

EUI WORKING PAPERS

LAW No. 2006/18



Validity As Bindingness:
The Normativity of Legality

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ISSN 1725-6739

©2006 Giovanni Sartor
Printed in Italy
European University Institute
Badia Fiesolana
I - 50016 San Domenico di Fiesole (FI)
Italy

<http://www.iue.it/>
<http://cadmus.iue.it/dspace/index.jsp>

ABSTRACT:

I shall argue that the concept of (valid) law is a purely normative notion, irreducible to any factual description. This uncontroversial notion, which is shared by all approaching the law from the internal point of view, needs to be distinguished from the competing theories on the grounds of legal bindingness, namely, on the reasons for qualifying a norm as legally valid. I shall consider some implications of this distinction for legal reasoning and for the role of the jurist.

KEYWORDS:

law

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Validity As Bindingness: The Normativity of Legality*

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Abstract

I shall argue that the concept of (valid) law is a purely normative notion, irreducible to any factual description. This uncontroversial notion, which is shared by all approaching the law from the internal point of view, needs to be distinguished from the competing theories on the grounds of legal bindingness, namely, on the reasons for qualifying a norm as legally valid. I shall consider some implications of this distinction for legal reasoning and for the role of the jurist.

Contents

1 The Puzzle of Legal Validity

The debate on legal validity characterises the history of legal thought: for centuries legal thinkers have been wondering whether the validity of a norm depends on cohering with the dictates of reason (as for natural law theorists), on being issued according to legal empowerments (as for legal positivists), or on being endorsed and applied by officers and citizens (as for legal realists), or on a combination of the above and other elements (as for various contemporary thinkers, like Dworkin 1986, MacCormick and Weinberger 1986, Peczenik 1989, and Alexy 1992).

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?

In this spirit, it would be very easy to distinguish different notions of validity appropriate for specific purposes. For example, following the suggestion of Wróblewski (1992), we could distinguish *axiological validity* (conformity to evaluative standards), *systemic validity* (conformity to procedures for lawmaking), and *operative validity* (conformity to the behaviour, attitudes, and beliefs of certain social actors, typically the judges).

*Supported by the EU projects ONE-LEX (Marie Curie Chair) and ESTRELLA (IST-2004-027665). Submitted for publication to *Ratio Juris*.

More articulate concepts could be devised by combining these notions. For example, we could define the notion of *systemic-operative validity* as being systemic validity according to operatively valid rules of recognition, namely, rules of recognition that are socially accepted (as for Hart 1961). By adding a further component we can define the concept of *axiological-systemic-operative validity*, according to which a norm¹ is legally valid if, besides being systemically-operatively valid, it does not (grossly) violate certain axiological standards (as for Radbruch 1950a).² Once we have built a taxonomy distinguishing all notions of legal validity we may want to express, there should be no reason for setting one notion against the others.

Unfortunately, a linguistic approach gives us a caricature representation of the validity debate. Let us consider, for example, a linguistic characterisation of the contrast between Radbruch (1950a) and Hart (1983) on the evaluation of extremely unjust laws (*leges iniustissimae*), such as those implementing racial persecution in Nazi Germany: Hart, when affirming that even such extremely unjust prescriptions were legally valid, was using the term *legally valid* to mean systemically valid (or, more exactly, operatively-systemically valid); Radbruch, when denying their validity, was referring to axiological validity (or, more exactly, to axiological-systemic-operative validity). Had the two authors been aware of these different senses of “valid,” they should have easily agreed on a platitude: racial laws were both systemically valid and axiologically invalid. Thus, their controversy on legal validity would be explained away as trivial linguistic misunderstandings.

Linguistic approaches to legal concepts have been vigorously criticised by Ronald Dworkin, who has affirmed that legal concepts have an interpretative nature, namely, 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 shall not here refer to the notion of an interpretative concept, nor distinguish it from other types of concept. For our purposes it is sufficient to point to the fact that legal concepts mediate normative preconditions and normative conclusions: they connect the preconditions for their application (that is, the preconditions for qualifying an entity as an instance of a concept) and the legal consequences that follow from such an application.³ For example, once that we are satisfied that sufficient preconditions obtain for a work to be qualified as an intellectual property of a certain kind (for instance, as a literary work or as a software program), we shall view that work as having the normative qualifications concerning that kind of intellectual property (for instance, the prohibition to make unauthorised copies of it).

This function of legal concepts determines certain features of legal argumentation. Consider for instance the recent debate about torture, where the absolute prohibition of torture has been recently questioned with regard to the so-called “war on terror” (for a critical review of this debate, see Waldron 2005). A lawyer who believes that the law permits inflicting pain on detainees for extracting information has two options for showing that this is the case: either she takes a restricted view of the conditions for applying the concept of torture (requiring for instance that permanent physical damage is caused) or she takes a restrictive view of the consequences of qual-

¹The term *norm* is here used in the sense of *normative proposition*, namely, to denote any proposition having a normative content (an obligation, a permission, a constitutive qualification, an evaluation). It refers to semantic entities, without ontological commitments: saying that a proposition is a norm just entails that it has a normative content; it does not entail (nor exclude) that it has a moral, legal or factual existence.

²According to Radbruch 1950a, positive law, stated and supported by political power, loses its validity when its injustice becomes *intolerable*, that is, when its injustice outweighs the benefit of legal security.

³See Ross 1957. For a more general articulation of an inferentialist approach, see Brandom 2000.

ifying an act as torture (assuming that certain kinds of torture, in certain cases are permissible). Correspondingly, a lawyer who on the contrary believes that the law never permits inflicting pain on detainees for extracting information would claim both that every way of inflicting pain for the purpose of an investigation qualifies as torture and that all kinds of torture are forbidden.

This double face of legal concepts explains why legal debates make sense even in situations of apparent conceptual disagreement: when we are discussing the preconditions for applying a concept we view the concept's consequences as relatively fixed (and thus our debate concerns determining what kinds of entities will be subject to the normative qualification linked to the concept); when we are discussing the consequences of a certain concept we view the preconditions for applying such a concept as relatively fixed (and thus our debate concerns what normative qualifications apply to the entities covered by the concept). The choice of focusing on the preconditions rather than on the consequences of a legal concept is constrained by way in which the concept is characterised in common language and in legal sources, and especially by the role it plays in legal reasoning.

In the following I shall argue that the function of the concept of validity in legal reasoning makes it so that the core-content of this concept is not provided by the preconditions for qualifying a norm as valid, but rather by the consequence that we associate to such a qualification. This consequence provides indeed a thin but invariant meaning for the concept of legal validity, a meaning that, through being purely normative, is simple and uncontroversial, and constitutes the shared focus of the debates on legal validity. On the basis of the distinction between the functional core of the concept of validity and the grounds for applying this concept (namely, for qualifying a particular norm as a valid one) I shall critically review some current views on legal validity.

2 Judgements on Legal Validity

To clarify the notion of legal validity we need to focus on legal decision-making and more generally on 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, is aimed at establishing what normative determinations are to be collectively accepted and possibly enforced.⁴

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 process 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 violating the limit, and acts consequently.

In other cases, however, one needs to reflect critically upon one's grounds for deriving a legal conclusion. This reflection leads to questions concerning the *justification* of such grounds,

⁴This idea may be linked to Dworkin's 1986 statement that the law's function consists in justifying coercion. However, the latter statement, taken literally, seems to express a very restrictive view of the function of the law (if a the "function" of something we mean the major result which is produced by it, namely, the result which explains its persistence). It is better to view the justification of coercion as a necessary way in which legal norms fulfil their social function, namely, providing a stable and effective normative framework for social action, a framework which enable, to a certain extent, the achievement of legal values (on legal values, see MacCormick 2005, 114ff).

namely, to the question whether such grounds can legitimately be used to support a legal conclusion (of the kind one is considering), whether one is justified in using them for such purpose. We obtain a positive answer to question concerning the justification of a certain proposition, by providing reasons supporting the use of this proposition in legal reasoning, reasons which prevail against reasons to the contrary.

This reflective exercise can concern a factual proposition (for instance, the proposition that a judge has accepted a bribe from a certain company). Can we (are we entitled to, and must we) use this proposition in supporting a legal conclusion? Does it provide an appropriate ground (reason) for adopting a legal determination? With regard to a factual proposition, the justification question can be answered by considering the strength of the evidence for the proposition in question (as compared to the evidence against it) and the correctness of the procedure through which the evidence was obtained or contested.

The same reflective question can also concern normative propositions, namely, norms, like the *deontic* norm⁵ that one is forbidden from corrupting judges, or the *constitutive* norm⁶ that giving money for obtaining a public decision beneficial to oneself amounts to corruption. With regard to norms, the justification question can be answered by appealing to properties like the following: their pedigree (as for legislative norms), their shared endorsement and application (as for customary norms), or their importance with regard to legal and political values (as for general principles of law).

