense, namely, to express that a norm is "legally existent" (existent as law, in the context of legal reasoning), even if defectively so (Kelsen 1967, par. 4.c).

We need to pay attention to the fact that municipal legal systems require judges (and citizens) to apply norms originating from processes taking place through private action, or in any case through actions taking place outside the public and official operations of such systems. This is the case for contractual clauses, commercial and other customs, collective labour agreements

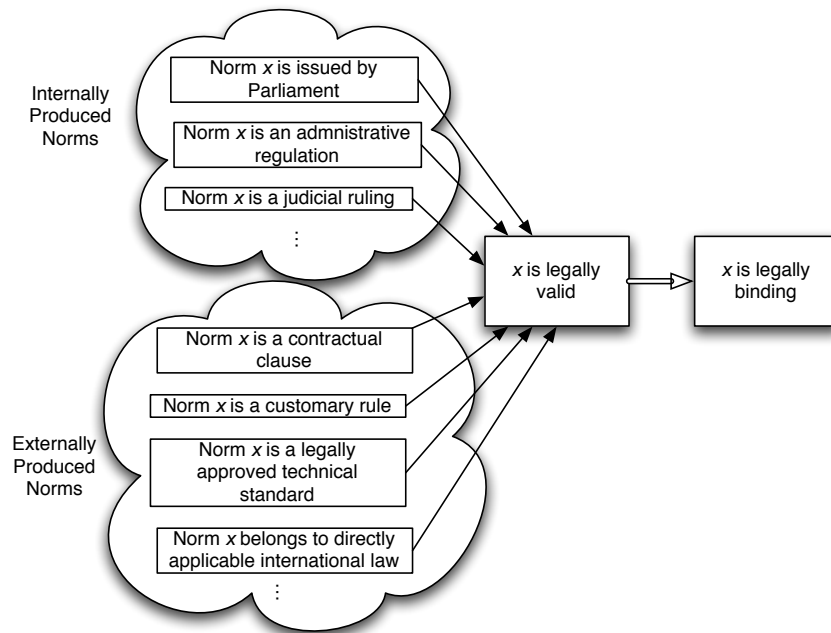


Figure 6: The inclusionist approach to the law

(where they are distinguished from “normal contracts”), rules defined by standardisation bodies, directly applicable international laws, peace agreements, and so on. If the law requires us to follow and apply such norms, they are certainly legally binding, but do they belong to valid (and thus) binding law? Clearly, we have two ways of conceptualising such norm-creating processes.

According to the first view—which we can call the *inclusionist* or *incorporationist* view—the norms resulting from such processes qualify as legally valid (as belonging to the law), and consequently as legally binding (see Figure 6). Correspondingly, the meta-norms giving effect to externally produced norms are to be viewed as rules on the production of law (*Rechtserzeugung*, see Kelsen 1967, par. 35), recognising the processes delivering such norms as sources of law. According to second view—the *exclusionist* view—the outcomes of such processes, satisfying the required conditions, qualify as legally binding without qualifying as valid law (see Figure 7). Correspondingly, the meta-norms giving legal effect to externally produced norms are to be viewed as referral rules, urging citizens and judges to follow and apply certain non-legal norms, but not as rules about the production of law.

Though both constructions are in a sense logically correct (since they provide the same ultimate outcome, namely, that the norms in question are legally binding), it seems to me that the first one is to be preferred, since it avoids introducing a distinction, that between internally and externally produced norms, which (a) is very uncertain and even arbitrary (should we view national customs as belonging to the first or to the second category, and what about inter- or trans-national phenomena like *lex mercatoria* or human-rights law?), (b) does not have significant legal implications (since in all cases the final issue is whether the norms in question are legally binding or not), and (c) introduces additional complexity in legal thinking. In particular, according to the second construction, two different approaches would be required to reach the conclusion that a norm is legally binding: For internally produced norms, we would need to pass through the intermediate concept of legal validity, a step which would not be required for externally produced

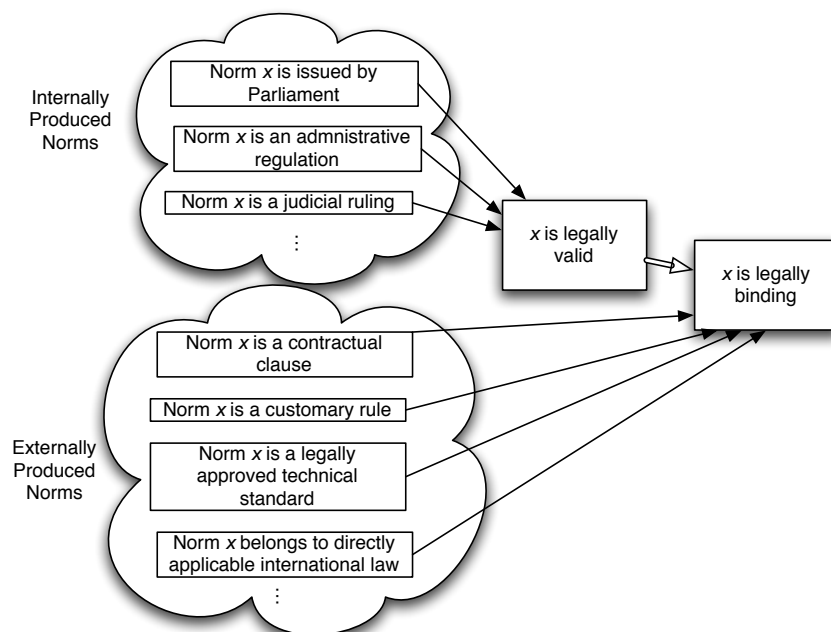


Figure 7: The (here rejected) exclusionist approach to the law

norms. Consequently, the reasons (such as extreme injustice or serious violation of human rights) against the legal bindingness of a norm created through an authorised procedure would need to be differently conceptualised: for internally produced norms, as impediments to validity (which indirectly, namely by preempting validity, also preempt bindingness); for externally produced norms, as direct impediments to bindingness. It seems to me the first construction, by avoiding such unnecessary distinctions, provides a simpler and more coherent approach.

