On Legal Validity

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Abstract. This paper presents a theoretical account of legal validity. We begin with a very simple criterial account of validity and discuss the possibility of elimination of such concept by means of procedure described in Ross' paper Tû-Tû. Then we discuss more ambitious theoretical proposals concerning validity, advocated by Grabowski and Sartor. We make an attempt to reconcile and further generalize these accounts. Finally, we focus on the broadest view encompassing the role of institutions with regard to validity. The notion of intermediate anchoring institutions is key in the new social scenarios created through linked-data systems. Some examples are provided.

Keywords. Inferential concepts, intermediate institutions, validity.

1. Introduction

The notion of validity plays a crucial role not only in legal theory, but in AI and Law research, especially in Information Retrieval systems, modelling of legislation, expert systems and in Semantic Web research as well. But is validity actually a necessary concept in legal theory and in computational modelling of law? As we will show, not all relevant elements of the said concept are computable, and this leads to the idea of intermediate anchoring institutions to build hybrid regulatory models. In order to turn *legal* a regulatory system, a hybrid strategy in between human and computer interfaces is needed, assembling hard law, soft law, policies, and ethical principles.

2. Is Validity Tû-tû?

In 1957 Alf Ross published the English version of his famous paper "Tû-tû" where he discussed the semantics of intermediate legal concepts [1,2]. Meaning nothing, 'Tû-Tû' is in reverse order 'Ut-Ut', in Latin, a funny shadow effect for 'So-that', in English. He observed that the application of such concepts (e.g. ownership – but the analysis is relevant for any term designing a legal status of a person or of a thing) is dictated by two sets of rules: input rules (determining the criteria of usage of a concept) and output rules (providing for the consequences of application of a concept). Let us present a set of such exemplary rules concerning ownership:

Input Rule. If A bought a thing T, then A is an owner of T.

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Output Rule. If A is an owner of T, then A may sell T.

By means of the law of transitivity of implication (if A → B and B → C then A → C) we may eliminate the intermediary concept of ownership and form the set of rules by obtaining a rule which adopts a disjunction of antecedents of Input Rules as its antecedent and a conjunction of consequents of Output Rules as its consequent (Final Rule), provided that the intermediate concept in question always entails a conjunction of all its legal effects. Such concepts as ownership, concludes Ross, are in fact empty shells with no meaning at all. Their main role is enabling the legislator to make normative texts more concise. As a matter of course, the application of the law of logic is trivial and straightforward. A question arises whether a legal theorist is justified to apply this law to the effect of semantic reduction of intermediate concepts.

Ross' conception provoked a broad discussion in legal theory. As any strong thesis, it provoked criticism, but it also has a strong heuristic value, because it inspired development of new theoretical accounts of the role of legal concepts in inference [5] [6] [7] [8] [9]. In a recent paper Brożek [8] argues in particular that logical argument cannot suffice to establish Ross' claim, because it leads to paradoxical results – any term of the language can be seen as semantically void.

Does this critique mean that Ross' reduction thesis is plainly wrong? We argue that only a subset of terms used in social reality is reducible in the sense of Ross. It is difficult to provide for a definitive set of criteria for determining whether a concept belongs to this class. Referring to the objections presented above, the following set of questions may be asked to assess an analyzed concept C:

Q1. Are the sets of Input Rules and Output Rules exhaustive?

Q2. Are all the Input Rules and Output Rules equally important?

Q3. Was the concept C specifically crafted for the normative context in which it functions?

Positive answers to the three questions provide a presumptive reason for claiming that C may be reducible in the sense of Ross, and that negative answers support a contrary conclusion. Taking the above analyses into consideration, let us try to answer a question whether the concept of legal validity is reducible in the sense described above. To give justice to Ross, let us stress that he would probably reject such possibility due to empirical (realistic) stance he adopted with regard to the most fundamental issues of legal theory. The notion of Rossian reduction has to a great extent detached from the legal-philosophical background adopted by the author , due to the work of Sartor, Hage and Pfordten [10] and many others. Therefore it seems worthwhile to consider whether legal validity can be reduced to the Final Rule of the form described above. Such reduction seems not to be adequate in case of the concept of validity, as it is actually used in legal reality. The criterial conception of validity is overly simplistic; even in legal cultures where positivism still dominates it is very difficult to provide an exhaustive list of sufficient and necessary criteria for validity of statutory norms – which entails a negative answer to Q1 above. Also, validity is not an artificial juristic concept with clear meaning, but on the contrary, it is present in juristic and also in general language and sometimes labeled as one of essentially contested concepts (negative answer to Q3).