Let us focus on the reflective evaluation of norms. The paramount question we need to answer when reflectively pondering upon a norm is whether we can (and must) use it as a ground in justifying (or attacking) legal conclusions,⁷ namely, whether the norm is *legally binding*. By qualifying a norm as legally binding we do not mean that it states a legal obligation (that it states that under certain conditions, one is obliged to perform a certain action): even permissive and constitutive norms can be legally binding. Legal bindingness does not concern an action which is prescribed by the norm at issue; it rather concerns the acceptance of this norm in legal reasoning: by qualifying a norm—for instance “Any person has a right to express his or her opinion”—as legally binding we mean that it can (that it must, if relevant) be used to support legal conclusions; we mean that one must use this norm in legal reasoning (if one wants to proceed correctly in the attempt to establish a justified legal conclusion).

The qualification of a norm as legally binding does not entail that this norm necessarily dictates the solution of the legal issue it addresses: there may be overriding legal grounds for taking a different decision (for instance, consideration pertaining to public safety may override freedom of speech). This qualification just says that this norm can justifiably (and must, when relevant) be used for supporting a legal conclusion. Thus, the idea of bindingness does not express an action-requirement, but rather a requirement concerning legal reasoning, namely, the requirement that we use the norm in question (whenever it is relevant) in order to properly come

⁵By a *deontic norm*, I mean a norm establishing deontic qualifications, namely, obligations or permissions.

⁶By a *constitutive norm* I mean a norm establishing non-deontic qualifications, namely, conferring a certain status or other legal quality on a certain entity, like the quality of being a legal person, a citizen, a literary work, etc.

⁷In principle we do not need to distinguish whether we may or we must use a certain norm in legal reasoning: since optimal justification requires use of all relevant information, any relevant information (any information that may make a difference with regard to the outcome) which we can use (which we are justified in using) is also information that we must use. Thus I would tend to reject the distinction between must- and may-sources of law (see Peczenik 1989), though omitting certain relevant data can entail a more serious defect in a legal decision than omitting certain other data (for instance, not considering a piece of legislation may be worse than not considering a precedent).

to a legal determination and in order to produce a proper legal justification.⁸

3 Validity and Legality Can Be Equated To Legal Bindingness

The main thesis I shall advance is that legal validity consists in legal bindingness: to say that a norm is legally valid just means that it is legally binding, in the sense just specified. Moreover, if we view the law (its normative component, as distinguished from the collective and individual agents who operate the legal system) as the set of the *norms* which are legally valid, this equation can be combined with another one: *legality* can be equated to *validity*, that is, being legal (in the sense of belonging to the law) consists in being legally valid.⁹

If legality amounts to validity, and validity amounts to bindingness, then legality too amounts to bindingness: the law is nothing more than the set of all legally binding norms, and to say that a norm is legal, namely, that it belongs to the law, just means to say that it is legally binding.

In conclusion, it is not the case that we first establish whether a certain norm belongs to the law, and consequently we accept to view it as legally binding; on the contrary, we need to establish whether a certain norm is legally binding, in order to view it as belonging to the law. From this perspective, we can easily see why “the law claims to be binding” (that it “claims to have legitimate authority”, see Raz 1979): given that legality means bindingness, then when one affirms (believes) that a norm is legal one obviously claims (assumes) that it is binding. However, according to the perspective adopted here a norm is legal only when it is actually binding (it is not sufficient that it is believed to be so).

Before discussing the implications of equating legality (legal validity) to legal bindingness, we need to rebut three objections against this equation: (1) it broadens too much the extension of legality (there are legally binding norms that are not legally valid), (2) it restricts too much the extension of legal validity (there are legal norms that are not legally binding), (3) it disregards the social aspects of the law (legality is not purely normative).

4 All Legally Binding Norms Are Legally Valid

It may be argued that if we define the (valid) law of a certain political collectivity as being the set of all norms that are legally binding for that collectivity, the law gets overextended: too many norms qualify as legally valid. Consider, for instance, private international law. If the choice-of-law rules of country *A* require that we (judges and citizens of *A*) use certain norms of country *B* to evaluate cases of type *X*, then even those norms of country *B* are legally binding for the legal reasoners of *A*. Consequently, it seems that we must conclude that also the latter norms belong to the law of country *A*. The same holds for contractual clauses and principles of political morality: if they are legally binding for citizens and judges of *A*, then they too belong to the law of *A*.

Contrary to this view, it may be affirmed that a municipal legal system only contains the choice-of-law rules, namely, the rules qualifying certain “external” norms as legally binding; it

⁸In Sartor 2000 I described legal bindingness as establishing a *doxastic* obligation.

⁹This is the sense in which the notion of legal validity is usually understood in legal theory, following Kelsen 1967. In legal doctrine we speak of validity in a different sense too, namely, in the sense of not having defects that might impinge on the bindingness of a norm, though not doing it yet. In this sense we may say that a voidable contract is not valid, even before that the empowered party takes the initiative to void it. Obviously, if we use the term of “legally valid” in the latter sense, the equivalence between being a legally valid norm and being a legal norm does not hold (since there may be legal norms that are not legally valid).

does not contain such external norms themselves (foreign laws, contractual clauses, and moral principles). According to the latter view, the need to address legal issues on the basis of external norms results from the fact that such norms are referred to by choice-of-law rules; it does not entail the inclusion of these external norms in the legal system, that is, it does not entail their legality.

It appears to me that the contrast between the two views I have just sketched is mainly a terminological issue: what matters is that the legal reasoner identifies an appropriate sufficient set of legally binding norms. We may assume that the law we are applying includes all such norms, or that it includes just a subset of them (which enables us to identify all other legally norms, through choice-of-law rules).¹⁰

We may even reconcile more comprehensive and more restrictive views of the law by distinguishing the law *of* a certain collectivity (a certain social system) and the law *in* a certain collectivity: the first notion of law includes only the norms which, besides being legally binding for that collectivity (for legal reasoning taking place with reference to it), also originate from facts and events taking place within the personal or spatial boundaries of the same collectivity (to the exclusion of foreign laws) or from official behaviour (to the exclusion of contracts and customs); the second notion, which is what we are concerned with, includes all norms which are legally binding for that collectivity, regardless the location and nature of their sources.

5 All Legally Valid Norms Are Legally Binding

Let us now move on to the second objection, namely the objection that it is possible, and even useful, to distinguish judgements on legal validity (legality, namely, inclusion within the valid law) and judgements on legal bindingness: the conclusion that a certain norm is legally valid does not lead necessarily to the conclusion that it is legally binding, namely, that we ought to adopt in legal reasoning and legal practice.¹¹

According to this objection, being legally valid is no sufficient ground for being binding. Thus when faced with an unbearably unjust norm produced according to the requirements of a certain legal system, a legal decision-maker could consistently affirm the validity (legality) of such a norm and at the same time deny its bindingness (and consequently disregard it). This way of reasoning appears very strange, since it seems to lead to suicidal legal decision (decision that apparently cannot stand scrutiny): what shall we make of a judicial decision motivated by explicit disregard for the law? As a legal reasoner, one would prefer to argue (and think) that the norm one rejects does not belong to the law, rather than arguing that one's moral convictions require one to disregard the law. Our embarrassment with regard to such a decision indicates that there is indeed some conceptual connection between being legally valid and being legally

¹⁰The view that a municipal law only includes a subset of the norms that are legally binding (from the viewpoint of that law) is often linked to the specific senses in which the term *law* is used within certain jurisdictions, for particular purposes, rather than to general issues of legal theory. Assume, for instance, that certain judicial remedies (like an appeal to a high court) are available only for "violations of law" and not for questions of fact; then by viewing contractual norms as not belonging to the "law", we mean to exclude issues of contractual interpretations from such remedies. In fact, from a purely logical perspective, any rule concerned with the normative bases of legal reasoning can be viewed either as constitutively stating that the norms having certain properties (having being produced, or applied in certain ways, or having certain moral qualities) are legally valid, or as a choice-of-law rule, obliging legal decision makers to take into account non-legal norms having such properties.

¹¹For this objection, see, for instance, Hart 1983, who argues that this distinction is necessary for separating law and morality.

binding.

However, there is a more serious objection to the separation of legal validity and bindingness, which goes beyond conceptual analysis. If validity (legality) can be detached from legal bindingness, we have to wonder why a legal reasoner should worry at all about legal validity. If what really matters is to establish what norms are legally binding, which is not the same as belonging to the law, why should the reasoner—within arguments aimed at establishing legal bindingness—wonder whether the norm at issue qualifies as an element of the law (whatever he or she means by “the law”)? We shall consider two possible replies to this objection, neither of which appears to stand criticism.

Let us assume, first, that we deny any justificatory role to the qualification “legally valid”: the ascription of this qualification to a norm does not say anything about its bindingness, it gives us no ground to conclude that we must apply it. In this case, we have to conclude that the qualification “legally valid” does not play any role in normative legal reasoning. We can still obviously conclude that a norm is legally binding on the basis of the fact that it has certain relevant features (for instance, that it has been issued by Parliament), but we must derive this conclusion directly from these features. We cannot support such a conclusion by appealing to the fact that the norm, having such features, belongs to the (valid) law.