Similar considerations apply to conflict-of-laws rules requiring foreign laws to be applied to certain classes of cases. Here we need to distinguish whether we assume that the jurist's perspective is limited to a particular municipal legal system or whether such a perspective includes different municipal legal systems (possibly as recognised by international law, following the monist approach of Kelsen 1967, par. 43). According to the first approach, norms belonging to foreign legal systems would be legally binding only if there is a norm requiring their application, which I would construe as a validity-conferring norm (on the grounds previously indicated) though the application of this valid (and binding) norm would be restricted according to the applicable conflict-of-laws rules. According to the second approach, even norms of foreign legal systems would be legally valid, though one would need to construct the applicability of such norms to the case at hand according to their implicit and explicit limits of applications and to choice-of-laws rules.

The approach I am advocating seems to correspond to Kelsen's idea that the law has King Midas's touch: Whenever the law requires the application of a norm, this norm itself becomes legally valid.<sup>10</sup> However, I think that it makes sense to limit the effect of the law's touch by recognising that certain legally binding norms do not belong to the law, and even the explicit recognition of their bindingness would not make them legally valid. These are the norms whose

<sup>10</sup>“Just as everything King Midas touched turned into gold, everything to which law refers becomes law” (Kelsen 1967, par. 35.k). On this point, see Green 2003, sec. 3.

legal bindingness *directly* and *exclusively* depends on their merit within a particular domain of activity or inquiry (like logic, accounting, medicine, engineering, experimental method, and so on), namely, when their appropriateness within a certain practical or theoretical discipline is a sufficient and necessary condition for their legal bindingness, both when a legal reasoner has to engage directly in an activity governed by that discipline (e.g. reasoning according to logic or probability calculus), or when the compliance with a legal norm depends upon doing a certain activity well, which depends on compliance with the technical norms of the corresponding discipline (e.g., the diligence of a doctor depending upon compliance with medical norms). Such legally binding but not legally valid norms would be binding for legal reasoning (as long as that remains a rational activity) even though they were not referred to by the law (though the law can make additional specific reference to such rules, as when establishing a specific legal effect for their violation, like the invalidity of an act based on illogical reasoning or the liability of a doctor for not taking certain precautions).

Finally, let us consider the hardest subject, namely, the legal validity of legally binding moral norms. These are those norms that are legally binding (also) on the basis of their *substantive merit*, intended as the *moral merit of their content*, namely, the merit their content deserves according to a rational, impartial, and benevolent evaluation. More exactly, we are considering those norms which would not be legally binding unless their content had a certain substantive merit though their substantive merit alone can be insufficient: Their substantive merit provides a *necessary*, but possibly *insufficient*, *element* of a *sufficient precondition* of the bindingness of such norms (the additional element required to complete such a sufficient precondition being constituted by the norm's broad enough acceptance in legal culture, in the case of general legal principles lacking a formal source, or by the norm's acceptance by a broad enough range of states, in the case of international *jus cogens*, and so on). The question for us is whether the legal bindingness of such norms results from their legal validity, so that they can be seen as part of the law (rather than as legally binding norms that are not legally valid). It seems to me that a positive answer to this question is dictated by the criterion indicated above (a legally binding norm fails to be legally valid only when its appropriateness within a particular discipline is a sufficient and necessary condition of its legal bindingness): A norm that is legally binding (also) because of its substantive merit deserves to be seen as part of the law, since the norm's appropriateness outside the law—within non-coercible morality—provides no sufficient and necessary ground for its legal bindingness. For a norm to be legally binding on the basis of its substantive merit, the norm's content must be specifically appropriate for legal reasoning and decision-making (as I will argue in Section 12), and such an appropriateness must be combined with a real chance of a broad enough acceptance. On the other hand, as I will argue in the following, the fact that a norm's content is extremely unjust (and its implementation extremely harmful) may indeed provide a sufficient reason for denying the norm's bindingness (without additional requirements).

To exemplify how the substantive merit of a norm may contribute to the norm's validity, let us consider two ancient principles (*regulae juris*) of Roman law: (a) "Women are excluded from all civil or public employments" (*The Digest of Justinian*, 5.17.2), (b) "In penal cases, the most benevolent construction should be adopted" (*The Digest of Justinian*, 5.17.155). Assume that in a certain legal system (for instance, a European legal system at the end of the 19th century) both principles have no formal source, but they enjoy the same, large but not general, acceptance in legal culture, and are coherent to a the same degree with the rest of the law. It seem to me that the substantive merit of the second principle (combined with the principle's large acceptance) would provide a sufficient ground for its legal validity within such a legal system, while the first principle would fail to be valid on account of the wrongness of its content (its large acceptance alone being insufficient to determine the principle's validity).

## 7 Grounds of Legal Validity

I have affirmed that the permanent anchorage of legal validity (of legality) has to be found in the consequential and evaluative side of this concept, namely, in the fact that legal validity entails legal bindingness. I will now argue that exactly this consequential anchorage gives importance to the antecedential side of legal validity, namely, the preconditions whose satisfaction makes a norm legally valid: By establishing what grounds make a norm legally valid, we predetermine what norms we are committed to accept as legally binding.

The antecedent side of the concept of legal validity can be viewed as constituted by a combination of validity-conferring inferential links:

- positive ones, establishing that a norm is valid if it has certain features (it was issued by a legislator, it is practised as a custom, it belongs to the legal culture, etc.),
- negative ones, establishing that a norm is not valid if it has certain other features (it has been annulled by a constitutional court, it grossly violates human rights, etc.).