It follows, therefore, that even though it is possible to adopt such conception of validity which may be easily reduced to the Rossian sense, this conception itself is not descriptively adequate to fulfil its promises. The inferential dimension of validity [9] should not lead to the conclusion that it can be reduced by means of the Rossian method (although some legal concepts can).

3. Post-positivistic Conception of Validity and Beyond

During the recent years the most ambitious legal-theoretical project related to the very concept of validity was presented by Grabowski [7]. The author focuses on the legal notion of validity (as opposed to other types of validity, e.g. moral ones) and on validity of statutory law (as opposed to other types of law, e.g. case law). The conception is located in the philosophy of law referred to as post-positivism, where the concept of law is understood broadly — the law comes to being by means of discourse.

Grabowski analyzed both intension (meaning) and extension (scope) of legally valid norms. As regards the former issue, he states that a norm of statutory law is valid if and only if the potential addressee of the norm does not have any legal possibility to refuse to behave in accordance with the norm or to undertake activities necessary to realize aims required by the norm . The extension of the notion "valid norm" is determined in a discourse concerning validity. In the discourse, certain criteria of validity are used, but they do not provide for a definition of validity, but rather for basis for a presumption of validity . The presumption of validity of a norm may be conveniently presented in a form of an argumentation scheme [11] which has not been done in earlier literature of the subject:.

Argumentation scheme for validity of a legal norm (with critical questions).

Premise 1. A norm N was made public in accordance with procedural conditions and it came into force.

Premise 2. A norm D, made public in accordance with procedural conditions, derogating the norm N, has not came into force.

Conclusion. The norm N is valid.

Q0. Are the premises 1 and 2 actually presumptively sufficient for inferring a conclusion that N is valid (this is in fact a meta-question which attacks the structure of the argumentation scheme itself);.

Q1. Was N actually made public in accordance with procedural conditions and did it actually came into force? (negative answer leads to rejection of conclusion).

Q1.1. Are there any strong reasons for admitting validity of N even though it was not made public in accordance with procedural conditions?

Q2. Did the norm D, derogating the norm N, made public in accordance with procedural conditions, came into force?

Q2.1. Are there any strong reasons for admitting validity of N even though its derogating norm, D, was made public in accordance with procedural conditions and came into force?

Q2.2. Did the norm E, derogating the norm D, made public in accordance with procedural conditions, came into force?

Q3. Are there any strong reasons for rejecting validity of N even though the answer to Q1 is positive and the answer to Q2 is negative?

Q4. Are there any reasons for suspension of validity of N even though the answer to Q1 is positive and the answer to Q2 is negative?

This account the conditions of validity cannot be easily reduced to any exhaustive set of criteria (and hence a complete set of Input Rules).[2] On the other hand, it enables

[2] Contrary to Alexy's opinion. According to Alexy [3]. the formal structure of the core of the theories of validity can be expressed as follows: "when in respect of norm N the Criteria C1,… Cn apply, then Norm N is

us to formulate one, very general, input rule: if a conclusion concerning validity of a legal norm N is justified by means of discourse on validity, then this legal norm is (presumptively) valid. The concept of validity is already assumed is the notion of discourse on validity, therefore the concept of validity cannot be eliminated - in Rossian sense – in the post-positivistic conception. Also, this account of validity offers a possibility to utilize formal models of argumentation (such as argumentation frameworks for structured argumentation) [5] to assess the validity of investigated legal norms.

It is worthwhile to compare Grabowski's postpositivistic conception of validity with Sartor's inferential view of this concept [9]. Sartor takes the inferential character of the notion of validity for granted, but he explicitly refuses the possibility of elimination of validity from the legal conceptual scheme. He proposes that satisfaction of certain conditions by a norm leads to a conclusion of its validity, and validity of a norm strictly implies its bindingness, which means that this norm should be endorsed and applied in reasoning of legal decision-makers. This leads to a conclusion that binding norms in the sense of Sartor are not necessarily valid norms in the sense of Grabowski, because in the latter ones the *pattern of behavior* has to be relatively fixed to make an answer possible to the question concerning possibility of refusal to comply with the norm or not. Nevertheless, we can see a pathway towards the reconciliation of the two conceptions. Araszkiewicz [12] argues that the dispute between legal defeasibilism and indefeasibilism may be solved by adoption of a set of rules translating one of these conceptual schemes into another.