Let us now consider a different way of supporting the distinction between being legally valid and being legally binding, namely, the idea that belonging to the law (being legally valid) is *prima facie* (defeasibly) a sufficient and necessary ground for being legally binding: legal norms are usually legally binding (unless there are exceptional reasons to the contrary) and non-legal norms are usually deprived of legal bindingness (unless there are exceptional reasons to the contrary). According to this idea, a two-step approach is required for legal bindingness: first one establishes whether a norm is legally valid and then, if this test is positive, one moves on to establish whether the norm is legally binding. Thus, for instance, a law ordering racial discrimination (or permitting torture) would possibly pass the test of legal valid (being established by the government, and on this account belonging to the law) but would fail the test of legal bindingness. The problem with this approach is that it still views the qualification “legally valid” as necessarily having a normative relevance (though a defeasible one): to say that a norm is legally valid entails that it is binding (unless exceptional circumstances occur). We can consider two variants of this view, both of them unacceptable.

The first variant consists in viewing the qualification “legally valid” as a purely factual property, which is to be determined exclusively according to non-normative criteria (like the mainstream linguistic usage of the term “law” or of the term “valid”). From this perspective, legally valid norms would deserve to be applied in legal reasoning only by a happy empirical contingency. Thus, the fact that a norm is legally valid, in itself, would not provide even a defeasible support to the conclusion that it is legally binding.

The second variant consists in assuming that we establish that a norm is legally valid knowing that this defeasibly entails its legal bindingness, and thus that providing reasons for legality means providing reasons for defeasible bindingness. In this case, to make a plausible case for the distinction between validity (legality) and bindingness we need to provide a rationale for separating two normative judgements, the judgement that a norm is legally valid and the judgement that it is legally binding. This requires a clear and sensible criterion for discriminating the reasons that can be produced in the first judgement and the reasons that are relevant to the second one. Unfortunately, it does not seem that such a clear-cut distinction can be provided; there is no convincing rationale for distinguishing a normative judgement on legal validity from a normative judgement on legal bindingness.

6 Legal Validity Is Purely Normative

Our quest for a distinction between legal validity (legality) and legal bindingness has yielded a negative outcome. We must conclude that the two judgements have to be merged into one: Saying that a norm is legally binding amounts to saying that it is legally valid; the two qualifications are synonymous.

Thus, validity (legality) appears to be a simple and purely normative concept: by qualifying a norm as legally valid (with regard to a certain context), we say that it can, and must (if relevant), be used to support or attack legal conclusions, that has a role to play in legal reasoning, namely, in the justification of legal conclusions. And legal reasoning is the type of reasoning which is meant to derive normative conclusions that must be complied with, and can be collectively enforced upon the parties in question.

This purely normative concept of validity provides no descriptive element enabling one to identify, from an external or objective perspective, what norms are legally valid, within a certain legal system. Thus, it may seem incompatible with the reasonable assumption that the law is a social phenomenon, which can be identified and circumscribed only with recourse to a basis of social facts

The answer to this observation is that the normativity of legal validity does not exclude that we refer to social facts in order to identify legally valid norms; it does not exclude that the law has an institutional dimension, so that it is mainly to be found in (reasonable interpretations of) the outcomes of institutionalised sources (legislation, precedent, and so on), identified according to shared rules of recognition. Legal validity does indeed depend on social sources, but this is because the outcomes of such sources are likely to be elements of a shared normative practice, through which legal values can be achieved. Thus, specifying what facts produce (embed) legally binding norms does not pertain to the illustration of the concept of validity, but it rather pertains to the specification of the normative grounds that justify qualifying a norm as legally valid (as we shall see in the following section).

To show that the recognition of legal sources is indeed a normative attitude, let consider three persons holding quite extreme positions: a religious fundamentalist, endorsing a “divine” rule which he believes is to be coercively enforced in any political community (for instance, a rule forbidding, under the threat of a severe punishment, adultery, abortion, or nudity); 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 shoot certain political or economical 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 instance, Carl Schmitt’s idea that Hitler “as supreme master-judge immediately creates the law”, when ordering, outside of any recognised procedure, the elimination of his adversaries and ex friends in the Night of the Long Knives).

These three people view certain norms (stated in religious texts, revolutionary decisions, dictatorial commands) as legally valid, namely, every one of them qualifies certain norms as binding laws, which must be coercively enforced in his or her community. They are, obviously, wrong in their judgements on the validity of the norms they endorse. However, they are not wrong because they fail to understand the concept of law: they perfectly understand that in qualifying a norm as legally valid they are claiming that it is to be applied and coercively enforced (and they commit themselves to reason and act accordingly). Instead, they are wrong because they fail to appreciate that by considering their preferred norms as legally binding (and by acting

accordingly) they impair certain fundamental values (human life, individual and collective self-determination, etc.), and more generally they fail to understand that the coercive enforcement of norms can produce valuable results only when such norms are, or at least can become, shared patterns of a common practice. But these criticisms pertain to the normative reasoning aimed at establishing what norms can qualify as valid laws, they do not concern the analysis of the concept of law, as I shall argue in the following.

7 Grounds of Legal Bindingness

The previous discussion has led us to identify the notions of legal validity, legality, and legal bindingness: we can view these three terms as synonymous, namely, as expressing the same concept. Let us use the term *legal bindingness* to express this concept, and try to elucidate its meaning.

The attribute “legally binding” does not include any specific indication of the grounds for applying it to a certain norm, it just expressed that by so qualifying a norm one is committed (bound) to endorse it in legal reasoning.

In fact, people discussing whether a norm is legally binding may disagree on these grounds. Some may think that only those norms are legally binding, that are issued by a national legislator, or are “contained” in certain precedents. Others may include also the 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 bindingness of those norms that violate human rights or are grossly unjust under other criteria. Others may take the radically anarchical stand that no norm whatsoever is legally binding, that is, exclude that any norm whatsoever can qualify for the purpose of acceptance in legal reasoning, namely, for the purpose of possible coercive enforcement.¹²

To understand how people having so different ideas can entertain meaningful discussions, we must identify the areas of their dissent and of their agreement. All debaters strongly dissent on “why” something is legally binding, that is, on what features or preconditions enable a norm to be legal binding, and consequently they disagree on “what” is legally binding. However, they all agree on the core-meaning of the attribute “legally binding” (and of its synonyms “legally valid” and “legal”) as expressing the commitment to accept a norm in legal reasoning.

This conceptual function explains why it matters so much to establish that a norm is legally binding (legally valid or legal), and therefore why there is such fierce dissent on what norms are so qualified, and on what reasons support this qualification. It also explains why the extension of our conceptual triad (bindingness, validity and legality)—namely, the set of all norm to which it applies—cannot be captured by appealing to definitions or conceptual analyses: it rather depend on the substantive grounds (the *grounds of law*, as Dworkin 1986 calls them) which make it so that a norm deserves to be accepted in legal reasoning.¹³

¹²This is the view that now, in our present society, no norm should be enforced (since coercive enforcement always causes more harm than unrestrained individual action), a view which needs to be distinguished from the view that a better kind of society would be possible, where enforcement would be unnecessary (as in various religious or secular utopias). The idea that such a radical anarchist would not see a legal order in his or her society (he or she would just see wrong beliefs about the authority of persons and rules, accompanied by the unjustified exercise of coercion) was advanced by Kelsen 1992, par. 16 (though later abandoned in Kelsen 1967, par. 34 (i), footnote 82).

¹³Our distinction between core-meaning and substantive grounds corresponds to Hart’s (1994, 246) distinction between the concept of law and the criteria for its application or to Rawls’s (1999, 5) distinction between the concept

In fact, since the concept of legal bindingness is evaluative (“*x* is legally binding” means “*x* must be accepted in legal reasoning”), any theory of the grounds for legal bindingness will also be evaluative (it will be a practical rather than an epistemic theory). The fact that a norm has certain features is not sufficient to support the conclusion that is binding (unless the argument is an enthymeme). We need to combine this fact with a normative reason, namely, a reason why norms having these factual features are legally binding. Indeed, a theory of the grounds for legal bindingness is constituted by a combination of bindingness-conferring arguments:

- positive ones, establishing that a norm is binding if it has certain features (being issued by the legislator, being practised as a custom, belonging to the legal culture, etc.),
- negative ones, establishing that a norm is not binding if it has certain other features (having been abrogated by the legislator, grossly violating human rights, etc.).

Bindingness-conferring arguments may have different structures. They may have a hierarchical form, appealing to further legally valid norms, and in particular, to *source-norms*, conferring legal bindingness to the norms embedded in (expressed by) a certain social fact (a certain source).¹⁴ 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 shall see in Section 12. They may consist in abductive rationalisation, namely, in justifying a norm’s bindingness through the consideration that this norm coheres with the very norms we already believe to be binding, for instance, since they are part of an ongoing practice that we generally approve as a whole.

In general, the notion of legal bindingness as “what we must accept in legal reasoning” is *neutral* in the sense that it is compatible with the most diverse theories of the grounds of bindingness (the conditions making it so that one must adopt a norm in legal reasoning): this notion does not constrain the structure of bindingness-conferring arguments nor the sources they appeal to. However, the neutrality of the idea of legal bindingness does not imply that adopting one or another theory of the grounds of legal bindingness is an irrelevant or arbitrary choice. On the contrary, this choice has weighty practical implications, especially for legal decision-makers: one’s theory of legal bindingness, by determining what norms one views as legally binding, affects the conclusions of one’s legal reasoning, and hence the decisions one will impose on the parties of legal disputes and possibly enforce upon them against their will. Therefore, proposing theories of the grounds of bindingness and developing arguments for or against them is an important and challenging task for the legal theorist.

