VALIDITY AND INVALIDATION

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ABSTRACT

Legal systems typically allocate powers to persons and establish conditions for their successful exercise. Legal thought tends to operate on the idea that if a power is exercised by meeting the conditions—if it is correctly exercised—the power-holder succeeds in creating a juridical act. Conversely, if the power is incorrectly exercised, the power-holder fails in his or her attempt. A concomitant notion of legal thought holds that in the first case the act is referred to as valid; in the second as invalid. The real and normal operation of legal systems shows, however, that very many exercises of powers are defective, and yet they nonetheless produce binding juridical acts, which in legal practice are commonly referred to as legally valid. Frequently, moreover, many such acts are not invalidated by a court. Legal systems employ a diverse set of alternative remedies, including delayed declarations of the invalidity of administrative decisions and statutes, non-binding declarations of the invalidity of statutes, the rectification of the terms of a contract, among many others. This state of affairs poses a theoretical problem. How to explain and justify the existence and binding force of such defective acts? And how to explain and justify the ample variety of remedies? The existing answers are not satisfactory. This DPhil thesis begins by explaining the current theoretical landscape and criticizing the current views; it then proposes an alternative answer, whose main features are the following. Juridical acts are institutional facts: they exist if persons recognize them to exist. There are strong moral reasons for a community to confer recognition on some defectively created acts. This justifies ascribing them the provisional or definitive status of legally valid. Remedies are a means to correct the injustice cause by an incorrect exercise of powers. There is no one means to correct that injustice. The remedy must be appropriate to the moral gravity and particular facts of the case.

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PART ONE

I. THE INVALIDITY QUESTION

1. Introduction

Juridical acts are the primary source of law in modern legal systems. A juridical act (legal act, juristic act, act-in-the-law) proposes a plan for action, a project designed to configure legal relations between persons in relation to sets of facts. These legal configurations take the form of rights, obligations, powers, immunities, disabilities, among other normative incidents. Contracts, wills, marriages, judicial rulings, administrative decisions, statutes, and even some constitutions are types of juridical acts. Juridical acts are brought into existence by exercises of legal powers. 'Legal validity' is a sufficiently stable term of art employed focally to signal the product of successful exercises of legal powers. That product has what within legal practice is called legal existence. Legal existence involves bindingness, for legal acts exist as normative propositions for action: they are entities that exert a rational force on persons, directing them to act by commanding, prohibiting or permitting. Hence legal validity is also a term for the binding force of a juridical act. 'Legal invalidity', by contrast, focally signals a non-existent act, something which, despite empirical appearances is in truth deprived of legal reality, a void. An invalid juridical act exerts no binding force and does not configure legal relations.

A basic principle of legal thought holds that to succeed in producing a legal configuration power-holders must meet a set of conditions or requirements laid down

by the law, which in contemporary jurisprudence carry the name 'validity criteria'. The rationale of the principle is that if the conditions are met the attempt to configure legal relations succeeds: it is legally valid. If the criteria are not met the attempt fails: it is legally invalid. An accompanying principle proposes that acts-in-the-law are either valid or invalid—there are no degrees of validity; juridical acts do not half-exist. These theoretical propositions form the tidy conceptual scheme of the operation of validation within a legal system.

The scheme, however, seems to frequently break down. In the normal operation of a legal system many juridical acts are defectively created. Power-holders, or purported power-holders, may make mistakes, or act with wrongful intention. Contracts of sale are concluded under mistake, fraud or duress; a married individual may conceal that status and try to marry again; a man may be sentenced without being properly heard; judges may issue rulings without having been properly appointed to their office; a municipal council may enter into a contract while lacking the power to engage in agreements of that kind; a public body in charge of securing fair competition in certain industries may unreasonably give permission for a merger; a statute regulating data detention may unjustly affect privacy rights; a statute may levy taxes that arbitrarily discriminate between persons; a constitutional amendment may be implemented in disregard of the relevant formalities; etc.[1]

Persons are imperfect and so the life of the law is also imperfect. This reality poses a pressing practical problem concerning what to do upon the advent of these

[1] To illustrate, see *Coppard v HM Customs & Excise* [2003] CA, (2003) QB 1428; *Kleinwort Benson Ltd v Birmingham City Council* [1997] CA, (1997) QB 380; *R v Monopolies and Mergers Commission Ex p Argyll Group* [1986] QB 1, (1986) WLR 763; *Murphy v Attorney General* [1982] IR 241 (SC). Charles de Gaulle famously reformed the French Constitution in 1962, introducing the institution of direct presidential suffrage, while bypassing the procedure established in Article 89. The Conseil Constitutionnel declared that the matter was beyond its jurisdiction (for discussion, see Francis Hamon and Michel Troper, *Droit Constitutionnel* (35 edn, LGDJ, Lextenso 2014) 438-40).

events. How should a legal system react against an incorrectly executed attempt to produce a juridical act?

Through centuries of refinement and intelligent institutional design political communities have decided that the matter must be settled by authority. In their private capacity persons are normally disabled from treating defectively created norms as invalid, ie as exerting no binding force upon them, until an empowered person or body has pronounced on the matter. That pronouncement may be of different kinds: the enactment of a statute repealing or derogating the defective juridical act, the decision of one of the parties to rescind the act (when the act is a contract), or, most commonly, a judicial ruling that invalidates the act (annuls, avoids, sets aside, quashes, strikes down, etc.). Communities have also decided that not anyone and everyone can access a court to challenge the validity of an act. Furthermore, those who do have standing must go through a specified procedure, and typically within a period of time. Even upon the fulfilment of these requirements a court may exercise discretion and refrain from invalidating a defective act, or may declare its invalidity with partial retroactive effects, or prospective effects only, among other remedial alternatives. A court may only be empowered to disapply an act without annulling it; it may be disabled from invalidating a specific act, if it is shielded by an ouster clause, or, finally, may lack any power to invalidate an act altogether.

In rough outline such is the general outlook of how modern jurisdictions react towards defective exercises of powers across private and public law. These practical choices of institutional design are informed by an understanding of the relevant facts and human goods or values involved, considerations which are in turn processed and organized through a (more or less articulated) conceptual framework. The practical problem, like any practical problem, has a theoretical dimension. It can be stated as

follows: how to explain and justify this state of affairs? I shall call it the 'invalidity question'.

Observe that the community may not even be aware that a juridical act has been defectively produced. Frequently power-holders make honest mistakes in exercising their powers. Those who are meant to be governed by the defective juridical act may be unaware of the defect; those cognizant of it may choose to remain silent. Many defective acts live a perfectly healthy legal existence. A validity criterion may also be vague and unclear, and there may be a long-standing debate in a community on whether a statute, say, infringes a constitutional right. Such acts do exist but may become highly unstable. This question may be less pressing in practical terms, but has the same theoretical dimension as the pressing states of affairs discussed above. How can these defective acts be said to be valid and exist? This aspect also forms part of the invalidity question.

To characterize the invalidity question more abstractly we can break the phenomenon down into two components. The first component concerns the relation between a defective exercise of a power and the binding force of the juridical act it purports to create. Why do some defective acts exert such a force? Why, furthermore, are they normally referred to in legal practice as legally valid (until invalidated)? The second component concerns remedies. Why is there an ample variety of remedial reactions? And why are some defective juridical acts immune to legal challenge?