Having said that, let us now adopt a conception according to which law is a system of different types of information which may be used as premises and conclusions in argumentation and in the decision-making processes (whose scope is set out by the criteria specified inside of this argumentative net). We may, therefore, propose for a scale of such premises from the most formally binding ones to purely persuasive ones, beginning from the relatively complete statutory norms in the sense of Grabowski, but this issue concerns the content of what is valid and not validity itself), then defeasible statutory rules in the sense of Sartor, case law, rules based on official recommendations issues by authorities, soft law, legislative materials, regulatory policies and so on. Hence, we may propose for a broader conception of *normative relevance*.

An object O is normatively relevant in legal system S if a legal subject P does not have legal ground not to take appropriate stance towards O. Let us add that the "legal ground" used in the proposed account is an open and context-sensitive concept which does not exclude that such ground may stem from the social practice and not necessarily from any authoritative act.

4. The quest for intermediate anchoring institutions

Let's take an empirical approach, now. Actually, Ross's attempt to eliminate the unnecessary meaning of inferential intermediate concepts was not new when he formulated it. Warren McCulloch [13] had put it crudely: "*biologists have exorcised ghosts from the body, whence they went to the head, like bats from the belfry*". *Tû-Tû*, in fact was anticipated by Gregory Bateson in *Naven* (1936) [14]. Positive and negative

valid. The various theories of validity can be distinguished by the criteria they adopt". The first part of Grabowski's monograph is devoted to a careful critique of non-positivistic conceptions of validity with particular emphasis on Alexy's theory.

feed-backs were needed to understand the functional role of *Naven* among the Iatmul and in the end, its 'meaning', another bat from the belfry.

This is a behavioural analogy for the intermediate legal concepts or "vehicles of inference" figured out by Ross (and Wedberg), and a bit later, Lindahl and Odelstadt, Sartor, and many others. What we are suggesting here is that in the new scenarios emerging within the Web of data, we can extend the same idea using not only argumentation schemes but *intermediate anchoring institutions*. We will put aside in this paper the discussion about defining institutions as a social ontology (the searlian "x counts as y in a context z"). We are more interested now in showing that *validity* can be treated in fact as a way of conveying the notion that a specific norm or a particular regulatory system have turned *legal, i.e.* have acquired the property of being identified as binding, acceptable or compliable into a particular social context(i.e. in the particular *ecosystem* created by its regulatory patterns. In this way, the concept can be better understood as referring to a gradual continuum than as a discrete category. It emerges from a complex social dynamics rather than supervene from an inferential chain [4].

On the web, regulatory tools (including law) cannot be the same than before [16]. Using semantic languages to model rights (e.g. Digital Rights Management, Open Digital Rights Management, legal ontologies, Ontology Design Patterns…) changes the epistemic object itself, as these tools have to be accorded, harmonised, and *anchored* at different stages and levels of organisation in a human-machine interface. Yet, we don't have a general framework to share all of them. E.g. to start with digital identity, the US National Institute of Standards and Technology (NIST) just launched an open call for comments (from August 1st to September 30th 2016) on a preliminary regulatory draft.[3] The metadata schema for attributes that may be asserted about an individual during an online transaction has not been settled either.

The meaning of norms are often different to that originally intended, due to social, cultural, and technical changes [15]. We can provide some examples of the kind of intermediate institutions we are thinking of. The regulation of emergent transnational markets, and privacy, data protection, and security *by design* (PbD, DPbD, SbD) offer examples of the so-called "identity meta-system layer" of the Internet, whose legal status is still pending. At present, data and metadata are being regulated through an intertwined network of sources, including national and international statutes, Directives, Regulations, policies, standards, protocols, technical recommendations, and ethical and professional principles (e.g. the Fair Information Practices, FIPs, adopted by USA government at the federal level). In Europe, the situation is even more complex since the General Data Protection Reform (GDPR) recently came to an end. The new Directive and Data Protection Regulation contain a complete set of legal concepts —transparency, data minimisation, proportionality, among others. It is worth mentioning that they bring about a sustainable extension of rights that can be enforced through economic sanctions, and instruments of monitoring and control. Many researchers in this area have already pointed out that they cannot be completely hardcoded [17]]. This is the space in which legal anchoring institutions operate i.e., a situated (contextual), hybrid (human-machine), and semi-formal space that brings together all the elements that are required to build, control and monitoring regulatory systems encompassing hard law, soft law, governance and ethics.