8 The Stance of the Enactment Positivist

Turning the serious problem of determining what norms are binding in legal reasoning into a linguistic dispute about the meaning of the term *legally valid* (or *legal*), leads to a deep misunderstanding. Let us consider, for example, the conflict between *natural law* and *enactment-positivism*, where by *enactment-positivism* we mean those theories according to which all valid legal norms are the content of authoritative enactment-acts.

Why should a norm be legally valid, for its intrinsic justice or for its legislative pedigree? Are enacted norms still valid when they are grossly unjust?

and the conceptions of justice.

¹⁴Consider, by way of example, a constitutional norm that recognises the legislative power of Parliament, namely, that confers legal bindingness on legislation, or a customary rule that recognises precedents, namely, that confers legal bindingness on *rationes decidendi*.

This issues makes sense if we assume that both the enactment-positivist and the naturalist are aware that they are putting forward competing theories on the grounds of legal bindingness, namely, competing normative criteria for establishing what norms are legally binding (deserve acceptance in legal reasoning must be collectively endorsed and enforced. It becomes absurd if they are putting forward competing views on the meaning of the term “legally valid”.

Let us first assume that the enactment-positivist is taking the correct (normative) stance (this point is clearly made by Scarpelli 1965). By simplifying the enactment-positivist’s position we may say that he is cognisant that he is putting forward two strict (indefeasible) bindingness-conferring criteria, an affirmative and a negative one:

- If a norm is enacted by the legislator, then it is legally binding.
- If a norm is not enacted by the legislator, then it is not legally binding

The naturalist is also putting forward two similar bindingness-conferring criteria:

- If a norm is required by justice (nature), then it is legally binding.
- If a norm is unjust, then it is not legally binding.

According to the above criteria, the enactment-positivist and the naturalist will reach opposed conclusions with regard to unjust norms issued by the legislator and of just norms not having a legislative source.

We may agree with one of the two parties, or with neither of them, but we cannot deny that their arguments make sense: these arguments concern the practical problem of determining what norms are to be used in legal reasoning, a choice on which the freedom or the well-being of individuals and communities depends.

By contrast, the opposition of the naturalist and the positivist’s views becomes senseless and misleading, when it is understood as concerning the choice of the best definition for the term *legally valid*.¹⁵ Let us assume that the enactment-positivist adopts indeed a definitional stance. He is not interested in whether a norm should be used or not in legal reasoning (on whether it is binding, in the sense here indicated). He is just working out, for his own cognitive and analytical purposes, a new definition of the term *valid law*, which he thinks has certain conceptual merits. This is why he stipulates that *legally valid* now means “issued by the legislator.” Unfortunately, common language cannot be changed by anybody’s fiat. After the enactment-positivist’s stipulation, the expression *legally valid* would have preserved its original conceptual function, and will be oscillating ambiguously between the old and the new meaning. Even those who accept the enactment-positivist’s “definition,” when affirming that a norm is valid, will tend to imply not only that this norm was issued by the legislator, but also that it is binding, to wit, that it must be accepted in legal reasoning.

Moreover, by rephrasing the source-norm “Whatever is issued by the legislator is valid” into a new definition of validity, the enactment-positivist has succeeded in making this norm unquestionable. Any denial of the validity (in the sense of bindingness) of a rule issued by political power—the assertion such a rule must not be adopted in legal reasoning, since it is not applied by the courts, it violates human rights, it is intolerably unjust, and so on—would not count as a challenge to the enactment-positivist’s stand. Such denials could be dismissed as futile and inappropriate attempts to contest his stipulation of the meaning of the expression *valid law*. This definitional stance stifles the validity debate by masquerading substantive arguments into definitional stipulations.

¹⁵Definitional approaches to validity are attacked by Dworkin 1986, 31ff.; cf. also Williams 1990, 175. For a critique of Dworkin’s view, see Coleman 2002.

9 The Stance of the Practice Positivist

Let us now look at the approach to legal validity which we can call *practice-positivism*, namely, the view that those norms are valid which are practised by the courts, the public administration, or citizens at large. Practice-positivism, like enactment-positivism, also views legal validity as depending on social facts (and thus it can be considered to be a kind of positivism), but it refers to different social facts: it focuses on practices rather than on authoritative enactments.¹⁶

Let us first interpret the claim of practice-positivism as a normative theory about the grounds of legal bindingness, that is, let us assume that “norm *n* is legally valid” means “norm *n* is binding in legal reasoning.” The practice-positivist’s theory would then consist of two strict (indefeasible) bindingness-conferring norms:

- a positive one, according to which “if a rule is practised by the courts, then it is binding,” and
- a negative one, according to which “if a rule is not practised by the courts, then it is not binding.”

Obviously, not everybody will be satisfied with these bindingness-conferring norms. Some may deny any duty to accept and perpetuate the current practice whatever it is. Others may qualify this duty in the framework of more articulated theories about the conventional grounds of legal validity. Others may put forward competing, negative or positive, bindingness-conferring norms: “those rules which violate human rights are not binding, even if they are practised by most courts;” “those rules which express the will of a democratically elected legislator are binding, even if they are not practised by most courts,” and so forth. However, even those who disagree with the practice-positivist’s normative stance cannot deny that this stance makes sense as a substantive position in the legal debate.

On the other hand, the practice-positivist may argue that this is not what she is doing. She is not interested in establishing what rules must be accepted in legal reasoning. She is redefining the term *legally valid* so that it becomes useful for her empirical enquiries. Besides wondering why she should bend the term *legally valid* to this new use, rather than choose a different term, we must observe that the practice-positivist’s stipulation is also likely to have little success. Even after her stipulation, the expression *legally valid* will maintain its original function (expressing the idea of legal bindingness), and will be oscillating ambiguously between this function and the meaning assigned by the practice-positivist’s stipulation.¹⁷

Thus, when qualifying a norm as valid, the practice-positivist would imply not only that the norm is practised by the courts, but also that on this ground it should be accepted in legal reasoning: she would continue to apply a bindingness-conferring norm (the norm that whatever is practised by the courts is valid, that is, should be accepted in legal reasoning), disguised as an apparently neutral definition of validity (*valid* means “practised by the courts”).¹⁸

¹⁶This approach is often called as *realism*, but I prefer to use a less ambiguous and controversial term.

¹⁷This ambiguity appears most clearly when the practice-positivist says that “to be valid” means “to be accepted as valid,” where the first occurrence of the term *valid* expresses the new descriptive meaning she is advocating and the second occurrence of that term expresses the old normative meaning.

¹⁸This problem also inheres within sociological notions of validity, such as Max 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 use of the term *valid* from the internal point of view: by qualifying a norm as valid, we do not mean that it is likely that others will view it as binding, but rather that it is binding. Weber himself seems to use the term *validity* in the latter sense, when he

10 The Stance of the Inclusive Positivist

The same criticism we addressed against enactment-positivism and practice-positivism can also be directed against so-called *inclusive positivism* (see Waluchow 1994 and Himma 2002), also called soft positivism (Hart 1994, 250) or incorporationism (Coleman 1996, 287–88). Inclusive positivists affirm that, in order to identify the valid law of a certain collectivity, one needs to apply the criteria (the rule of recognition) that are actually used within that collectivity. These criteria may, but need not, include a reference to morality.

When read in a normative way (namely, by assuming that “valid” means “binding”, in the sense above specified), this prescription seems to amount to a strict (indefeasible) request of conformism: “Adopt in your legal reasoning exactly those norms which you can qualify as binding according to the bindingness criteria which most (or the most influent) people in your collectivity are currently adopting!” This prescription puts these criteria out of discussion, and excludes that one may try to contest, or even refine, the very standards for legal bindingness that are currently in use.

The prescriptive version of inclusive positivism seems questionable. For instance, suppose that a German jurist, during the Nazi era, had the courage to try to convince his fellow citizens to reject or restrict the generally accepted principle that any wish of Adolf Hitler was legally binding at the highest level (the legal application of the so-called *Führer’s Principle*). Such a generous—and reasonable, though not from a purely self-concerned perspective—attempt seems to violate prescriptive inclusive positivism.

On the other hand, the inclusive positivist may claim that he is not interested in the issue of legal bindingness, as we are intending it. He is just proposing a new definition of the term *valid*: for him, *valid* does not mean “legally binding,” but rather “qualifiable as legally binding according to the bindingness criteria adopted by most (influential) people in the legal collectivity.” This definitional stipulation, however, provides no substitute for the notion of bindingness as we have been describing it, though it may be interesting for certain purposes (for example, in sociological inquiries, or when one is interested in analysing and evaluating the content and the implications of the most widespread views of the law).

11 The Normativity of Legal Validity

As we have observed above, we can overcome the conceptual puzzles described in the previous section by assuming that the statement that a norm is legally valid (or legal tout court) usually and primarily expresses an elementary normative characterisation, namely the idea that the norm is legally binding.