Validity-conferring arguments may have different structures. They may have a hierarchical form, appealing to higher legally valid norms, and in particular, to *source norms*, conferring legal bindingness to all the norms embedded in (expressed by) a certain kind of social fact (a certain source).<sup>11</sup> They may have a teleological form, appealing to the fact that the norm at issue advances certain legal values (or values pertaining to political morality), as we will see in Section 8. They may consist in abductive rationalisation, namely, in justifying a norm's legal validity through the consideration that it belongs to (or coheres with) the best explanation-justification of an ongoing norm-governed practice.

People may be deeply committed to different views on the preconditions of legal validity. Some may think that only those norms are legally valid that are issued by a national legislator or are “contained” in certain precedents. Others may also include norms issued by certain international bodies. Others may endorse conventions (customs) shared by the judiciary, by international arbitrators, or by professional circles. Others may insist on principles that can be derived from certain religious traditions or political ideologies. Others may exclude the validity of norms that violate human rights or are grossly unjust by other criteria. Others may take the radically anarchical stand that no norm whatsoever is legally valid, to wit, that no norm whatsoever qualifies for the purpose of acceptance in legal reasoning, as a premise of a coercible determination.<sup>12</sup> People having such different ideas strongly dissent on *why* a norm is legally valid, that is, on what features or preconditions enable a norm to be legally valid, and consequently they disagree on *what* norms are legally valid. However, they all agree that legal validity (and “legality” tout court) expresses a commitment to accept a norm in legal reasoning. This conceptual function of legal validity—as a bridge between a norm's having certain properties and its legal bindingness—explains why it matters so much to establish that a norm is legally

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<sup>11</sup>Consider, by way of example, a constitutional norm recognising the legislative power of Parliament, namely, conferring legal validity on norms produced through legislative acts, or a customary rule recognising precedents, namely, conferring legal validity on *rationes decidendi*.

<sup>12</sup>This is the perspective of a radical anarchist according to whom now, in our present society, no norm should be enforced (since coercive enforcement always causes more harm than unrestrained individual action), a perspective which needs to be distinguished from the idea that a future society is possible in which enforcement would no longer be unnecessary (as in various religious or secular utopias). Such a radical anarchist would not “see” a valid legal system governing his or her society; he or she would “see” instead just a false ideology, namely, a set of wrong beliefs about the authority of persons and the bindingness of rules accompanied by unjustified exercise of coercion (the idea that the law would disappear from such a viewpoint was advanced by Kelsen 1992, par. 16, though later abandoned in Kelsen 1967, par. 34 (i), footnote 82).

valid (or legal), and therefore why there is such fierce dissent on what norms are so qualified, and on what reasons support this qualification.

Since in providing different preconditions for legal validity we are providing different preconditions for the substantive conclusion that the concerned norms are legally binding, these preconditions are no matter for stipulation: The extension of the concept of legal validity (of law)—namely, the set of all norm to which it applies—depends on the substantive grounds (the *grounds of law*, as Dworkin 1986 calls them) making it so that a norm deserves to be accepted in legal reasoning. This rules out all attempts to “define” legal validity by identifying its preconditions, for instance, by stating that *legally valid* means “stated by the legislator,” “practised by the highest court,” “ordered by God,” “accepted on the basis of shared rules of recognition”, or “providing generalised normative expectations.” Rephrasing Moore’s (1968) argument against naturalistic definitions of the good, we can counter every such an attempt with a non-trivial question, namely, “But are these norms (the statements of the legislator, the rules currently practised by the courts, the orders of God, or the shared rules and expectations) really legally valid?” By which we entail, “But should we really accept these norms in legal reasoning?” The possibility of asking such a question proves that these “definitions” are rather to be viewed as grounds for the bindingness of certain norms, which can be dialectically questioned and challenged as such. This implies the failure, not only of the naturalist and positivist definitions, but also of those definitional attempts that build upon institutional or conventionalist models of law. As far as legal validity is concerned, a convention is no different from any brute physical, psychological, or historical fact. The fact that a norm is conventionally endorsed can provide (in the appropriate circumstances and in the framework of an appropriate theory of the values and purposes of law) a ground for the conclusion that the norms is legally valid (and thus legally binding), but it cannot offer any self-standing and complete notion of validity.

Obviously, no reasonable person can deny that social facts contribute to determine whether a norm is legally valid: We usually have very good reasons for assuming that norms issued by certain authorities according to certain procedures as well as norms endorsed and practised by the collectivity or by the judiciary are legally binding (albeit within certain constraints). However, this does not mean that the problem of identifying valid laws coincides with the problem of listing what kinds of facts are generally viewed (by judges and citizens) as generating the legal bindingness of the norms they embed.<sup>13</sup> On the contrary, the opposite holds true: The attempt to solve the genuinely evaluative problem of identifying what norms are legally valid (and should thus be endorsed in legal problem-solving) leads us to refer to certain social facts (such as, in particular, the shared acceptance of certain norms and meta-norms). These are the facts which on normative grounds have the ability to generate the legal bindingness of the norms they embed. Thus, legal inquiry cannot be reduced to the detection of shared practices, it also includes the determination of whether and to what extent these practices provide valid norms, namely, norms we can accept as legally binding.

Following this idea, we can address theories of the concept of (valid) law, not as descriptive or explanatory accounts of a social phenomenon, but as attempts to indicate what grounds are

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<sup>13</sup>The failure to distinguish validity and social beliefs about validity (bindingness), while recognising that the second can contribute to the first, also undermines certain sociological notions of validity, such as Weber’s (1972, chap. 1.6) idea that the *validity (Geltung)* of a normative order is the probability that social action will actually be governed by the belief in the bindingness, or as he calls it, the legitimacy, of that order (the connection between beliefs and legal validity is emphasised in Pattaro 2005). Weber’s definition seems at odds with the common use of the term *valid*: By qualifying a norm as valid, we do not mean that it is likely that others will view the norm as binding, but rather we mean (entail) that the norm is binding. Weber himself seems to use the term validity in the latter sense, when he considers the conditions under which “legitimate validity is attributed to an order by the agents” (Weber 1972, chap. 1.5, my translation).