An answer to the invalidity question requires an adequate grasp of certain fundamental legal phenomena. These include an account of how legal norms come into and remain in existence. That account must be able to explain how a defective juridical act can legally exist. A theory of the notions of validity and invalidity is also required.

That theory must include an explanation of why some defective juridical acts are signalled as legally valid. Finally, an answer to the invalidity question also demands an account of what remedies are, including an explanation of why courts ought to invalidate in some cases and not others.

The aim of this DPhil thesis is to answer the invalidity question. An answer is needed because the current approaches are not satisfactory. The existing tools must be refined and a conceptual apparatus that can organize them as a coherent whole produced.

2. The Current Landscape

The invalidity question is as old as the practice of political communities choosing to organize themselves through the set of institutions we call a legal system. It emerges in any jurisdiction and in any area of law in which persons are conferred a legal power to produce a juridical act. The question, while ancient, continues to challenge the minds of lawyers, judges, and scholars.

The challenges of the invalidity question are well illustrated in English administrative law. In England the invalidity question is considered to pose a set of 'thorny' questions, the answers to which must 'deliver outcomes that are normatively desirable and practically sensible' through a 'conceptual apparatus that lends [them] structure and intellectual coherence'.[2] The scaffolding of that conceptual structure and the vocabulary through which to articulate it—centrally the notion of 'voidness' or

[2] Mark Elliott, Jason Varuhas and Jack Beatson, *Administrative Law: Text and Materials* (Fifth edition. edn, Oxford University Press 2017) 113.

'nullity'—is deemed to lead to significant 'theoretical difficulties'.[3] On high authority the question has been characterized as involving 'terminological and conceptual problems of excruciating complexity,[4] and it has even been suggested that the vocabulary is so 'confusing' that it should be abandoned.[5]

Consider, furthermore, that in 2021 a group of academics, commissioned by the Government of the United Kingdom of the time, published a report on reforms on the law of judicial review. The set of problems they were asked to address are all practical aspects of the invalidity question.[6] It is worth stating some of them, which were in general summarized as 'fundamental issues concerning the appropriate constitutional place of judicial review'.[7] The issues encompass 'the amenability of public law decisions to judicial review'; what the 'grounds of judicial review' should be, and whether they 'should be codified in statute'; whether 'the legal principle of non-justiciability requires clarification', including the subject-matters it covers. The Panel was also asked to examine the availability of 'remedies' other than nullification. While the report's concern was primarily practical, it explicitly complained about the lack of conceptual clarity on the matter.[8]

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[3] Clive Lewis, *Judicial Remedies in Public Law* (Sixth edition. edn, Sweet & Maxwell 2021) 5-014; Michael Taggart, ' Rival Theories of Invalidity in Administrative Law: Some Practical and Theoretical Consequences' in Michael Taggart (ed), *Judicial Review of Administrative Action in the 1980s* (Oxford University Press 1986) 93 et passim.

[4] Catherine M. Donnelly and others, *De Smith's Judicial Review* (Ninth edn, Sweet & Maxwell 2023) 4-058.

[5] Timothy Endicott, *Administrative Law* (Fifth edn, Oxford University Press 2021) 397-98. For well-known complaints of judges to a similar effect, see *Ridge v Baldwin* [1964] UKHL 2, (1963) AC 40 92; *Durayappah v Fernando* [1967] PC, (1967) 2 AC 353; *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] HL, (1975) AC 295 359; *Boddington v British Transport Police* [1999] HL, 2 (1999) AC 143 165. For a more recent statement, see *R (on the application of Majera (formerly SM (Rwanda))) v Secretary of State for the Home Department* [2021] UKSC 46, (2021) 27ff.

[6] Lord Edward Faulks QC and others, *The Independent Review of Administrative Law* (2021) 1.

[7] Cabinet Office and Ministry of Justice, *Terms of Reference for the Independent Review of Administrative Law* (2020) 1.

[8] Faulks QC and others, *The Independent Review of Administrative Law* 3.47ff

A comparative examination of how prominent jurisdictions have confronted the invalidity question shows that the English debate is far from parochial. The very terms in which the issues are framed, and the conceptual difficulties grappled with, are found in most if not all modern jurisdictions, and across private and public law, either presently or some moment in their past history.[9]

What are the current approaches? What are the main features of their operative concepts and the frameworks that organize them? It is difficult to find a definite statement of the existing approaches, a difficulty compounded by the fact that the terms (void, voidable, etc.) are frequently used equivocally.[10] The existing information on the matter, ranging from the law of contracts to constitutional law, and in a diverse set of prominent civilian and common law jurisdictions can, however, be distilled. The approaches in effect can be reduced to two competing views. For the sake of clarity and simplicity I will exposit these approaches as archetypes, in their purest form. To fix ideas I will refer to them as the 'voidable' and 'void ab initio' doctrines.

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[9] On the foundations of the doctrinal treatment in private law, and its challenges in grappling with the conceptual issues, see: Paolo Gallo, 'Nullità ed Annullabilità (Diritto Comparato)' in Rodolfo Sacco (ed), *Digesto delle Discipline Privatistiche: Sezione Civile* (Utet Giuridica 2018) 261ff; Phillip Hellwege, 'Invalidity' in Jürgen Basedow and others (eds), *The Max Planck Encyclopedia of European Private Law* (Oxford University Press 2012); Jaap Hijma, 'The Concept of Nullity' (2016) 30 Bw-Krant Jaarboek ; Serge Gaudet, 'Inexistence, Nullité et Annulabilité du Contrat: Essai de Synthèse' (1995) 40 McGill Law Journal 291; Claude Renard and Edouard Vieujean, 'Nullité, Inexistence et Annulabilité en Droit Civil Belge' (1962) Annales de Droit de Liège ; Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Clarendon Press 1996) 681-82; François Terré, Yves Lequette and Philippe Simler, *Droit Civil: Les Obligations* (Précis, 10 edn, Dalloz 2009) 156-57; among many others. There is an asymmetry between private and public law on this matter that is worth noting. The phenomenon of invalidating acts of authority is comparatively new. The notion of legal validity began its career in the field of private transactions and its conceptual framework was gradually extended to administrative and constitutional law. For a general comparative treatment in administrative law, see Gabriel Bocksang, 'Voidness and Voidability of Unilateral Administrative Acts in the Western Tradition' in Susan Rose-Ackerman, Peter L. Lindseth and Blake Emerson (eds), *Comparative Administrative Law* (Edward Elgar 2017). For constitutional law, see the references in fn 18, below.

[10] In some jurisdictions the term 'voidable' is associated to the proposition that the judicial ruling should be prospective, or that it encompasses some defects (or errors of law) and not others. Also, the term void is very frequently used as synonymous with voidable, both in statutory instruments and constitutional provisions, as well as in doctrinal scholarship. Finally, there is also a common distinction between 'absolute' and 'relative' nullity. In some jurisdictions these categories mean void and voidable, respectively, and in others they both mean voidable, but differ in the time limitation to challenge the act as well as the scope of the persons allocated standing.