In the history of legal thinking, different grounds have been put forward to support this characterisation: being enacted by the legislator, being included in a sacred book, being accepted by most judges, being accepted by most citizens, being qualifiable as binding according shared rule of recognition, being endorsed by most scholars, being included in the best construction of the political morality of the community, corresponding to the will of God, and so forth. It may be more reasonable to give more importance to one or another of those grounds, to exclude some of them, to consider other facts, but this pertains to a substantive theory of the grounds of legal

considers the conditions under which “legitimate validity is attributed to an order by the agents” (Weber 1972, chap. 1.5, my translation).

bindingness, not to a definitional stipulation (or social inquiry) about the meaning of the term “legally binding.”

Viewing the specification of grounds for legal bindingness (validity) as a definition of the meaning of the “legally valid” leads us to confuse two different questions. Moore (1968, 37) urged us to distinguish the question “What is meant by *good*?” from the question “To what things and in what degree does the predicate *good* attach?” Similarly, we need to distinguish the question “What is meant by *legally valid*?” and the question “To what norms and in what degree, does the predicate *legally valid* attach?”

Every stipulation about the meaning of “valid law” appears to be an answer to the second question, which is presented as a reply to the first one. Therefore, it could be attacked by a version of the famous open-question argument proposed by Moore (1968) against naturalistic definitions of the good. Let us consider different possible “definitions” of *legally valid*, like the following: “what is stated by the legislator,” “what is practised by the highest court,” “what was ordered by God,” “what we expect that other people will expect” (Luhmann’s 1985 generalised normative expectations). With regard to any such definition, we may always ask a non-trivial question: “But are these things (the statements of the legislator, the rules currently practised by the courts, the orders of God, the shared expectations, and so forth) legally valid?,” by which we mean: “But should we accept these things in legal reasoning?” The possibility of asking such a question proves that these pseudo-definitions are disguised arguments 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 the law. As far as validity (bindingness) is concerned, a convention is no different from any brute physical, psychological, or historical fact. A convention can provide (in the appropriate circumstances and in the framework of an appropriate theory of the grounds of legal bindingness) a factual ground for a conclusion about legal bindingness, but cannot offer any self-standing notion of validity.

Thus, as we have rejected inclusive positivism, *a fortiori* we need to reject the so-called *exclusive legal positivism*, namely, the thesis that “legal validity is exhausted by reference to the conventionally identified sources of law” (Marmor 2002, 105), or even that “legal norms are products of authoritative resolutions; every legal norm consists of an authoritative directive” (ibid., 117).¹⁹ 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 (albeit within certain constraints) binding in legal reasoning.

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. On the contrary, the opposite holds true: the attempt to solve the genuinely normative problem of identifying what norms are binding in legal reasoning (what norms we should endorse in legal problem-solving) leads us to refer to certain social facts. These are the facts which, according to 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 legally binding norms.

¹⁹This latter statement seems very strict: it reduces exclusive positivism to what we called *enactment-positivism*, excluding, for instance, the bindingness of customary law.

12 Legal Bindingness Is Distinct from Legal Optimality

In this section, I shall try to distinguish the idea of legal bindingness (and thus of legal validity and legality) I am proposing from other normative concepts. Precise distinctions are required because an important motivation for rejecting a normative concept of the law consists in the fear that such a normative concept will collapse into different, more demanding normative ideas (like those of justice and morality), thus endangering the autonomy of law.

First of all, legally binding norms should not be confused with *optimal* (ideal or just) law, namely, with the norms that would constitute the best possible legal regulation, those norms which would mostly advance legal values, were they communally adopted and practised.²⁰ Bindingness and optimality are both normative notions, but they are different notions: optimality is neither a necessary nor a sufficient condition for legal bindingness. There are indeed many circumstances in which one can consistently affirm that a suboptimal norm is legally binding and exclude the legal validity of an optimal (or better) norm. For instance, one can consistently affirm that we should accept a legislative statement or a judicial ruling, though one thinks the legislators or the judges were wrong and should have taken a different, better decision.

The possibility of distinguishing legal bindingness and legal optimality is offered by different theories about the grounds of bindingness. This option is available, for instance, within a normative version of legal positivism. In fact, the source-norm "if a rule is enacted by the legislator, then it is binding" does not imply that the legislator only enacts optimal norms. An enactment-positivist judge may consistently believe that he should accept (and implement) a norm (since it was issued by the legislator), and still consider the norm sub-optimal (it would have been better if the legislator had decided differently).

Similarly, a judge endorsing a normative version of practice-positivism may consistently believe that a norm is binding (it deserves adoption by her in her decision) since it is practised by most of her colleagues, and still consider that this norm is sub-optimal (it would have been better if her colleagues had been following a different practice).

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

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

According to this approach, moderately unjust norms issued by an effective legislator are both sub-optimal and binding: they should be adopted in legal reasoning (for the sake of legal security) even though the legislator could have and should have decided better (that is, he should have enacted a just rule rather than a moderately unjust one). Only unbearably unjust legislative norms are both sub-optimal and non-binding.

²⁰For our purposes, we do not need to commit ourselves to a specific way of characterising optimal norms. For instance they may be characterised as the norms that would be identified (as candidate for legality) through a perfect unbounded exercise of practical reason (cognition), or that would be suggested by a perfectly rational, knowledgeable and benevolent person (according to Leibniz's idea of justice as the "charity of the wise"), or that would be agreed upon through the ideal dialectical interaction of perfectly rational, knowledgeable, and impartial communicators (as in Habermas's idealised dialogues).

As on the one hand suboptimal norms may be binding, on the other hand optimal norms may fail to be binding: you do not have to be an Hobbesian absolutist (or Schmittian decisionist) for believing that the truth (in the sense of optimality) of a norm is insufficient to ensure its legal bindingness.²¹

For instance, according to the approach developed in Sartor (2005) legal reasoning has the function of realising communal values (the aims that a collectivity should pursue, there included the protection of individual interests and rights) through collectively accepted (endorsed and applied) norms. Consequently, the legal bindingness 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 that the collective practice of the norm would bring, and (b) the chance that by adopting it, one contributes to its collective practice. One's attempt to participate in the collective practice of a norm would fail if one's fellows would reject that norm. Thus, one may rationally choose to stick to a norm one believes to be less beneficial than a new norm would be (if it were 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. Though a democratic legislator has no monopoly over the law, it must be recognised a vast competence, or prerogative, concerning the formation of new law, a prerogative which must be respected in legal reasoning, and in particular in judicial reasoning, according to the ideal of judicial restraint (see Kriele 1976, 60ff.).²²

Suppose, for example, that in a country the legislative rate for high-income taxpayers is 40%. Two judges, let us call them Libertarian and Egalitarian, would have preferred a different legislative choices: judge Libertarian advocates a lower tax rate (20%), while judge Egalitarian supports a higher one (60%). However, both of them will stick to the legislative rate in their legal inferences: neither would Libertarian acquit a person who has paid a tax corresponding only to 20% of his revenue, nor would Egalitarian order a person who has already paid a tax corresponding to 40% of her revenue to pay a further 20%.

But why do both of them apply a norm they believe to be sub-optimal (although for different reasons and with regard to different alternatives)? The answer comes from the need that norms are collectively practised. Judge Egalitarian's support for the rule establishing a higher income tax is justified by his expectation that it would provide certain public benefits he highly values: more public resources, and therefore better education, health care, and social services, especially for disadvantaged people. These benefits, however, are not going to be provided by Egalitarian's individual enforcement of the higher-rate rule; only the general practice of this rule, based upon

²¹This idea is contained in the famous sentence of Thomas Hobbes: *auctoritas, non veritas, facit legem* (power, not truth, makes the law, Hobbes 1968, sec. 16). In Section 15 we shall comment on the other, complementary but distinct, idea we can extract from this sentence, namely, the idea that the statement of a norm by the political power is sufficient to make it binding.

²²Similar considerations also restrain judicial review with regard to the discretionary rulings of administrative bodies.

its shared acceptance, is going to achieve these public objectives. If Egalitarian goes alone in what he considers to be the right direction, against the expectations of everybody else, he would only cause disruption.

Moreover, judges like Libertarian—who have a different view of what is optimal—could view Egalitarian’s licence as an authorisation to go 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 should adopt a norm he believes to be sub-optimal, but which at least allows for coordination. 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).

Similarly, Libertarian also 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 it is generally expected to be so). Libertarian, in the impossibility of establishing a better equilibrium through her own action, should stick to the existing one, and apply the 40% rate.

Therefore, both judges can conclude that they should adopt (i.e., consider valid or binding) the legislative rule: this is the only rule they (and their fellow judges and citizens) can share, even though for neither of them is this rule optimal.

13 Legal Bindingness Is Distinct from General Compliance

In the piece of reasoning just presented, Libertarian’s and Egalitarian’s concern for norm-sharing and their awareness of their institutional role allowed them to distinguish bindingness from optimality, in the sense of admitting the legal bindingness of sub-optimal norms. This, however, does not imply that the intrinsic goodness or badness of a norm is necessarily irrelevant to establishing whether it is legally binding. Though bindingness and optimality are distinct, there may be a link between a norm’s bindingness and the evaluation of its substantive merit:

1. the assessment of the optimality of a norm, under certain conditions, may justify the assertion of its validity even when the norm is not yet generally endorsed and complied with, while
2. the assessment of the sub-optimality of a norm, under certain conditions, may justify the denial of its validity, even when the norm is currently endorsed and complied with.