sufficient to base the conclusion that a norm is legally binding, through the recognition of its legal validity. Positivist approaches only recognise ultimate validity grounds consisting in social sources, like the fact that a norm has been enacted through an authoritative determination (as in so-called exclusive positivism, see Kelsen 1967, and similarly Marmor 2002), or that it is endorsed and applied by the courts (as for Scandinavian realists, see Ross 1965), or that its application is required by a shared rule of recognition (Hart 1961; Hart 1994), possibly including a reference to morality (as in so-called inclusive positivism, see Coleman 2001, Himma 2002). It seems to me all such approaches—by renouncing to give reasons for validity independent from social sources, and by renouncing to give moral reasons for the recognition of the ultimate social sources and for the limits to such a recognition—necessarily fail to provide an adequate account of the concept of legal validity, to wit, an account which enables us to precisely circumscribe the domain of legally valid norms. In particular, they do not explain why a norm can fail to be legally valid (and thus to be binding) exclusively on the basis of the substantive demerit of its content (even if it enjoys vast social and political acceptance), and how the substantive merit of a norm's content can provide a (possibly contributory) ground for its validity.

## **8 Legal Validity Is Distinct from Legal Optimality**

The idea of legal validity needs to be distinguished from other evaluative concepts, to ensure that it does not collapse into broader normative ideas (like those of justice and morality), endangering the autonomy of law. It may be useful to start discussion by referring to a famous statement by Thomas Hobbes, *auctoritas, non veritas, facit leges* (power, not truth, makes the laws, Hobbes 1968, sec. 16), which we can reformulate as the combination of two statements: (a) the imposition of a norm by political power is usually sufficient to make it legally binding, and (b) the optimality (truth) of a norm is usually both insufficient and unnecessary to make it legally binding. I will argue in this and in the following section that both such statements do indeed make sense, and they are consistent, if appropriately qualified (and understood as defeasible, rather than strict, entailments), with an evaluative account of the notion of legal validity.

First of all, legally valid norms (which constitute the present, given law) should not be confused with *optimal* (ideal or just) law, namely, with the norms that would constitute the best possible legal regulation, those norms that would most effectively advance legal values, were they to become legally binding and be communally adopted and practised. Thus an evaluative understanding of legal validity does not cancel the distinction between identifying the current law (arguments *de lege lata*) and suggesting how to change it (arguments *de lege ferenda*). To establish the distinctness of these two perspectives, I will show that it can consistently be affirmed that optimality is neither a necessary nor a sufficient condition for legal validity.

The possibility of distinguishing legal validity and legal optimality—namely, the possibility of consistently stating that a legally valid norm may be suboptimal, or that an optimal norm may not be legally valid—is indeed offered by different approaches to the grounds of legal validity. This possibility is available, for instance, within evaluative approaches to legal positivism, namely, approaches on which any norms resulting from authoritative sources or practices are legally valid. For instance, a legalistic judge may consistently believe that a norm is valid since it was issued by a legislator, and at the same time consider the norm sub-optimal (it would have been better if the legislator had decided differently). Similarly, a realist judge may consistently believe that a norm is valid since it is practised by most judges, and at the same time may consider this norm sub-optimal (it would have been better if her colleagues had been following a different practice, taking from the start better decisions based on different norms). Even from a

perspective sensitive to the claims of natural law, it is possible to distinguish validity from optimality. For instance, we can rephrase Radbruch's (1950a) approach as the combination of the following ideas:

1. Norms stated and supported by political power are valid unless they are unbearably unjust.
2. A norm is unbearably unjust when the harm caused by its practice far outweighs the contribution its consistent implementation would provide to legal security.

On Radbruch's approach, moderately unjust norms issued by an effective legislator are both sub-optimal and valid: They should be adopted in legal reasoning (for the sake of legal security) even though the legislator could have and should have decided better (obviously, the legislator should have enacted a just rule rather than a moderately unjust one). Only unbearably unjust legislative norms are both sub-optimal and invalid.

As on the one hand suboptimal norms may be valid, on the other hand optimal norms may fail to be valid: You do not have to be an Hobbesian absolutist (or Schmittian decisionist) to believe that a norm's truth (in the sense of optimality) is insufficient to ensure its legal validity. I believe (see Sartor 2005) that legal reasoning has the function of implementing communal values (the aims that a collectivity should pursue, including the protection of individual interests and rights) through collectively accepted (endorsed and applied) norms. Consequently, the legal validity of a norm does not follow from its optimality, namely, from the fact that its collective acceptance would represent the best possible collective choice; it rather follows from the fact that the individual choice to endorse it would represent a sufficiently good way to participate in a collective determination on the matter, a determination that may contribute to effectively coordinate individual actions. In this approach, the evaluation of whether one should accept a norm as legally valid can be viewed as resulting from the combination of two factors: (a) the advantage the collective practice of the norm would bring about, and (b) the likelihood that by adopting the norm, one contributes to its collective practice. One's attempt to participate in the collective practice of a norm would fail if one's fellows rejected that norm. Thus, one may rationally choose to adhere to a norm one believes to be less beneficial than a new norm would be (if it were to be collectively practised), since one expects that one's endorsement of the new norm would not be shared by one's fellows and would therefore only cause uncertainty and useless litigation. Moreover, one needs to consider whether one's endorsement of a new norm—whatever its substantive merit and chances of success—will instantiate and promote attitudes which may have a negative impact on the legal system. In particular, disregard for the statements of the legislator (even when they are “moderately” wrong) may impair the correct functioning of the lawmaking process and the balance of powers.