The *voidable doctrine* holds that all products of defective (or incorrect) exercises of powers are valid but liable to be avoided—void*able.* The doctrine recognizes that juridical acts which produce effects, ie configure legal positions, have legal existence. In the main this doctrine is justified under the proposition that rendering an act void from its inception is unrealistic. Many defective acts are not evidently defective, and the coordination of social life would become impossible if all juridical acts would need to be checked before following them. The doctrine considers invalidation to be the normal remedy, but does not have a settled view on its temporal effects. It allows for both retroactive and prospective invalidation. The doctrine typically holds that the modulation of the temporal effects of an invalidation is based on the need protect certainty, administrative efficiency, and avoid legal gaps and financial chaos, among other considerations.

The *void ab initio doctrine* holds that all products of defective (or incorrect) exercises of legal powers are invalid from their inception. Courts must therefore annul the act, with retroactive effects, and the annulment is merely declaratory of a pre-existing reality. Strictly speaking, therefore, the word 'nullification' is a misnomer.[11] There are two ways in which this doctrine is typically justified. One is that voidness should follow as a matter of moral principle. This justification is commonly deployed in administrative law, the rationale being that giving legal effect to the ultra vires activity of public officials would violate the demands of the Rule of Law and other morally significant values that legal systems should pursue.[12] Another way is to hold that invalidity follows as a logical entailment. There is more than one form to present this idea. A widely influential

[11] The point is insightfully noted in Christopher Forsyth, 'The Rock and the Sand: Jurisdiction and Remedial Discretion' (2013) 18 Judicial Review 360 374 fn52.

[12] See, for example, Paul Craig, *Administrative Law* (Ninth edition. edn, Sweet & Maxwell 2021) 24-011. See also Nadhamuni Veena Srirangam, 'Suspending Invalidity While Keeping Faith with Nullity: An analysis of the Suspension Order Cases and their Impact on our Understanding of the Doctrine of Nullity' (2015) Public Law 596 597-98.

account, developed in the judicial decision that is said to have founded the power to review legislation in the modern era, is found in *Marbury v Madison*. In Chief Justice Marshall's words, an unconstitutional law is entirely void and not a law. The logical reasoning can be reconstructed as proposing the following train of thought: the Constitution is superior to legislation; any statute contrary to the Constitution is void; if a law is void, it lacks binding force, and it must not be enforced.[13]

The foregoing is a characterization of the doctrines as archetypes. As a matter of fact they are sometimes combined. In the law of contracts it is uncontroversial to say that some defective ('vitiated') contracts are void ab initio and others—most of them—voidable.[14] The choice for a doctrine is less settled in the field of public law. In German and Spanish administrative law, for example, the general view is that some few and grave defective ('unlawful', 'illicit') acts are void ab initio and the rest are voidable,[15] whereas in English law some scholars advocate for the void ab initio doctrine[16] and others for the voidable doctrine.[17] In German constitutional law the declared view is that an 'unconstitutional' statute is void ab initio, in Austria the orthodoxy is the voidable doctrine, and in the United States the issue does not seem to be entirely settled.[18]

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[13] *Marbury v Madison* 5 US 137 (1803) 177-78. See Carlos Nino, 'A Philosophical Reconstruction of Judicial Review' (1992) 14 Cardozo Law Review 803ff; Michel Troper, 'Marshall, Kelsen, Barak and the Constitutionalist Fallacy' (2005) 3 International Journal of Constitutional Law 24 26-29.

[14] For comparative treatment, see John Cartwright, *Contract Law: An Introduction to the English law of Contract for the Civil Lawyer* (Fourth edn, Hart Publishing 2023) Chapter 7; Birke Häcker, *Consequences of Impaired Consent Transfers: a Structural Comparison of English and German Law* (Hart Publishing 2013) Chapters 3-6; Konrad Zweigert and Ulrich Drobnig, *International Encyclopedia of Comparative Law* vol VII (Brill|Nijhoff 1982) Chapter 11.

[15] Mahendra Singh, *German Administrative Law in Common Law Perspective* (Springer 2001) 82; Eduardo García de Enterría and Tomás-Ramón Fernandez, *Curso de Derecho Administrativo*, vol 19th (Civitas, Thomson Reuters 2020) 667ff.

[16] Eg Craig, *Administrative Law* 24-001ff.

[17] Eg David Feldman, 'Error of Law and Flawed Administrative Acts' (2014) 73 Cambridge Law Journal 275; Thomas Adams, 'The Standard Theory of Administrative Unlawfulness' (2017) 76 Cambridge Law Journal 289.

[18] For comparative treatment, see Mauro Cappelletti and William Cohen, *Comparative Constitutional Law: Cases and Materials* (Bobbs-Merrill 1979) 96, 100-01; Patricia Popelier and others, *The*

Combining the two approaches seems to work in the law of contracts, but less so in the field of administrative and constitutional law. Participants of the practice may profess a theoretical preference for the void ab initio doctrine, but the picture is quite different on the plane of practice. In fact the void ab initio doctrine rarely applies in the practice of administrative and constitutional adjudication. Most administrative decisions and statutes are deemed valid until avoided, and the retroactive effects of a judicial nullification are commonly subject to exceptions. The neat logic of the void ab initio doctrine seems to be defeated in practice, and its application ends up closely resembling the voidable doctrine. This fact is acknowledged in a well-known statement in English administrative practice according to which an unlawful act is 'theoretically void, yet functionally voidable'.[19]

What are the merits of these doctrines? Both doctrines have flaws. The void ab initio doctrine, as the quoted statement straightforwardly acknowledges, seems to be right in theory but wrong in practice. This is a serious weakness: for the point of a legal theory is, at least partly, to account for practice, not run against it. Acts which the doctrine calls void do seem to have a real existence, an existence which the doctrine, in theory, denies. When the doctrine is applied in practice those who hold it adds exceptions, stating that some recognition of the existence void juridical acts must be acknowledged. Yet no theoretical justification for this move can be made coherent with the doctrine's premises.

Effects of Judicial Decisions in Time (Interestitia 2014); Paul Yowell, 'The Negative Legislator: On Kelsen's Idea of a Constitutional Court' in Martin Belov (ed), *Courts, Politics and Constitutional Law: Judicialization of Politics and Politicization of the Judiciary* (Routledge 2019); Gerard Hogan, 'Declarations of Incompatibility, Inapplicability and Invalidity: Rights, Remedies and the Aftermath' in Kieran Bradley and others (eds), *Of Courts and Constitutions: Liber Amicorum in Honour of Nial Fennelly* (Hart Publishing 2014).

[19] Christopher Forsyth, '"The Metaphysic of Nullity' Invalidity, Conceptual Reasoning and the Rule of Law' in Christopher Forsyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (Oxford University Press 1998) 143.

The voidable doctrine, in turn, seems to more aptly fit the facts, but it does not account for the varieties of remedial responses that legal systems exhibit, such as delayed declarations of the invalidity of administrative decisions and statutes, non-binding declarations of invalidity of statutes, or the rectification of the terms of a contract, among others. While intuitively more accurate in description, the voidable doctrine does not have a developed account of the ontological status of defective juridical acts. As the English example indicates, the doctrines lack a clear and distinct view on this. A fully fledged theory of its operative concepts, especially existence and validity/invalidity is lacking.