To exemplify from under what conditions this may be the case (according to a particular theory a the grounds of legal validity), I shall take again the liberty to mention the views expressed in Sartor (2005). From this perspective, establishing the legal bindingness of a norm requires an appropriate justification, combining normative and descriptive elements. Most commonly, such a justification is provided by a hierarchical argument: we conclude that a norm is legally binding on the basis of a source-norms conferring legal bindingness to all norms having a certain origin. A hierarchical arguments, however, is not self-standing, since it presupposes the assessment that the applied source-norm is legally binding, which needs to be established according to further arguments.

Therefore, we also need substantive, or rather teleological arguments, which are to be developed in two steps.

Firstly, one needs to establish whether the general practice of a norm would really contribute to realising legal values. This judgement is evaluative with regard to the assessment of what is legally valuable (what individual and collective interests we should pursue though the shared acceptance of coercive norms), but it involves an epistemic component, since one needs to rely on empirical knowledge to establish the impact of the norm's practice on the relevant values.

Secondly, one needs to consider whether one's acceptance of the norm would really contribute to the norm's general acceptance and application, so that such acceptance can be referred to the collectivity one is considering. The latter judgement is a factual judgement, based upon what normative views are held—or are likely to be held in the future—as a matter of fact, by one's fellows, taking into account their roles and positions. This is the kind of reasoning we need to perform when deciding whether to accept a certain principle lacking an authoritative legal pedigree, or when considering a new source-norm, which recognises the legal bindingness of (norms resulting from) a source which was not previously recognised. Consider, for instance, the norm that precedent is binding in Italian law, or the norm that acquiesced-in decisions of international bodies are binding in international law.

According to this perspective the issue of the legal bindingness of a putatively optimal norm can be addressed as follows.

First of all, one may attribute legal bindingness to a new norm when one—besides believing that the norm is optimal (or at least better than the currently practised alternative norm)—is also aware that one's optimality-belief is shared by most of one's fellows, 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 the others will follow. The common belief about the optimality of a certain norm provides a background against which this assumption may be justified: 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 one, everybody will follow, converging toward the new norm.

Moreover (though much more precariously), one may conclude for the bindingness of a norm one believes to be optimal, even when there is no agreement yet on the norm's optimality, but one expects that such an agreement will come when everybody has heard one's arguments. Among the factors that condition one's chances of success, there are also one's institutional role (for instance, one's position as a judge) and the expectations that are aimed at that role (in particular, the fact that one is considered to be entitled to decide legal conflicts, through certain ways of reasoning).

The latter considerations presuppose that the reasoner's peers are endorsing a sub-optimal norm only because this is the current convention. One's reasoning would need to be more complex if the others were endorsing that norm (also) because it was characterised as binding by a source-norm (like the norm according to which legislative norms are binding). To convince the others, one would then also have to propose an exception to this source-norm, appearing acceptable to all, which excludes the bindingness of the sub-optimal norm.

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 which is 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 assured through the practice of the law (through the endorsement coercive normative determinations): coordination, protection of rights, liberty, se-

curity, 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 a 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, one should usually consider binding any norm that is viewed as binding and consequently practised by a sufficient number of people, in the appropriate roles (even when this norm is sub-optimal).

However, not every form of coordination based upon common norms achieves the benefits that make the law a valuable enterprise: the fact that coordination is in place is a necessary, but not a sufficient 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 which should be publicly resisted, rather than pursued. If the currently endorsed and practised norms should deliver such results, one should conclude that these norms—although providing the pattern for the ongoing practice of the collectivity—should not be accepted in legal reasoning: these norms though effective, and believed to be binding by most citizens and judges, are not legally binding (cf. Peczenik 1989), and thus they are not legal (according to the normative concept of legality I have proposed).

Rejecting the bindingness of a currently shared norm presupposes a complex balancing exercise. Among the benefits, besides the immediate advantage of not applying the harmful norm in the specific case, one would need to consider the probability that others may follow one’s example, so that the general practice of the bad norm could, in the long run, be interrupted or at least questioned. Among the costs, besides the immediate disadvantage of frustrating the expectations of one’s colleagues and citizens in the individual case, one would also include increasing future uncertainty. Moreover, one would need to add to such costs the risk of jeopardising the norm-spreading mechanism that turned the harmful norm into a communally accepted one (the mechanism of legislation) and of discrediting the values underpinning this mechanism (the value of democracy).

In general, what sub-optimal norms—among those generally practised and enforced—one should consider as legally binding 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 wishes for) the “destabilisation” of the existing social practices. With regard to a legal system that is acceptable as a whole, reason requires that norm-sharing is usually viewed as an overriding concern: from this perspective, a reasonable legal decision-maker in order to provide those goods that only norm-based coordination can ensure, should 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 practiced norms (for denying their bindingness, and thus their legality), 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 according to legal values, or at least when the choice not to sanction the violation of a legally valid norm can find such a justification. Then, these justificatory grounds can be viewed as prevailing reasons which defeat (according to the law itself) the

application of the binding norm (or the imposition of the corresponding sanction), which remains binding with regard to other cases.

14 Legal Bindingness Is Distinct from Constitutional Conformity

In many legal systems the rejection of legislation is facilitated by the common view that certain normative standards—a constitution—prevail over ordinary legislation and thus limit the action of the legislator: in the event of a conflict with such standards (including, in particular, certain individual rights) legislation is not to be applied, and possibly can be voided through constitutional review.

When constitutional principles—which prevail over legislation—include basic human rights and respect for fundamental legal values, one may reject a bad legislative norm by referring to the fact that it violates the constitution rather than by directly appealing to its evilness. Appeal to a constitution makes the legal rejection of a piece of legislation much more practicable: one may expect that others will more easily converge on one's belief that a certain legislative rule should be viewed as legally invalid when one can argue that this rule violates certain standards which all view as constitutional limitations to the legislative power. Thus, it is true that, in a way, constitutionalism is the successor of natural law, as a legal constraint on political power.

We cannot here consider the many theories of constitutionalism, broadly intended as the doctrine of the legal limitations of political power.²³ We shall thus content ourselves with some common-sense considerations. Just as reason, according to the natural law theorists, requires humans to abandon the state of nature and endorse a legal order, so reason favours a constitutional arrangement: it requires that one participates in the currently adopted constitutional arrangement, when the substantive contents of the currently endorsed constitution appear to be acceptable enough; it also requires that one tries to push forward for such an arrangement if it is not yet in place.

In fact, a realistic analysis of electoral and political processes, and of the decisional practice of elective parliaments and governments shows that things can go very wrong: laws may be issued merely to satisfy the hates and fears of the constituency; they may infringe basic liberties; majorities through the government may oppress minorities; lobbies and private interests may dictate the contents of legislation. Thus, constitutional constraints (possibly coupled with some form of judicial implementation) may contribute to make it so that legislation tracks (up to a certain extent) practical reason: they may prevent major mistakes, limit the tragic risks of unlimited political power, ensure that everybody can trust that minimal warranties are being preserved.

On the other hand, a realistic appreciation of the decisional practice of judicial decision-making (even in constitutional review) shows that here too things can go very wrong: judges may protect corporative or individual interests, may impose their prejudices on society (without the feedback provided by democratic elections), may fail to assess the social and economic im-

²³One may locate within constitutionalism, understood in a broad sense, quite opposite ideas, like for instance: Kelsen's idea of a positive constitution, prevailing over ordinary laws (Kelsen 1967, sec. 35.a); Dworkin's idea of fundamental moral-political rights, trumping laws aimed at collective goals (Dworkin 1984); Hayek's idea that the whole law governing interpersonal relationship (as opposed to the organisation of the state's administration) should not be decided upon by legislators (not even when elected through a democratic process), but should rather reflect the autonomous order resulting from spontaneous socio-economic evolution, which judges should understand, clarify and facilitate (Hayek 1973).

pact of their choices, or may prevent innovative legal solutions from being tested through their implementation and submitted to public debate.

In conclusion, respect for political democracy (for the dignity of legislation, see Waldron 1999) and awareness of the limited capacity of judges as policy makers (and practical reasoners) require that a large legislative prerogative is left to elected bodies, though within constitutional constraints.

Finally, the collective endorsement of a constitution and the existence of a constitutional jurisdiction entail neither that all constitutional norms necessarily are legally binding, nor that all legislation respecting the constitution is legally binding. 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. Thus, we need to reject the view that a constitution can always provide correct guidance to legal reasoning 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 would not be legally binding (should not be used in legal reasoning), either on its own or in evaluating other laws. Consider, for instance, the above-mentioned *Führer’s* principle, which was indeed a constitutional principle in Nazi Germany, being publicly endorsed and generally assumed to prevail over any other legal source.²⁴

The distinction between the bindingness of a constitution and the fact that it is endorsed and applied, does not exclude that, as a matter of fact, usually there is a very large overlap between binding constraints on legislation and the endorsed and applied constitution.