The following example illustrates the distinction between the (belief in the) legal validity of a rule and (the belief in) its optimality by showing how a legal decision-maker can accept the validity of a rule he or she views as suboptimal. Suppose that in a country the statutory marginal rate for high-income taxpayers is 40%. Two judges, let us call them Libertarian and Egalitarian, have different views on legal optimality: Judge Libertarian believes that according to justice there should be a lower rate (20%), while Judge Egalitarian holds that social justice requires a higher rate (60%). So, each one of them, when faced with a case falling under the statutory provision, has to decide whether to apply that provision or whether to follow instead what he or she believes to correspond to ideal justice (to the law as it ought to be). If both of them followed their diverging views of ideal justice they would come to opposite results: Libertarian would acquit a high-income taxpayer who has paid a tax corresponding only to 20% of his income, and Egalitarian would order a high-income taxpayer who has already paid a tax corresponding to 40% of her income to pay a further 20%.



Let us consider how Egalitarian can avoid this outcome and conclude in favour of the statutory norm, while maintaining the belief that norm rule is suboptimal, namely, that it violates the requirements of social justice. Egalitarian's support for a different norm, establishing a higher income tax (60%), is justified by his expectation that the latter norm would provide certain public benefits he highly values: more public resources, and therefore better education, health care, and social services, especially for disadvantaged people. However, he sees that these benefits are not going to come about through his individual adoption and enforcement of the higher-rate norm; only the general practice of such a norm, based upon its shared acceptance, is going to achieve these public objectives. If he goes alone in what he considers to be the ideal law, against the expectations of everybody else, he would only cause disruption. Moreover, he also considers that judges like Libertarian—who have a different view of what is optimal—could view Egalitarian's licence as an authorisation to proceed themselves in the direction they prefer (to lower tax rates), which might lead to a drop in total tax revenues. In conclusion, since Egalitarian himself can see that his example is not likely to be generally followed, he concludes that the valid norm for him is the parliamentary statement (40%). This conclusion is reinforced through the idea that by disregarding the legislative rule he would jeopardise the convention that legislative norms are and should be respected, a convention providing a fundamental mechanism for spreading cooperation (and implementing democracy), and he will disappoint the expectations of his fellow citizens.

Libertarian's reasoning mirrors that of Egalitarian: She can conclude in favour of the legislative norm, while maintaining the belief that this norm is suboptimal, namely, that it violates the requirements of justice being above what she views as the optimal tax rate (20%). Libertarian expects from a lower tax rate certain important public benefits: a vibrant economy, job creation, new opportunities for individual initiatives, and an increased sense of personal responsibility. However, she can see that these public benefits cannot be provided by her action alone. They will accrue only when the lower tax rate is generally applied (and is generally expected to be applied). Libertarian, in the impossibility of bringing about this result through her own action, should stick to the statutory norm, which was the outcome of a democratic legislative process and corresponds to the expectations of her fellow citizens.

In conclusion, both judges can conclude that they should consider the legislative rule legally valid (and consequently legally binding upon them): They arrive at this conclusion since they believe this is the only rule that they, and their fellow judges and citizens, are likely to share, even though neither of them accounts this rule to be optimal.

## **9 Legal Validity Is Distinct from General Compliance**

In the reasoning just presented, Libertarian's and Egalitarian's concern for norm-sharing, for democratic legislative procedures, and for the institutional role of the judiciary have led them to distinguish validity from optimality, in the sense of admitting the legal validity of a sub-optimal norm. This, however, does not imply that the goodness or badness of a norm's content is necessarily irrelevant to establishing whether the norm is legally valid. Though validity and optimality are distinct, there may be a link between a norm's validity and its substantive merit:

1. the substantive merit of a norm may, under certain conditions, justify the assertion of its legal validity even when the norm is not yet generally endorsed and complied with, while
2. the substantive demerit a norm may, under certain conditions, justify the denial of its legal validity, even when the norm is currently endorsed and complied with.

To justify the first kind of judgement—the assertion that a substantively good but not yet generally practised norm is legally valid—it will not suffice to point out the advantages that a general

implementation of the new norm would bring about (as compared to the costs of its implementation), it is also necessary that the new norm can be predicted to become soon generally practised. Obviously, such a prediction can retrospectively appear to be wrong (the new norm fails to gain general acceptance, contrary to our expectation), so that the behaviour that the new norm allows or requires has to be evaluated according to the pre-existing law, which may prohibit or even sanction them. It seems to me that this risk does not entail that the new norm becomes valid only from the moment when it becomes generally accepted (so that the acts through which its practice is initiated always fall under the pre-existing law): Rather the present validity of the new norm depends upon a future situation (its general practice in the immediate future).<sup>14</sup>

The forecast that a new norm will be generally endorsed is facilitated when—besides believing that the norm is optimal (or at least better than the currently practised alternative norm)—we are also aware that our optimality-belief is widely shared in the relevant circles. In fact communal endorsement and application can be obtained not only by following existing practices, but also by starting new practices, under the assumption that others will follow. The common belief in the optimality of a certain norm provides a background for the expectation of future general endorsement: If one knows that everybody shares one's belief that the general application of the new norm would be better than the application of the old norm, then one may reasonably expect that, once one starts applying the new norm, everybody will follow, converging toward the new norm. Moreover (though much more precariously), one can assume the legal validity of a norm one believes to be optimal, when there is no agreement yet on the norm's optimality but one expects that such agreement will come about as soon as everybody has heard one's arguments. Among the factors conditioning one's chances of success in contributing to making a norm generally practised, there are also one's institutional role (for instance, one's position as a judge) and the expectations coming with that role (like the expectation that a judge will decide correctly legal disputes, on appropriate reasons).