Not much aid is found when stronger conceptual foundations are sought in the canon of contemporary jurisprudence. Hans Kelsen, HLA Hart, and Joseph Raz have developed the general structure within which thinking on legal validity is carried out today.[20] While these theories cover a range of central issues, little attention has been devoted to the invalidity question as such. Indeed, it has been rarely thematized as a distinct topic.[21] The void ab initio and voidable doctrines are largely the product of judicial developments subsequently systematized by doctrinal scholars. The issues raised by the invalidity question, in other words, have not been a primary concern for most of the participants of legal practices whose task is to elucidate and refine the

[20] For this diagnosis, see Maris Köpcke, *Legal Validity: The Fabric of Justice* (Hart Publishing 2019) 12.

[21] For a synopsis of the canon, noting this absence, see Paolo Sandro, 'Unlocking Legal Validity: Some Remarks on the Artificial Ontology of Law' in Pauline Westerman and others (eds), *Legal Validity and Soft Law* (Springer International Publishing 2018) 112-17. Sandro rightly observes that European legal philosophers have been long aware of the problem. In Anglo-American legal circles the question has begun to emerge as a by-product of the debate between 'inclusive' and 'exclusive' legal positivists (see Wil Waluchow, 'Four Concepts of Validity: Reflections on Inclusive and Exclusive Positivism' in Matthew Adler; Kenneth Einar Himma (ed), *The Rule of Recognition and the US Constitution* (Oxford University Press 2009) 138-41; Matthew Grellette, 'Legal Positivism and the Separation of Existence and Validity' (2010) 23 Ratio Juris 22). Although raising awareness of the problem is to be welcomed, these approaches, I will argue, are in an important respect misguided.

conceptual equipment employed by lawyers, judges, and doctrinal scholars.[22] This fact may explain why the conceptual apparatuses on the invalidity question remain in an under-developed state.

Now it is important to have a precise diagnosis of the gravity of the problem. That a practical problem poses conceptual difficulties does not necessarily hinder practice. Legal thinking and acting are practical. As the Romans jurists well knew, what is required to arrive at just solutions is more a sufficient measure of practical wisdom than a perfectly worked out system of thought.[23] This truth, however, is compatible with the equally true claim that a sound and coherent conceptual apparatus can enhance legal practice. The complaints in English administrative law I have alluded to are a case in point. This is a primary motivation to undertake this DPhil project.

I will focus less on doctrinal developments and more on philosophical analysis. The purpose is to acquire a deeper grasp of the relevant phenomena at a higher level of abstraction, and thus to understand the invalidity question in general terms, not exclusively tied to a particular domain of legal practice (contracts, marriages, wills, administrative decisions, statutes) or a jurisdiction. My aim is to develop the theoretical foundations for an answer to the invalidity question which can apply to any jurisdiction and any area of law.

The contribution of this project is thus twofold. It attempts to clarify theoretical issues surrounding the invalidity question by developing a general conceptual framework. In so doing, the framework can be applied to legal practice and enhance

[22] On how philosophical analysis operates within a practice, and contributes to shape it, I follow Charles Taylor, 'Social Theory as Practice', *Philosophical Papers*, vol 2 (Cambridge University Press 1985).

[23] The Romans lacked a systematized framework on the invalidity question: see Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* 679-82. On the pragmatic and non-systematic character of the Roman jurist, see Peter Stein, *Regulae Iuris* (Edinburgh University Press 1966) 47-49.

the reasoning processes that courts are challenged with in settling how to respond towards defective exercises of legal powers.

3. Outline

Within the contemporary canon of jurisprudence only Kelsen and Eugenio Bulygin have devoted direct attention to the invalidity question. Their answers can be rendered to furnish the voidable doctrine with stronger conceptual foundations. I begin by examining these answers in Chapter II. They are sound in some respects but fail in others. Bulygin's proposal derives from Kelsen's and is largely based on his presuppositions. While both answers differ to some extent, they are structurally similar. I contend that they suffer from similar flaws and therefore deserve joint treatment. I will focus particularly on how their methodological commitments to a value-free theory, based on a scepticism of the objectivity of moral value, shape their views on the invalidity question. For this reason, an exposition of the main tenets of their general theories will be necessary to grasp the core of their views. Such a characterization of Bulygin's views on validity has not been developed yet, whereas for Kelsen's theory there is abundant secondary literature. Nonetheless, the examination I offer, because focused on matters of method, is to some extent novel and can contribute to that literature.

After explaining Kelsen's and Bulygin's answer to the invalidity question, in Chapter III I argue that they fail in three ways. They are descriptively inaccurate and explanatorily weak, and they lack an account of what it is for a legal norm to exist. The chapter is devoted to explaining these failures in light of their methodological

commitments. The aim of these two initial chapters, which constitute Part One of this thesis, is to learn from their shortcomings, and I conclude by charting a path forward.

The main feature of that path is the deployment of an entirely different method, a value-engaged method, as we may call it, according to which legal techniques—crucially the techniques of validity and remedies—are artefacts designed for moral purposes. This insight, which the existing answers largely lack, is the structuring dialectic of Part Two, which contains my proposal. I will not justify the theses that legal methodology must engage with moral values and that moral values have an objective standing. There is no need to invent the wheel on this matter, so I will rely on arguments advanced in our days, through somewhat different routes but in largely convergent ways, by John Finnis and Raz. I will assume, in other words, the truth of the idea that law is an institutionalized means at the service of moral values. Cognition and identification of those values has explanatory priority: by attending to them can institutions be understood, evaluated, and designed.

In Part Two, one chapter builds on another. The account is cumulative and sequential. Since the notion of validity signals juridical acts that legally exist, and legal existence involves the notion of binding force, I first explain the ideas of legal existence and binding force, and how they relate to each other. That will be the aim of Chapter IV. The core of my argument is that juridical acts come into and remain in existence by an inter-action of two different movements. The first movement is the exercise of a legal power, an event introduced into the world that attempts to succeed in configuring legal relations. To that event a political community, or a segment of that community, may react either by recognizing that attempt to succeed or by withholding such recognition.

To explain this inter-action, which I term 'action and reaction in the law', I employ John Searle's theory of institutional reality, traces of which can be found in Hart's account of the existence of social rules and his idea of the rule of recognition. Specifically, then, I argue that juridical acts are institutional facts that exist because and in so far as recognized (assigned, ascribed, accepted) to perform the institutional function of configurators of legal positions (rights, duties, powers, permissions, etc.). A defective juridical act, therefore, can exist if the community recognizes it to exist. Legal existence, in short, is the result of the choice of a community. Action and reaction in the law are the necessary and sufficient conditions for the existence of juridical acts.