Firstly, one’s rejection of a piece of enacted legislation is rational (with the exception of most tragic cases) only when one forecasts 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. In fact, we need to distinguish between optimality and bindingness also with regard to constitutional constraints. On the one hand, an optimal constitutional standard (a constitutional constraint that a certain collectivity should ideally adopt) might not be legally binding for an individual legal reasoner, since there is no chance that this standard will be collectively adopted (see Section 12). On the other hand, even sub-optimal (but practised) constitutional standards can be binding for the individual reasoner.

Secondly, the tragic history of the last century (and advances in legal and ethical thinking) has led us to include, within the currently adopted constitutions, many principles that undoubtedly deserve legal 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 elaborate 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 good guidance to the legal reasoner, or at least a good starting point for his or her thought.

²⁴This conclusion can be avoided (at least in the worst cases), when the words *constitution* and *constitutionalism* are used to refer only to those arrangements which respect the basic principles which are typical of modern liberal societies, being intended to limit the power of the State in order to protect individual liberties (see, for instance McIllwain 1947). This notion of a constitution is historically and politically very important. For instance, according to Art. 16 of the 1789 Declaration of the rights of man and the citizen, “Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no constitution.” However, I prefer not to use here this history- and value-laden notion of a constitution, since this would add a level of complexity to our analysis (the need to establish when the basic legal arrangement of a collectivity qualifies as a constitution in this restricted sense), without any significant advantage for our purposes.

15 Legal Bindingness Is Distinct from Enactment by Political Power

As we observed above, the idea that legal validity and legal bindingness coincide must be distinguished from a prescriptive version of what we called enactment positivism. In particular, it must be distinguished from the acceptance of the principle that: “the most obnoxious legislative law, as long as it is produced in a formally correct way, must be recognised as binding” (Bergbohm 1892, 144).²⁵

Such a strict (undefeasible) source-norm expresses a specific (and highly criticisable) theory on the grounds of legal bindingness; namely, the contestable view that the state enjoys an unlimited *legal sovereignty*, that is, an unlimited legal power (authority) to make any norm whatsoever legally binding.²⁶ We can consistently reject such a view, while continuing to equate legal validity and legal bindingness.

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 (binding) laws when seriously violating such warranties: such determinations would not be legally binding, 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 assuming that incompatible state-norms are not legally binding.

The equation of validity and bindingness is also consistent with the rejection of the idea that all binding laws are necessarily produced or authorised by the state. Certain sources of normative contents may deserve acceptance in legal reasoning even if state legislation does not qualify them, either explicitly or implicitly, as legally binding. Among such sources we may 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 adopting the norms produced by such sources, the ground of their legal bindingness, may consist in the very fact that these norms work (or are likely to work), through collective practice and enforcement, as the shared basis of valuable forms of coordination, which advances communal 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 contents are immediately legally binding, though with various limitations and exceptions: regulations and judgements issued by the institutions of the European Union, *rationes decidendi* of judicial precedents (at least as long as they are not shown to be wrong), customary rules followed in international contractual practice, norms generally used in international arbitrations, standards adopted by Internet bodies, acquiesced upon deliberations of certain international bodies, and so on. Similarly, EU judges may recognise the bindingness 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).

²⁵Quoted in Kaufmann 1984, 76–7, who provides an introduction to the German debate on legal positivism (ibid., 70ff.). The classical reference for a critique of legal positivism is Radbruch 1950a, whose approach has been recently developed by Alexy (1992).

²⁶By a legal power (or authority) I mean one’s (a person’s or a body’s) capacity to make declarations whose content is legally binding (for the fact of having being so declared), which needs to be distinguished from one’s factual power of making so that others people act according to one’s commands.

The normative version of strict enactment-positivism I have just criticised needs to be distinguished from a milder form of normative legal positivism, which seems generally justified, at least when citizens are provided with legal security, a working framework for cooperation, and democratic controls. This is the idea that the outcomes of political decision-making, according to pre-established procedures for law-making, are normally legally binding, a presumption which may be defeated by prevailing reasons to the contrary. More generally, if by a *legitimate authority* we mean an authority such that its statements are normally legally binding (on legitimacy see Sadurski 2005), then *legitimacy* is a condition for legal bindingness which is: (a) defeasibly sufficient (since there may be 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 binding norms may have a non-authoritative origin, as for customary rules, and since concerns for coordination may justify the bindingness of some statements of an illegitimate authority, like a violent dictatorship, with regard to “neutral” domains like contracts and property).

16 Legal Bindingness Is Distinct from Moral Bindingness

As legal bindingness can be distinguished from legal optimality (ideality), both notions can be distinguished from moral bindingness. We cannot undertake here a serious attempt at defining the notion of morality, but we can advance the hypothesis that when one says that a norm is morally binding, one means that it should be accepted in moral reasoning, namely, for the purpose of establishing how the members of a collectivity should behave toward one another (and consequently what they are entitled to expect from others) regardless of the possibility of coercion.

The equation between legal validity and legal bindingness does not entail a moralisation of the law. This equation is indeed consistent with holding that certain norms are both morally binding (we should accept them for the purpose of establishing how we are to behave toward one another) and legally invalid (we should not use them in legal reasoning).

In fact, even if a norm is morally binding, its coercive enforcement may be inappropriate—too expensive, too obtrusive, and so on. Moreover, the norm’s enforcement without a previous enactment may violate constitutional arrangements and citizens’ expectations. Therefore, certain norms are morally binding, and yet are not, and should not become, legally binding.

The distinction between law and morality does not need to be grounded on the subjectivity and indeterminacy of morality, as opposed to the objectivity of the law. A deeper ground for distinguishing law and 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 the areas where, according to the traditional liberal doctrine of Mill (1991), the intervention of the law is legitimate.

Suppose that whenever an action impacting on others was morally binding, it would also be

also legally binding: one would be legally bound (under the threat of a sanction) 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 the 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).²⁷

A further ground for distinguishing morality from legality is the fact that morality admits of disagreement much more than legality does. While different people can practice incompatible 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 enforced in the same case. Thus, one’s belief that a certain norm is morally binding does not justify the conclusion that this norm is legally binding when there is no chance that the norm will be generally practised and enforced (not being contained in a legally binding source, nor being viewed as legally optimal by most lawyers). 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 (assume to be a high-court judge who is deciding a case by providing a *ratio decidendi*), the transition from morality to legality requires that one considers the costs of enforcing the norm and the harm that in any case results from forcing people to comply with what contradicts their moral convictions (even when such convictions are wrong).

Finally, even when a moral requirement is translated into a legal norm, this translation may require considerable adaptations, in order 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 considerations pertaining to political morality may be relevant to legal bindingness, a normative view of legality does not equate morality (i.e., the norms to be practised regardless of coercion) and legality. On the contrary, the belief that a norm is morally binding is generally neither a sufficient nor a necessary ground for concluding that it is legally binding.

17 Statements of Legal Bindingness Are Not Descriptive

The predicate *legally binding* is primarily used in normative propositions having the form “norm *n* is legally binding,” meaning “I (as any other) should accept norm *n* when engaging in legal reasoning.” Such *bindingness-conferring* propositions must be distinguished from the propositions that speak about them, which we can call *bindingness-embedding propositions*.

Bindingness-embedding propositions may be factual ones, such as those asserting that certain people believe in a bindingness proposition: “Most people believe that [norm *n* is binding].” Further levels of embedding are also possible: “All citizens are aware that [most citizens in the

²⁷The 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 affirms 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.”

collectivity believe that [norm n is binding]].”

Bindingness-embedding propositions can also express cognitive idealisations. They may affirm that people would come to believe certain bindingness propositions under certain epistemic circumstances: “People would come to believe that [norm n is binding] if they were reasoning correctly, in the awareness of the relevant facts, etc.” The formulation of cognitive idealisations requires vicarious reasoning: one must consider what results other people would achieve given the beliefs that these people are currently having (and assuming that they are capable of rationally processing such beliefs).

Bindingness-embedding propositions provide no descriptive notions of bindingness that may substitute for the normative characterisation of this concept: they contain bindingness propositions, and therefore assume the very notion of bindingness expressed by the latter. This is true even when—as in coordination-based arguments—bindingness-embedding propositions provide pre-conditions for affirming a bindingness proposition: the fact that most others accept a norm (whose application provides a valuable form of coordination) represents a reason why an individual should accept that norm.

One can make proper bindingness judgements (judgements expressing bindingness propositions) only when one is reasoning from within a legal system (when one views oneself one of the individuals that should accept the norms at issue, as members of a certain collectivity). There is no detached way of asserting a proper bindingness proposition. When asserting such a proposition, one is adopting a normative determination, namely, one is establishing that one should apply that proposition in legal reasoning.

This is not contradicted by the possibility of affirming that a norm is binding in a foreign or an ancient legal system, since such statements are to be understood as elliptical ways of expressing bindingness-embedding propositions.²⁸

For example, the assertion that “Norm n was binding in ancient Roman law,” where n stands for “masters are permitted to kill their slaves,” does not mean “we should have accept norm n for our legal reasoning in ancient Roman law, that is, under the hypothesis that we were members of the Roman legal collectivity.” It rather means: “Romans believed norm n to be binding.” I may have this belief and at the same time also believe, that, if I were a Roman jurist (keeping all my current knowledge) I would not view such a rule as legally binding.