The second kind of judgement (the negation of the bindingness of a practised norm) takes place when common endorsement and application of a shared enforceable norm is likely to produce a harm so big as to outweigh the costs of rejecting that norm. Let us see how this difficult issue may be approached. Suppose that a legal reasoner upholds the shared collective acceptance and implementation of norms as the only way of achieving the main collective benefits which may be ensured through the practice of the law (through norm-governed coercible determinations): coordination, protection of rights, liberty, security, collection of resources for various social functions, and so on. Such norm-sharing is an instrumental good (it is valuable since it provides these further benefits), but a necessary one (there is no other way of providing these benefits): Unless judges and citizens share a set of common norms, these objectives are not going to be achieved. The need to achieve certain fundamental collective goods through the law gives moral significance to the conditions under which the law can achieve coordination, conditions which represent “the morality that makes the law possible” or the “internal morality of the law” (as Fuller 1969, 33ff. calls it). Therefore, we should usually consider as legally valid any norm that is viewed as legally valid and consequently practised (as being legally binding) by a sufficient number of people, in the appropriate roles, even when this norm is sub-optimal. Thus, an evaluative understanding of legal validity is consistent with the idea that legal validity is based upon shared conventions (shared belief and practices). This happens because of our need for an effective coercible normative system, a need that gives moral significance to the current practice

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<sup>14</sup>The idea that the substantive merit of a norm could make it so that an agent may apply it even if it contradicts the existing legal practice has been discussed with regard to international law, for instance, with regard to the admissibility of “humanitarian” intervention beyond the limitations established by the UN treaties (see Francioni 2000).

of such a systems, and consequently commits us to join its practice.

However, not every form of coordination based upon common norms achieves the benefits that make the law a valuable enterprise: Effective coordination is a necessary but insufficient condition for the attainment of those benefits. Shared norms may indeed be geared towards different and even incompatible purposes (repression of civil liberties, exploitation, slavery, genocide, etc.), purposes that should be publicly resisted rather than pursued. If the currently endorsed and practised norms should deliver such results, one should conclude that these norms—despite providing a pattern for the ongoing practice of the collectivity—should not be accepted in legal reasoning: These norms, though effective and believed to be valid by most citizens and judges, are not legally valid (see Peczenik 1989). Rejecting the validity of a currently shared and practised norm presupposes a complex balancing exercise. Among the benefits of such a rejection, besides the immediate advantage of not applying the harmful norm in the specific case, there is the probability that others may follow our example, so that the general practice of that norm could, in the long run, be interrupted or at least questioned. Among the costs, besides the frustration of the expectations of our colleagues and citizens in the individual case, there is an increased uncertainty, and the risk of discrediting the source of the harmful norm (for instance, legislation or precedent) and its underpinning values (such as legal certainty and democracy).

In general, what sub-optimal norms—among those generally practised and enforced—we should exclude from legal validity depends on what purposes one believes should be collectively pursued (or contrasted) and on how these purposes relate to one's concern for the shared practice of norms in the legal and social context in which one is operating. These premises would determine how much one approves (or disapproves) of the currently practised norms, and how much one fears (or welcomes) the “destabilisation” of existing social practices. With regard to a legal system that is acceptable as a whole, norm-sharing is usually an overriding concern: A reasonable and responsible legal reasoner in order to provide those goods that only norm-based coordination can ensure, should only adopt those norms that are, or at least are likely to become, shared patterns of a common practice. Still, one needs to agree with Radbruch in considering that history has provided many cases where sufficient reasons do indeed exist for rejecting generally practised norms (for denying their legal validity, and consequently their legal bindingness), even when no alternative norms are likely to provide coordination. Moreover, there may be contexts (as in certain instances of non-violent social protest) when the violation of a binding norm can be justified on the basis to legal values, or at least when the choice not to punish the violation of a legally valid norm can find such a justification. These justificatory grounds can be viewed as prevailing reasons that (according to the law itself) defeat the application of the norm (or the imposition of the corresponding sanction) in the concrete case, without questioning the norm's validity.

## **10 Legal Validity Is Distinct from Constitutional Conformity**

The idea that legal validity is a strictly sufficient precondition of legal bindingness entails the rejection of the view legal validity can be equated with constitutional conformity, since there are cases where we must deny that certain norms are legally binding even when such norms have been produced according to the requirements laid down in a constitutional text or custom.

In fact, the collective endorsement of a constitution and the existence of a constitutional jurisdiction do not imply that every constitutional norm is legally valid or that each legislative norm respecting the constitution is legally valid. There is no logical necessity that a constitution sufficiently respects human rights and provides sufficient constraints over legislation: It is perfectly

conceivable that a constitutional text should admit or require racial or sexual discrimination, criminalise dissent on certain political or religious issues, give unlimited power to a dictator, and so on. Norms having such features cannot be legally valid, given that validity strictly entails legal bindingness (and that we cannot be bound to endorse and apply such norms). This means that we must reject the view that a constitution can always provide correct guidance to legal reasoning (telling us what norms are legally valid) simply because of its general acceptance and effective implementation, simply because “it is there”: We can think of many cases where a shared constitutional principle (and many norms whose enactment was authorised by such a principle) would not be legally binding. Consider, for instance, the *Führer* principle, which was indeed a constitutional principle of Nazi Germany, being publicly endorsed and generally assumed to prevail over any other legal source.<sup>15</sup>

The distinction between the validity of constitutional norms and their endorsement and application does not exclude that, as a matter of fact, a very large overlap usually obtains between valid constraints on legislation and the endorsed and applied constitution. Firstly, one’s rejection of a piece of enacted legislation is usually reasonable (with the exception of most serious cases) only when one expects that one’s collectivity may (now or in the near future) share this rejection. This result can usually be achieved only when one can appeal to constraints expressed in a constitutional text or endorsed on a customary basis. Secondly, the tragic history of the last century (as well as advances in legal and ethical thinking) has led us to include, within the currently adopted constitutions, many principles that undoubtedly deserve our recognition. Finally—at least when an unrestrained legal debate can take place—legal doctrine makes a shared constitution the focus of its collective efforts to work out theories and principles, producing results which are tested and reviewed through widespread discussions and experiences. This is a further ground for assuming that shared constitutional norms and principles usually provide valid guidance to the legal reasoner, or at least a good starting point for his or her inquiries. These arguments, however, only establish that a norm’s conformity to an effective constitution defeasibly supports the endorsement of that norm as legally valid; they do not establish the conceptual equivalence of constitutional conformity and legal validity.