It is morally desirable that persons exercise their powers in the manner established by law. A political community thus has reason to confer legal recognition on exercises of powers that meet the relevant validity criteria. In Chapter V I explain the nature of that moral desirability. I argue that the allocation of powers, and the conditions that the law fixes to exercise them, realize requirements of distributive and commutative justice. The enterprise of norm-generation is just when validity criteria are themselves just. Validity conditions are internal criteria of correctness, but their correctness depends on their correspondence with an ulterior set of moral norms and human goods. Validity criteria, when just, can secure to a large extent that action in the law is generally just. I argue that power-holders are normally under a moral obligation or duty to correctly (non-defectively) exercise their powers. This is how persons should *act in the law.* I explain this duty under the heading of what I call the 'principle of responsibility', which, I argue, is in fact a legal principle, embedded in current legal practice. So the moral duty is also a legal duty. An important implication of the argument of Chapter V is that a breach of the duty imposed by the principle of responsibility—an incorrect exercise of a legal power—is normally an injustice.

Throughout, I focus on the operation of the central case of a legal system. Dysfunctional systems are excluded from my analysis. Therefore I will set aside the question of how unconstitutionally, 'revolutionary' created constitutions, as Kelsen and Bulygin would call them, come into existence. While this phenomenon gives rise to interesting questions, it constitutes a peripheral instance of the phenomenon I propose to provide an answer to. Peripheral instances can be assessed by reference to central or paradigm instances. Thus, by extension my answer to the invalidity question can inform our understanding of those questions.

The fact that validity criteria can largely secure justice in norm-generation provides a reason for the community to confer recognition on juridical acts produced by a correct exercise of legal powers. Conversely, if the criteria are not met, that fact may provide reason to withhold recognition. In Chapter VI I argue that the community is normally under a duty to confer recognition if the criteria are met; but they are not always under the converse duty if the criteria are not met. In other words, the community is not always under a duty to withhold recognition from defectively formed juridical acts. This latter claim—that a defective juridical act can be conferred legal recognition—is a crucial aspect of my account. This is how they can be said to genuinely exist. The justification of the claim lies in the thesis that justice in norm-generation is but one aspect of the common good, and it is not a moral absolute. Other values constitutive of the common good include certainty in legal relations, trust between persons and in institutions, action in good faith, speed in the operation of markets, administrative efficiency, avoidance of legal gaps and financial chaos, among others.

To advance these values a community may be justified in conferring provisional or definitive legal recognition on defectively created juridical acts. Incorrect exercises of powers are a morally undesirable state of affairs. The way out, as it were, is sub-

optimal, and thus a trade-off becomes necessary. The institutional decision to make that trade-off, by deciding which defective juridical acts, and under which specific circumstances, ought to be conferred or withheld recognition must result from a careful balancing of the competing values and goods.

I then move to show that the notion of legal validity is best understood within this broad scheme. Specifically, I argue that ascriptions of validity and invalidity serve as an institutionalized means to channel the act of conferring or withholding legal recognition. This idea, of validity-as-an-institutionalized-means, partly builds on Maris Köpcke's recent theory of legal validity, according to which legal validity and invalidity are a pair of techniques employed for the moral end of coordinating social interaction. I also further develop certain aspects of her account. I show that, for coordinative reasons, it is morally desirable to refer to defective but binding juridical acts as legally valid. I also argue that the existence of defective juridical acts does not require talk of degrees of validity: there are moral reasons to prefer the binary vocabulary of validity/invalidity.

I have said that juridical acts come into existence by means of an action, an exercise of powers, and a reaction, a conferral of legal recognition. Ascriptions of legal validity, in summary, are a primary means by which persons *react in the law*. In their central case, the function of rules on voidness and voidability is to direct the community to react in a just manner. In developing the ideas contained in this chapter I show connections with current conceptions of validity, such as those of Hart and Raz. Overall, this DPhil thesis will provide a general synopsis of the current legal philosophy on legal validity.

The validity of a defective juridical act may be defeated. Courts may be morally justified in invalidating a defective (but) valid juridical act. However, and this is also a crucial claim of my account, justice may require that such an act be reacted against through other remedial techniques, such as those listed in section 1, above. Remedies are an additional institutionalized means of *reaction in the law*. Chapter VII develops this thesis and argues that remedies are a separate technique. They satisfy distinctive requirements of justice. Remedies are not logically necessitated by the fact that a juridical act has been found defective. Defectiveness does not conceptually or logically entail invalidity. If there were such an entailment it would be moral, but strictly speaking there is no necessity, for the existence of the defect does not automatically dictate the remedy.

A central claim that Chapter VII seeks to substantiate is that remedies are a technique to correct the injustice caused by an incorrect exercise of powers. The remedy must be fitting, or appropriate, to correct the injustice, and this explains the need for a flexible set of remedial reactions, sensitive to the contingent facts and specific requirements of justice at play.[24] In short, and this is where the void and voidable doctrines fall short, there is no one way to react against the incorrect exercise of a legal power, and it may be morally right for judges to be empowered to exercise discretion, as shown by sound actual adjudicative practices. To flesh out these claims I undertake a comparative examination of prominent civilian and common law jurisdictions, using examples from contract, administrative, and constitutional law.

[24] For example: the moral weight of the violated validity criterion; the strategic importance of the defect in relation to the purpose of the adoption of the juridical act; the salience of the defect; the nature of the power-holder; the time during which the act actually governed the community; the expertise and institutional capacity of courts to deal with complex technical information; and the number of persons, legal norms, and states of affairs affected by, or that came into existence under, the government of the impugned juridical act.

In Chapter VIII I conclude by stating the main claims of my account. To tie the threads of the foregoing exposition of the chapters I can summarize my proposal to answer the invalidity question as follows. Juridical acts exist if persons choose to recognize them to exist. Powers are allocated to persons, and conditions are laid down for their exercise, to secure that *action* in the law be just. A legal system can secure a just *reaction* in the law by imposing a duty on the community to confer recognition on justly created acts (normally when created in the established way).

Legal validity is a technique to express the act of recognition and to signal the existing juristic act. The signalling function of validity is coordinative. An all-things-considered moral judgement ought to be carried out to determine what to do in the face of a defective attempt to configure legal relations. It is for the political community to settle the course of action, and it may do so through its constitution, legislation, or the jurisprudence of courts. Modern jurisdictions typically use a combination of the three, albeit not always.

Two questions must be sharply distinguished: one is whether the power has been correctly or incorrectly exercised, the other is how to correct injustices that arise from defective exercises. The particular circumstances of the case, and the relevant considerations of justice involved, may yield the conclusion that imposing a remedy might be worse than the disease. In this case courts must be disabled from granting a remedy. If, alternatively, the all-things-considered judgement is that some remedy must be granted, a duty may be imposed on courts to grant a remedy, and (depending on the facts) if the injustice may be corrected by more than one means, discretion should be conferred on courts to select the appropriate remedy.

As a general rule there is a moral duty to confer recognition on a defective act, either defeasibly or indefeasibly. Here lies the wisdom of the voidable doctrine. Very exceptionally there is a moral duty to completely withhold recognition of a defective act from its inception. The common good may require, in other words, that some juridical acts be deemed void ab initio. The void ab initio doctrine errs in universalizing this claim. A further, and fatal, flaw of this doctrine is that it proposes that validity and invalidity are conceptual or logical entailments. Ascriptions of validity and invalidity are, in truth, a moral choice; and so is the remedy designed to correct the injustice.