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5. Conclusions and future work

From an inferential approach, if the rule x satisfies certain preconditions, then it is valid. Validity means 'legal'. If the rule is legal, then it is obligatory (binding), which means that the inferential role of the concept of validity "consists exactly in the fact that establishing that a norm is legally valid licenses us (and indeed obliges us, if the norm is relevant) to use the norm in legal reasoning" [5].

We have shown in this paper that this perspective could benefit from a more empirical approach, which is most needed in the present regulatory trends of the web of data. The quality of "legal" has a discursive and argumentative component, but it is embedded into regulatory systems (or 'legal reality') which are broader and cannot be confused with the *existence* of norms. If validity emerges from the dynamics of different constituents and it is not only a normative property, several problems arise. E.g. What kind of models and metamodels could be built to describe such regulatory systems? What kind of metrics could be used? Would it be possible to produce composite social indicators for these properties? How could we encompass normative validity with its empirical legal dimension? How could we bridge ontological and non-ontological legal resources? These are problems still to be solved.

References

[1] Ross, A. *Tû-Tû*, *Festskrift til Henry Ussing*. O. Borum, K. Ilium (eds.), Juristforbundet, København ,1951

[2] Ross, A. Tû-Tû , *Harvard Law Review*, 1957 70 (5), 812-825. Also in *Scandinavian Studies in Law*, 1, (1957), 137-153.

[3] Alexy, R. *A Theory of Constitutional Rights* (1986), Oxford Scholarship Online, 2006.

[4] Casanovas, P. Semantic Web Regulatory Models: Why ethics matter. *Philosophy & Technology*, **28, 1** (2015), 33-55.

[5] Prakken, H., Sartor, G.. Formalising arguments about norms. *Legal Knowledge and Information Systems. JURIX-2013, pages* 121-130, Amsterdam, IOS Press.

[6] Lindahl, L., Oldestad, J. The theory of Joining-Systems, D. Gabbay et al. (Eds.) *Handbook of Deontic Logic*, pages 545-634, UK, College Publications, 2013.

[7] Grabowski A., *Juristic Concept of the Validity of Statutory Law. A Critique of Contemporary Legal Nonpositivism*, Dordrecht, Springer, 2013

[8] Brożek B., On tû-tû, . *Rev. Inter. de Fil. Iber. y Teo. Soc.* **20, 71** (2015), 67-73.

[9] Sartor, G. Legal validity: An inferential analysis. *Ratio Juris* **21, 2** (2008), 212-247.

[10] Haage, J.C., Pfordten, von der D. Concepts in Law, Dordrecht, Springer, 2009.

[11] Walton, D., Reed, C., Macagno, F. *Argumentation schemes*, Cambridge University Press, 2008.

[12] Araszkiewicz M., Legal Rules: Defeasible or Indefeasible, M. Araszkiewicz, P. Banas, T. Gizbert-Studnicki, K. Płeszka (eds.), *Problems of Normativity, Rules and Rule Following*, Springer 2015, 415-431.

[13] McCulloch, W. Mysterium Iniquitatis of Sinful Man Inspiring Into the Place of God (1955), *Embodiments of Mind*", Pages 1957-164, The MIT Press, 1966.

[14] Bateson, G. *Naven: A survey of the problems suggested by a composite picture of the culture of a New Guinea tribe drawn from three points of view* (Vol. 21), Stanford University Press, 1936.

[15] Boella, G., Humphreys, L., Muthuri, R., van der Torre, L., & Rossi, P. A critical analysis of legal requirements engineering from the perspective of legal practice. *Seventh IEEE Workshop on Requirements Engineering and Law*, pages 14-21, IEEE RELAW-2014,.

[16] Rodríguez-Doncel, V., Santos, C., Casanovas, P.; Gómez-Pérez, A. Legal aspects of linked data – The European framework, Computer Law & Security Review: The International Journal of Technology Law and Practice (2016), doi: 10.1016/j.clsr.2016.07.005

[17] Koops, B.J., Leenes, R. Privacy regulation cannot be hardcoded. A critical comment on the 'privacy by design' provision in data-protection law, *International Review of Law, Computers & Technology*, 28, 2 (2014) , 159-171, DOI: 10.1080/13600869.2013.801589.