## 11 Legal Validity Is Distinct from Enactment by Political Power

The idea that all norms issued by political power are valid is emphatically expressed in the statement that even “the most obnoxious legislative law, as long as it is produced in a formally correct way, must be recognised as binding” (Bergbohm 1892, 144). Such a strict (undefeasible) source-norm expresses a specific theory about the grounds of legal validity; namely, the view that the state enjoys unlimited *legal sovereignty*, that is, an unlimited legal power (authority) to

<sup>15</sup>See for instance Engisch 1935, 11 (discussed in Kelsen 1960, 206): “The rule legitimising the highest instances being called to make the law . . . in today’s Germany [1935] assigns the highest law-making competence, delegating any other such competence, to the Reichskanzler and Führer.” The conclusion that even the worst ultimate principles of a legal system—once accepted and implemented by those in power (or even by the majority of the population)—are legally valid can be avoided if such bindingness is limited to the ultimate principles qualifying as a *constitution* and the latter term is assumed to refer only to the arrangements respecting the basic principles typical of modern liberal societies (see, for instance to Art. 16 of the 1789 Declaration of the Rights of Man and Citizen: “Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no constitution.”). However, this history-sensitive and value-laden notion of a constitution would only add a level of complexity and uncertainty to our analysis (the need to establish when the basic legal arrangement of a collectivity qualifies as a constitution in this restricted and evaluative sense), without any significant advantage for our purposes.

make any norm whatsoever legally valid (and thus binding).<sup>16</sup>

It seems to me that, contrary to this view, there are reasonable arguments by which certain norms enacted by political power are not legally valid. A legal reasoner could, for instance, argue that certain minimal warranties (like those contained in the UN human rights conventions) limit a state's authority, so that a state has no legal power to produce valid laws that seriously violate such warranties: Such determinations would not be legally valid, even if successfully enforced through violence, threat, or propaganda. Further limitations to the legal sovereignty of a state may depend on the need to cooperate with other legal communities, and to participate in the activity of international organisations, like the UN or the European Union: With regard to such organisation, the legal reasoner may also be justified in finding that incompatible state norms are not legally valid.

Similarly, I think we should reject the idea that all valid laws are necessarily produced or authorised by the state. Certain sources of normative contents deserve acceptance in legal reasoning even if state legislation does not qualify them, either explicitly or implicitly, as legally valid. Among such sources we can mention commercial practices (even at the international level), custom, judicial precedent (even from foreign countries), decisions of international bodies, and so on. A decisive criterion for assuming the validity of the norms produced by such sources (namely, the ground for endorsing a validity-conferring norm to this effect) consists in the very fact that, through collective practice and enforcement, these norms work (or are likely to work) as the shared basis of forms of coordination advancing legal values. Such considerations—and reference to values like certainty, cooperation, and respect for self-organisation and for shared expectations—may lead Italian judges, for instance, to conclude that the following norms are immediately legally valid, though with various limitations and exceptions: regulations and judgments issued by the institutions of the European Union, *rationes decidendi* of judicial precedents of the higher Italian courts (at least as long as they are not shown to be wrong), customary rules followed in international contractual practice, norms generally used in international arbitration, standards adopted by Internet bodies, acquiesced-in deliberations of certain international bodies. Similarly, EU judges may recognise the legal validity of various international sources, like UN deliberations or even WTO agreements (within appropriate constraints, such as, in particular, respect for human rights and fundamental values).

While I distinguish enactment by political power from legal validity, I think we can recognise a connection of defeasible entailment between these two properties: The outcomes of political decision-making, resulting from pre-established procedures for law-making, are normally legally valid—at least when citizens are provided with legal certainty, a working framework for cooperation, and democratic controls (see Scarpelli 1965)—and this presumption can be defeated only by prevailing specific reasons to the contrary. If by *legitimate authority* we mean any authority whose its statements are normally legally valid, then *legitimacy*, as a precondition for legal validity, appears to be (a) defeasibly sufficient (since there may be exceptional but prevailing reasons for disregarding a statement by a legitimate authority, like its extreme injustice, its uncontroversial unreasonableness, its desuetude) and (b) not necessary (since legally valid norms may have a non-authoritative origin, as in the case of customary rules, and since concerns about coordination may justify the legal validity of some statements of an illegitimate authority, like a violent dictatorship, with regard to relatively “neutral” domains like contracts, inheritance, or property).

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<sup>16</sup>By legal power (or authority) I mean the capacity to make declarations whose content is legally valid (by virtue of their being so declared), which needs to be distinguished from the factual power of making it so that others act according to one's commands.

## 12 Legal Validity Is Distinct from Moral Bindingness

In Section 3 I argued that, if morality is understood in a broad sense—namely, as the faculty telling us what practical determinations we should take (from a rational, impartial, and benevolent perspective)—legal reasoning can be viewed as a kind of moral reasoning, namely, as the part of moral reasoning dealing with the adoption of norm-governed and publicly coercible determinations. Consequently, legal validity (as a precondition of legal bindingness) can be viewed as a “moral” property in this broad sense. However, this does not mean that all moral norms are ipso facto legally valid norms, namely, that a norm’s moral bindingness is a sufficient condition for its legal validity. Not only this inference (from a norm being morally binding to its being legally valid) fails with regard to “positive morality” (intended as the set of rules that as a matter of fact most people believe or feel that everybody should follow within their community), but it also fails with regard to critical morality (understood as the faculty telling us how, according to reason, we should behave one toward one another and consequently what we are entitled to expect from others). The inference fails because there are many norms which are morally binding (we should accept them for the purpose of establishing how we are to behave toward one another) but are legally invalid (we should not use them as grounds for coercible determinations). In fact, even if a norm is binding according to morality, its coercive enforcement may be inappropriate (too expensive, too obtrusive, and so on). Moreover, the enforcement of a norm not resulting from a recognised a legal source may violate constitutional arrangements and citizens’ expectations. Therefore, it can be consistently affirmed that many norms are binding within non-coerced morality and yet are not, and should not become, legally valid.