4. Scope

This DPhil thesis proposes a conceptual structure for how to think about the invalidity question. It does so relatively abstracted from the particulars of the operation of each jurisdiction and area of law. The reason to undertake a project of this kind lies in the benefit of contributing to a *general* theory of the validity and invalidity of juridical acts. This approach is justified, as I have remarked, because few such attempts have been produced, and they have not entirely succeeded.

I have drawn a distinction between doctrinal and philosophical theoretical activity, and observed that the invalidity question has mostly been a matter of concern for doctrinal scholarship. Among the many assets of doctrinal analysis is the proximity to the facts and details, especially of the case law, which vividly displays the issues in the flesh. Doctrinal analysis also contributes quite directly to improve judicial practice. There are also disadvantages to this mode of inquiry. Too proximate an analysis lacks a bird's-eye view of the general treatment across different jurisdictions and areas of law. Doctrinal approaches are also limited in a sense by their object—legislation, the

jurisprudence of courts—and must thus deal with categories and conceptions as they are presented in the specific practice they study.

A philosophical examination, like the one I propose to undertake, is less limited in this respect, as it enjoys a larger freedom to detach itself from the current operations of a practice. It can legitimately examine a practice with one foot in and one foot out, as it were. Since my focus is on fundamental legal notions, rather than an examination of how specific jurisdictions address the questions, and since it is general in scope, covering private and public law, I attempt to maintain a careful balance between detail and synthesis, on the one hand, and abstraction and concrete examples, on the other. Reasons of pertinence, space, and time preclude inquiring into the details of the case law.

Finally, observe that the answer I propose will be both familiar and novel. Familiar in that it incorporates much of the practical wisdom there is in legal practice, as it attempts to track and make theoretical sense of the lawyerly practical common sense. The views on legal existence, validity, and remedies I develop build on theses that are more or less known in contemporary jurisprudence and social ontology. These theses were put forth by theorists who belonged to different traditions. The novelty of my proposal lies in articulating them as a coherent whole, while introducing certain relatively new key ideas on legal ontology, validity and the distinctiveness of remedies.

II. TWO ANSWERS

1. Introduction

Part One of this DPhil thesis exposits and criticizes two of the most complete philosophical answers to the invalidity question available today. I will do that in this and the following chapter. The answers, which I shall henceforth refer to as the 'received answers', form part of general theories of law. The theories are general in their scope, as they provide a framework to explain law as a general phenomenon. They are also highly systematic in character, as their constitutive elements—presuppositions, concepts, technical distinctions, and so on—cohere together as a unit, a single whole. One virtue of both Kelsen and Bulygin as thinkers, among many, is the consistency with which they answered a vast array of questions. At all times they strove for methodological rigour to the smallest detail. The invalidity question is a paradigmatic instance of this effort.

Like most theories of law produced in the 20th Century, they were developed with a most sharp awareness of the need for a sound methodology, which was explicitly articulated as capable of meeting what many considered to be a basic requirement of any endeavour in the social sciences: to explain by means of description, not evaluation. Freedom from value was, on their view, a necessary feature of any attempt to engage in scientific inquiry proper. The value-free method is based on the metaethical presupposition that human goods and moral norms lack truth-value. Kelsen and Bulygin held that assertions of goods and norms are expressions of interests or feelings, mere subjective views which do not refer to any objective property or fact about the

world. Now they both did believe that there is an objectivity to legal phenomena—even if law is, as they both held, interwoven with values and evaluations. We may say that they aimed to be cognitivists about law and non-cognitivists about morality. To that end they elaborated a set of sophisticated and complex conceptual frameworks which attempted to construct a demarcation between law and morality.

I place emphasis on methodology because it informs the received answers in crucial respects, such that attention to it provides a key to understand their failures. The aim of this chapter is to assess these answers under that light; in the next chapter I offer a critique. For ease of exposition I will name each theory after their method. Kelsen aimed to 'purify' an understanding of the normative nature of law from what he considered to be extraneous elements, thereby rendering an account of legal (normative) force not reducible to sheer facticity, on the one hand, nor equivalent to a moral force, on the other. Bulygin's method, in turn, involved cleansing legal theory by way of a 'rational reconstruction', or 'explication', of legal reality. I will refer to Kelsen's account, as he himself did, as the Pure Theory, and to Bulygin's account, as he himself did not, as the Reconstruction Theory.

Recall that the invalidity question is constituted of two elements. One is the question of the status of a legal norm produced by an incorrect (defective) exercise of powers; the other is what, if anything, ought legal systems do upon the advent of an incorrect exercise of powers. The structure of this chapter is straightforward: sections 2 and 3 exposit the answers provided by the Pure and Reconstruction theories, and section 4 concludes.

2. The Pure Theory

The first step to understand a thesis is to identify the question it seeks to answer. We are fortunate that Kelsen was clear about his motivations, which he explained with characteristic precision. However, he wrote extensively, on a vast array of topics, and throughout a seventy-year career span modified the Pure Theory in ways not always explicitly acknowledged.[1] These facts make an exhaustive and coherent account of Kelsen's thought a significantly difficult task, as all readers of Kelsen are well aware of. That is not my aim, however, as our focus is only on Kelsen's answer to the invalidity question and the general conceptual apparatus out of which it is articulated.

The substance of that framework was developed in what is considered to be the 'classical' statement of the Pure Theory;[2] and, to the best of my knowledge, it was not modified in Kelsen's last, posthumous book, in which he revised other aspects of the Pure Theory.[3] For this reason I will mostly but not exclusively rely on the texts which make up the classical statement of the Pure Theory. These are *General Theory of Law and State* and the second edition to the English translation of *The Pure Theory of Law*. In this section I begin by addressing the question that Kelsen's general theory attempted to provide an answer to. Understanding the nature of that answer will supply the necessary insight to grasp the Pure Theory's concepts of legal validity and legal system. That in turn will equip us to understand the nature of his answer to the invalidity question.

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[1] See Michael Hartney, 'Introduction: The Final Form of The Pure Theory of Law' in Michael Hartney (ed), *General Theory of Norms* (Oxford University Press 1991) ix-x.

[2] Stanley Paulson, 'Four Phases in Hans Kelsen's Legal Theory? Reflections on a Periodization' (1998) 18 Oxford Journal of Legal Studies 153 159-61; Hartney, 'Introduction: The Final Form of The Pure Theory of Law' x-xi.

[3] Kelsen refers very briefly to his answer to the invalidity question without adding any modification in Hans Kelsen, *General Theory of Norms* (Oxford University Press 1991) 125, 248-49. Two well-known revisions of the Pure Theory are the admission of the possibility of conflict between norms and the characterization of the basic norm as a fiction. The latter thesis does not affect our inquiry; I will address the former in Chapter III.3

2.1. The Problem

There is a plight at the centre of Kelsen's thought. His writings show a permanent struggle with a tension at the heart of the subject-matter of legal theory. Legal theory is a science about persons, that is of political communities who decide to be ruled by law and take action in order to establish and administer legal institutions. Yet Kelsen thought that it is not possible to fully grasp the nature of action. The opening insight of Kelsen's legal thought is that law is, as he frequently expressed, a technique for social ordering. Now a distinctive feature of ordering through legal norms is the motivation of conduct. Since law aims to guide action, and action is in some sense veiled to human understanding, it follows that there are inevitable constraints on the prospects of a theory about law. Kelsen's whole enterprise can be understood as an attempt to develop a theory within such constraints.