One’s bindingness-embedding beliefs may approach one’s bindingness beliefs through cognitive idealisation. For instance, when cognitive idealisation is pushed far enough (including the Romans’ capacity to review their legal and moral theses, and to interpret their legal sources appropriately), the critical student of Roman law could even conclude that a norm was not binding event in ancient Roman law (Romans should not have endorsed it, and they would not have endorsed it if they had fully exercised theoretical and practical cognition, coming to accept the humanity of slaves and their right to equal treatment), although, as a matter of fact, most Roman lawyers believed that the norm was binding.

To substantiate this statement, the critical Romanist scholar needs to present a (hypothetical, or better, counterfactual) cognitive process that starts with the actual beliefs of ancient Roman lawyers, like the Aristotelian thesis that slaves are animated instruments, but leads, through the examination of normative reasons and experiential data, to revise such beliefs. Obviously, it does not make much sense to engage in such extreme cognitive idealisations with regard to past legal systems, which nobody is going to apply. It may, however, make sense to pursue this approach

²⁸The notion of bindingness-embedding propositions seems to also cover statements expressed from the *hermeneutical* point of view of MacCormick (1981, 33–40), or from the *detached* point of view of Raz (1980, 153ff.).

with regard to certain present legal traditions that, having only recently come in contact with modernity, have not yet absorbed much of the factual and normative knowledge available today.

18 Statements of Legal Bindingness Are Not Detached

To clarify the distinction between reasoning from a detached perspective and reasoning from an internal perspective, consider the position of an administrator of a firm. The administrator, when acting in his professional competence, has to take decisions in the interests of his firm: he will adopt the goals that characterise his firm (providing profits to its shareholders, but also maintaining and increasing its market share, preserving the jobs of the employees, and so on) and will devise ways of contributing to such goals. His participation will not be purely passive; he will creatively contribute to the achievement of such goals, but he will also contribute to refine and characterise these goals, according to his understanding of the mission of a commercial firm, and of his understanding of the views of its owners, managers, and employees.

When doing all of this, the administrator is not engaging in vicarious reasoning, he is not asking himself: “What determinations would another do if he or she were the administrator of my company?,” or even “What determination would my company adopt, under the present circumstances?” He is rather reasoning directly, in his professional role, that is, adopting the perspective which corresponds to his identification with, or his participation in, his company. He is asking himself: “What determination should *I* adopt, being the administrator of my company?,” which is equivalent to “How should I participate in the decisional process of my company?”²⁹

This also happens when one engages in legal reasoning. Like the administrator of a company directly gives *his* contribution to the decision-making process of his company, rather than figuring out what another would do in his place, similarly a legal decision-maker (and any citizen) actively participates in determining what norms are legally binding for *her* collectivity rather than figuring out, from a detached perspective, what another would have thought at her place.

One may certainly also engage in vicarious legal reasoning, for anticipating what norms other people will or would endorse and implement. Not only is this perspective proper to Holmes’s (1897, 8) bad man (who looks at the law “only for the material consequences which such knowledge enables him to predict”), but this is also an essential step in the process of converging toward shared normative beliefs. However, this attitude does not exhaust the stand of honest legal reasoners, be they judges or common citizens. It rather has for them only a preliminary function: the ultimate issue they have to address is what norms they have to endorse as legal ones, namely as determinations to be practised and coercively enforced within their collectivity.

This view only partially matches the reasoning of advocates (solicitors, barristers, or attorneys), who tend to present the theses more advantageous to their clients as being the most legally appropriate, even when they do not believe that this is the case. This attitude corresponds indeed to their professional duty (within the limits of professional correctness), and to the adversarial mechanism of litigation. However, advocates can achieve their main objective (winning the case) only by modelling the reasoning of the judges and by anticipating the sincere reactions of the latter.³⁰

²⁹There is nothing mysterious in this phenomenon, which is indeed present in every collectivity and organisation, both in the public and in the private domain, and is ubiquitous in political discourse. Simon (1965, 205) speaks in this regard of *identification*: “we will say that a person identifies himself with a group when, in making decision, he evaluates the several alternatives of choice in terms of their consequences for the specified group.”

³⁰We discount illegal conducts, such as bribing the judge, or otherwise appealing to the personal interest of the latter.

Moreover, the advocate's approach would be unbecoming even for doctrinal writers. We would indeed criticise the insincerity of a writer defending in a doctrinal article a thesis he does not endorse, but which is more convenient to an important client (though he may rightly advance and defend the same thesis when acting as an advocate in the course of judicial proceedings).

19 Statements of Legal Bindingness Do Not Report Shared Opinions

When engaging in legal reasoning, one needs to take into account not only formal legal sources, but also shared values, attitudes, and opinions. However, this does not confine the legal reasoner to the reiteration of these sources, values, attitudes, and opinions: a good jurist (*juris peritus*) should contribute to make it so that "the law [...] is improved day by day,"³¹ an objective which may involve two aspects.

Firstly, a (good) lawyer can play a creative role in the legal process. A lawyer (and even a doctrinal writer) should be a problem-solver, not limiting his or her activity to describing the practical determinations (norms, values, goal, decisions) adopted by others in the past, but extending that activity to the refinement of previous determinations and also to the contribution to new determinations. In proposing refinements and developments of the current legal practice one often refers to political morality (as observed by Dworkin 1986, 96): one needs to consider what determination should be adopted by one's collectivity, though this reference is constrained by the need to converge with others and to insert this determination in the framework of the collectivity's reasoning and decision-making.

Secondly, the very need to focus on the values that one's collectivity should pursue may lead one—though still identifying with one's collectivity, and even because of this identification—to deny the legal bindingness of some determinations one's collectivity is currently endorsing, and of the norms which implement such determinations. For instance, with regard to shared norms that are designed to bring about the genocide of a minority, the elimination of political opponents, engagement in aggressive warfare, or some clear and severe form of injustice (like racial discrimination) the rejection of their legal bindingness seems to be the appropriate conclusion, to the benefit of the political collectivity in question and even of its law.

The idea that lawyers, including doctrinal lawyers, need to identify with the legal system—rather than reproduce the reasoning of those who identify with the legal system—can also be given a psychological explanation. A lawyer, like any problem solver, needs to engage in heuristics for finding imaginative solutions to the legal problems he or she has to face. To perform well in such a heuristic search, one needs to focus on the problems one is addressing, to adopt them as one's own, rather than to aim at mimicking somebody else's reasoning in facing these problems. Probably, one would not contribute much to science, if one did not believe in science as a form of cognition and was not working to make scientific discoveries, but rather aimed at anticipating what kind of inquiries and discoveries committed scientists would do. Similarly, one would probably be a bad artist if one aimed at reproducing or anticipating the style of some other artists rather than at making one's own contribution. In the same way, one would probably be a bad legal scholar and decision-maker, if one aimed at reproducing or anticipating what other lawyers would think and do rather than at solving the legal problems one has adopted as one's own

³¹*Jus [...] cottidie in melius produci* (*The Digest of Justinian*, 1, 2, 2, my translation). On this statement of the Roman jurist Pomponius, see Lombardi Vallauri 1967, 5ff.).

problems (or rather as the problems of one's own collectivity).

We may say that the legal positivist tends to assimilate the task of the lawyer, and in particular of the doctrinal lawyer, with the task of the sociologist or historian of science. Sociologists and historians of science should indeed study what scientific theories are accepted in a certain society at a certain time and work out implications and presuppositions of such theories, taking also into account—if one is an inclusive sociologist of science—shared scientific values, background metaphysical assumption, and so on.

However, it goes beyond the mission of the sociologists of science to try to solve substantive scientific issues, a task which they must leave to real scientists. Thus, if we adopt the positivist perspective, and we view lawyers as sociologists of law, we need to find somebody else who will provide the object of the lawyer-sociologist's studies, not only by solving specific legal issues, but also by developing normative theories that support legal decision-making.

20 Overcoming the Puzzle of Legal Validity

At the beginning of this paper we have identified a puzzle: how can the validity debate be so important for lawyers and jurists if it only concerns choosing a definition of the term *legally valid*? We have argued that to solve the validity puzzle we need to bring the validity discourse, even within legal theory, to its proper domain, namely, to the normative issue of establishing what norms we must accept in legal reasoning.

In fact, the assertion that a norm is legally valid is the answer to a substantive issue (What norms are binding in legal reasoning?) rather than to a definitional one (What is the meaning of *legally valid*?). This assertion is the conclusion of arguments supporting the use of that norm in legal reasoning, a conclusion which may be countered by arguments rejecting such use. One needs to be capable of expressing such arguments if one wants to engage in reflexive legal reasoning, that is, to question or support the norms one is using in drawing legal conclusions.

Thus, a normative theory of validity (legality) is a theory of the grounds of legal bindingness, namely, of what reasons, in what contexts, can support or exclude the use of a norm in drawing legal conclusions. Besides developing such normative theories, we may also investigate what views of the grounds of legal bindingness are in fact adopted in legal communities or in sections of these communities. However, these empirical analyses cannot provide any sensible definition of legal validity, not even a lexical one. They only provide a description of how (on what grounds) the members of the relevant communities usually establish bindingness propositions.

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