The distinction between valid law and non-coerced morality does not need to be based on the subjectivity and indeterminacy of morality, as opposed to the objectivity of the law. A deeper ground for distinguishing law and non-coerced morality can be found in the idea that an essential aspect of moral life is autonomy, intended as the freedom to choose between different goods, but also between good and evil. Thus, this idea of autonomy does not assume moral relativism, and may go beyond the domain where one chooses among a set of acceptable options, and where one’s personal likings and attitudes contribute to establishing what is better for oneself (as, for instance, when one chooses a job, a partner or more generally a style of life).

For the sake of moral autonomy, understood in this broad sense, doing the right thing must to some extent be legally facultative (neither obligatory nor forbidden) rather than legally obligatory. This requirement may even extend to areas where one may cause damage to others, i.e., in areas where, according to the traditional liberal doctrine of Mill (1991), the intervention of the law is legitimate. Suppose that whenever an action affecting others is required by morality, it should also be also required by a legally valid norm: One would be legally obliged (under the threat of punishment) to be generous, to help people in need, to respect feelings, and so on. Under such conditions, one would be unable to experience morality, to freely exercise moral self-determination. For the sake of moral life itself, it seems that the law must leave some space for immorality, egoism and greed, so that one can have a chance to autonomously adopt and implement moral choices. As Radbruch (1950b, 139–40) observes, “the law serves morality not through the obligations it imposes, but rather through the rights it grants [...] to individuals, so that they can better satisfy their moral obligation.” To offer us the “possibility of morality,” the law must also offer us the “possibility of immorality” (ibid., 141).<sup>17</sup>

<sup>17</sup>In the same sense as Radbruch, see, for instance, von Savigny 1981, sec. 52: “The law serves morality, not by implementing its commands, but by ensuring the free development of the force internal to each individual will” (my translation). The idea that “not everything which is permitted is honourable” (*non omne quod licet honestum est*) can be found in *The Digest of Justinian*, 50.17.144. Radbruch’s view is rejected by Raz 1986, 381, who finds

A further ground for distinguishing non-coerced morality from legality is the fact that non-coerced morality admits of disagreement much more than legality does. While different people can practice incompatible non-coerced moral norms, give different evaluations of the same situation, and criticise one another for failing to have the right opinion and do the right thing, incompatible legal norms cannot be jointly enforced. Thus, one's belief that a certain norm is morally binding does not justify the conclusion that this norm is legally valid when there is no chance that the norm will be generally practised and enforced (not being contained in a legally valid source, or being viewed as legally optimal by most citizens and officers). Moreover, even when there is a real chance that a norm will be generally enforced, as a result of one's determination to adopt it (suppose you are a high-court judge who is deciding a case by providing a *ratio decidendi*), the transition from morality to legality requires that we consider the costs of enforcing the norm and the harm that in any event results from forcing people to act against their moral convictions (even when such convictions are wrong).

Finally, even when a non-coerced moral requirement is translated into a legal norm, this translation may require considerable adaptations, to make it so that the resulting legal norm can be coercively implemented in ways which are both effective and compliant with the rule of law (consider, for instance, how the idea that we should not harm others gets translated into the many rules of tort law, with the corresponding presumptions, burdens of proof, etc.).

In conclusion, though moral consideration shape legal validity—and the law can be viewed as a section of morality in the broad sense, a section containing the norms whose present coercible application is morally justified—we need not equate non-coerced morality and legality. On the contrary, the fact that a norm is binding within non-coerced morality is generally neither a sufficient nor a necessary ground for concluding that this norm is legally valid, and consequently, we can still address the reasons for limiting the impact of morality on law (see Alexander and Schauer 2006). The oft-discussed problem of whether and to what extent the law includes or excludes morality can indeed be rephrased into different, more accurately characterised issues:

- To what extent, and on what grounds, norms that are binding within non-coerced morality can also be viewed as legally valid (and thus legally binding)?
- Under what conditions can we view as legally valid a norm which mandates a behaviour which is contrary to what non-coerced morality would permit (if the law was not there)?
- What norms are legally valid on the basis of their substantive legal merit (the merit they will have once adopted for the purpose of coercible determinations) even though they are not expressed by socially recognised sources, and what norms are not legally valid even though they are expressed by such sources?
- What is the relationship between norms expressed by sources of the law and the norms that would be legally binding if such sources were not available? Under what conditions, and within what limits, do the first norms substitute for the latter and exclude their application?<sup>18</sup>

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that “only very rarely will the non-availability of morally repugnant options reduce a person's choice sufficiently to affect his autonomy.” In consequence, Raz concludes that “the availability of such options is not a requirement of respect for autonomy.”

<sup>18</sup>Note that even in the absence of social sources, not all moral norms would be legally valid: even under such a condition, this qualification would only apply to those moral norms which are appropriate standards for public coercion, which the modifications required by this function.

## 13 Conclusion

On the basis on an inferential analysis of the concept of validity I have argued legal validity is an evaluative property, whose establishment pertains to moral reasoning (in the broad sense). This is because the function of legal validity consists in linking certain features of a norm to the conclusion that the norm is legally binding.

This evaluative understanding of validity does not exclude the relevance of social-institutional sources of law: Such sources contribute to determining what norms are legally valid since they constitute, given a certain context and certain constraints, appropriate moral justifications for validity (as a precondition of bindingness). Such an understanding is also consistent with distinguishing legal validity from other evaluative concepts (such as moral bindingness or legal optimality).

Within the framework I have presented, any characterisation of the ultimate preconditions of legal validity appears to be based upon assumptions pertaining to morality (in the broad sense), and cannot therefore hope to have any merit or any neutrality stretching beyond such assumptions. However, I hope that this framework may have a significance which goes beyond my personal convictions, on the one hand by contributing to clarifying what the debate on legal validity is really about, and on the other hand by suggesting some arguments for this debate.

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