To provide an ordering in political communities law has to move persons in a certain direction. Statutes, administrative acts, private transactions, and so on move persons to act in a way which Kelsen termed 'normative'. He observes that normative causation of movement must be contrasted with 'causal' origination of movement, which does not involve agency. If a person is pushed by another the movement is caused by the exerted physical force. If a person instructs another to move, and the instructed person moves because of the instruction, the cause of the movement is the person's choice to move, informed by the instruction. The person's choice to move is caused by the prospect of realizing a value in following the instruction. The instruction is what, by

analogy, exerts the force, thereby causing, by way of motivation, the person to gravitate towards a particular direction.[4]

Inspired by Hume Kelsen conceived reality to be divided into two completely separate worlds: the world of fact ('is') and value ('ought').[5] This distinction Kelsen took to be self-evident.[6] An aspect of this division is the impossibility of deriving an ought-proposition from an is-proposition. Kelsen coupled this thesis on the division of reality with a thesis about the cognition of facts and values. Cognition of movement, physical and normative, is according to Kelsen the linking of causes with effects. Kelsen's view seems to be that inquiries on physical causation have the dignity of a science because causal movement is factual, and facts can be sensed, and sensation provides enough evidence to serve as the basis of objective assertions about reality, which bear truth value because verifiable.[7] Cognition of causal movement is the subject-matter of the natural sciences, which the 'positivist' tradition in the social sciences more generally has regarded to be the paradigm form of science.

The kind of certainty that the scientist can acquire in the realm of facts is not attainable in the realm of values. Kelsen thought that it is not possible to have a rational understanding of the values by virtue of which persons seem to be moved to act. 'Truth', Kelsen says, 'means conformity with reality' and values do not form part of our experienced reality.[8] Indeed, frequently Kelsen reserved the term 'reality' to refer only to the realm of the factual. Talk of values is neither true nor false because they cannot

[4] I am elaborating upon the discussion in Hans Kelsen, *Pure Theory of Law* (Lawbook Exchange 2005) Part III, especially 70, 75-82, 94-95. For Kelsen's views on the relation between motivation and free will, see 91-99, and Hans Kelsen, *What is Justice?* (University of California Press 1971) 345-47. The details of Kelsen's metaethics lie beyond the scope of the present exposition.

[5] For some observations on Hume, see Kelsen, *General Theory of Norms* 86.

[6] See ibid 65.

[7] See Kelsen, *What is Justice?* 350-51.

[8] ibid 351. For Kelsen's views on cognition of values, see more generally ibid chapters 1, 8 and 13.

be verified. Moral assertions do not bear truth-value: they are subjective expressions of interests or feelings. Because there is no objectivity to values it follows that they cannot not be the subject of 'scientific' inquiry.

Kelsen's predicament therefore is that the understanding of normative phenomena involves the understanding of action, but action is in a sense beyond the grasp of science. Yet it is a basic feature of law, a feature in need of explanation, that it does exert a kind of force on persons which is not causal, a particular kind of force he called 'binding'. Kelsen's ambition was to develop a 'normative science' of law, one which could engage in some sense with its normative force. Such a science is to be contrasted with empirical sciences, those that only engage with facts, like sociology, psychology, history, and ethnology.[9] If a normative science of law is to succeed it must be able to provide an account of the particular kind of force which law exerts while withholding from inquiring into whatever it is that motivates action. How is this possible?

Kelsen held that the condition of possibility is to *presuppose* that the act of following a norm involves the attainment of a value. More specifically, the theorist assumes, in the form of a hypothesis, a working postulate, that the 'legal ought' represents a value. The theorist, in other words, presupposes that persons obey a norm because they regard such an act to be 'right' or 'just'.[10] To build a theory by way of a presupposition is, by Kelsen's own admission, a 'self-imposed' limitation,[11] but a necessary one if values are to be excluded from legal cognition. Such is the core of what

[9] See ibid 330-31.

[10] Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1949) 394. See further Kelsen, *Pure Theory of Law* 217-20; Kelsen, *What is Justice?* 352-55. Kelsen terms these presupposed values 'formal' to distinguish them from the notion of genuine or 'substantive' values—a kind of value, to repeat, which cannot be scientifically grasped. Formal values are always 'relative' to a positive system of law: the need to presuppose them arises, as we will see, only within a by and large efficacious legal system.

[11] Kelsen, *General Theory of Law and State* 396.

Kelsen meant by providing a 'value-free' theory. He also claimed that such is a main tenet of legal positivism, the school of thought he inscribed himself in. This methodological starting point establishes the foundations for his account of legal validity and legal system.

2.2. Legal Validity

To develop a theory of law which assumes, rather than ascertains, the normative force of law Kelsen recurred to Kant. From the outset it must be noted that Kelsen regarded Kant's practical philosophy to be unscientific because it confused the worlds of is and ought.[12] The sound insight to be taken from Kant lay instead in his epistemology. There is debate among scholars on the details of Kelsen's Kantianism.[13] For our purposes it will suffice to understand it in broad outline. I take the core of the idea to be a blend of Humean-inspired moral scepticism, as explained above, and Kantian idealism, as I now turn to explain.

Kant argued that the world is intelligible through concepts which are independent from and prior to experience. Knowledge obtains when our intuitions conform to those 'pure concepts' or 'categories'. These concepts allow us to 'convert the raw materials of sensible impressions' into knowledge.[14] Only a metaphysics that accounts for such pure concepts can follow, to use a recurrent expression of Kant, the secure course of a science.

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[12] See Kelsen, *General Theory of Norms* chapter 18.

[13] For discussion, see Eric Voegelin, 'Kelsen's Pure Theory of Law' (1927) 42 Political Science Quarterly 268; Stanley Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law' (1992) 12 Oxford Journal of Legal Studies 311; Richard Tur, 'The Kelsenian Enterprise' in Richard Tur and William Twining (eds), *Essays on Kelsen* (Clarendon Press 1986); Iain Stewart, 'The Critical Legal Science of Hans Kelsen' (1990) 17 Journal of Law and Society 273 277-78; Gustav Bergmann and Lewis Zerby, 'The Formalism in Kelsen's Pure Theory of Law' (1945) 55 Ethics 110.

[14] Immanuel Kant, *Critique of Pure Reason* B1; see also A93-93/B126.

Kelsen adapted this thesis as follows. The knowledge of the given, of that which empirically appears to us in legal enactments and exercises of legal powers, and so on, is grasped under the aspect of being, and thus made intelligible *as* a legal entity, by presupposing that it represents a value which moves the will to act. Pre-theoretically, we have seen, the legal ought motivates action; it exerts a force because it represents a value and persons are moved to act because of the realization of a value. In the *theoretical* sense, by contrast, the legal 'ought' is an epistemic assumption, an hypothesis or postulate through which legal force is intelligible.

The realm of normativity or the ought, in Kelsen's scheme, is the realm of epistemic postulates. Thus Kelsen says that 'the term "ought" has not [in the Pure Theory] its usual moral, but purely a logical meaning. It designates, like causality, a category in the sense of Kant's transcendental logic'.[15] The concept Kelsen stipulates to denote the legal ought is 'legal validity'. Legal validity is like a pure concept of understanding, a category, which is necessary to make sense of our legal experiences. To say that a norm is legally valid is to say that it is legally existent. Legal ought, legal existence, binding force, and legal validity, are synonymous ideas.[16]

The intellectual exercise by which the grasp of normativity is carried out is what Kelsen called a 'scheme of interpretation'. The 'meaning' of an utterance, say, by which a legislator enacts a statute (an 'external manifestation of human conduct': an 'is'), which lies in the realm of causality, is understood to be a norm by interpreting the utterance to be an 'act of will' through which an authority directs (commands, permits, authorizes) persons towards a particular direction. This exercise makes a merely factual event a norm.[17] The scheme of interpretation turns the whole complex of given

[15] Kelsen, *What is Justice?* 363.
[16] For the relevant passages, see Kelsen, *General Theory of Law and State* 434-38, 444-46.
[17] Kelsen, *Pure Theory of Law* 2-4.

empirical data, the 'historical-political reality' we call legal systems, that 'claim to be legal acts', into oughts.[18] Our sensory experience of legal materials is structured and organized, and therefore made sense of, but only hypothetically, as justified coercion. The scheme of interpretation is the intellectual exercise that constitutes Kelsen called the 'legal point of view'.[19]

Kelsen's notion of a legal norm is thus roughly the following. The legal ought—a prescription for action whose binding force is presupposed—is contained in the utterance, written or verbal, by which persons exercise a power, which Kelsen's calls an act of will. A norm includes operative facts and normative consequences attached to the obtainment of those facts. The structure of a norm is a link between facts and legal consequences. Legal norms are described in the form of hypothetical statements. The statements are formulized thus: 'it is the case that in this legal system there is a rule that prescribes that if x (a specified set of facts) obtains then y (a specified consequence in the form of a sanction) ought to follow'. These are 'ought' statements in the sense that they refer to a prescription, posited by an authority, but are not themselves the prescription.[20] The legal consequence is a punishment. Kelsen famously took coercion to be central to the concept of law. This aspect of Kelsen's theory is not relevant to our purposes. What is worth emphasizing is that coercion is not understood here as a factor that motivates action: for that would involve inquiry into the nature of motivation, which would require entering the forbidden territory of agency. Rather, coercion is understood descriptively, as it were, in the sense that the Pure Theory simply asserts that it is in fact

[18] Kelsen, *General Theory of Law and State* 436-37. See also Hans Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* (Clarendon Press 1997) especially 23-26, 57-63.

[19] See Kelsen, *Pure Theory of Law 70*; Kelsen, *General Theory of Norms* 27; Hans Kelsen, 'On the Basis of Legal Validity' (1981) 26 The American Journal of Jurisprudence 178.

[20] In this sense assertions of validity are 'verifiable' and thus apt of truth or falsity: Kelsen, *General Theory of Norms* 180-81.

the case that all norms are in some sense connected to a sanction. As Kelsen frequently expressed it, the sole focus of attention of a Pure theorist is the posited norm.

To summarize: Kelsen's concept of legal validity is composed of two elements. The first is that it signals the normative force of a norm; the second that its habitat lies in the realm of the epistemic postulate.

2.3. Legal System

Having examined Kelsen's account of legal validity we can now turn to his concept of a legal system. Crucial to Kelsen's thought is the idea of orderings as *systems*. The notion of system is so central to his mindset that Kelsen even characterized religions, which in a sense provide an ordering, as systems of norms. A system in Kelsen's view is a set of entities which exist as self-contained units. The idea of system is meant to capture two main features of law.

The first is that the binding force of law does not depend on any external source of normativity: legal systems are as it were normatively self-sufficient. At the basis of every legal system lies a presupposed 'basic norm'. The basic norm is the source of the normative force of all of norms of a legal system. The basic norm transmits[21] normative force to all positive norms. It is not the posited constitution; rather, the basic norm is the non-posited norm which commands persons to obey the posited constitution and all the norms created in accordance with its provisions. Under this conceptual scheme

[21] I take this useful term from Joseph Raz, *The Authority of Law* (2nd edn, Oxford University Press 2009) 310.

the basic norm is understood to be the unifying factor of all the otherwise diverse set of norms that form part of a legal system.

Secondly, the notion of system captures the idea that law operates reflexively. The law itself provides, intra-systemically, for the creation, modification, and derogation of its component norms. Legal systems, as Kelsen insightfully put it, regulate their own creation and application. The reflexive operation of legal systems explains the idea that the norms of the system are 'members' if created according to the conditions laid down by its norms, which in legal theory, since Hart, are commonly called 'validity criteria'.

Kelsen says: 'a legal norm belongs to this legal order only because it has been created in conformity with the stipulations of another norm of the order'.[22] This unity is commonly explained in terms of chains of reasons. The idea runs as follows. An administrative act, say, is binding and of this system because created in accordance with the validity conditions laid down in a statute. That statute must have been enacted in accordance with the validity criteria established in the constitution, which in turn must have been created as prescribed by a previous constitution. The regression stops at a 'historically first constitution' created in an unauthorized, 'revolutionary' way, or for a territory where no previous legal system existed. The basic norm, in sum, is the source of the normative force of a system. The basic norm thus gives the system its unity.

Now a necessary condition for a legal system to exist is that its norms be 'efficacious'. In the relevant sense of the term a legal system is efficacious when it is in fact able to secure the coercive ordering of human behaviour. Here we must note that Kelsen draws a technical distinction between the concepts of 'efficacy' and 'validity'.

[22] Kelsen, *General Theory of Law and State* 132.

Efficacy captures the sheer fact—an is—that a norm is by and large followed and applied; validity captures its normative force—an ought—which obtains by virtue of it being transmitted from the basic norm. The efficacy of the legal system he calls the 'condition' for the binding force of a norm, and the 'reason' for its binding force is the transmission of normativity from the basic norm.[23] The details of this distinction Kelsen does not explain and I will return to it in Chapter III.4.

2.4. The Answer to the Invalidity Question

I will structure the exposition of Kelsen's answer around the two components of the invalidity question: the question of the status (valid or invalid) of a defectively created norm, first, and the question about how courts should remedy this state of affairs, second.

Status

We have seen that Kelsen's theory proposes that law partakes both of the realm of the factual and of the postulate. The sense or way in which law partakes of each realm differs. In the order of the factual law exists as a purely empirical phenomenon, ie as efficacious; in the order of the ought it exists as a normative phenomenon, ie as valid. Since legal norms exist *qua* legally valid, assertions to the effect that an existing norm is 'invalid' or 'void' are contradictory in terms, oxymorons.[24] The *only* way for a norm to

[23] See Kelsen ibid 29-42; Kelsen, *Pure Theory of Law* 193-213; Hans Kelsen, 'Professor Stone and the Pure Theory of Law' (1965) 17 Stanford Law Review 1128 1139.

[24] See Kelsen, *General Theory of Law and State* 155.

be legally valid is by acquiring the normativity transmitted from the basic norm. That transmission must be uninterrupted, and it is interrupted when a norm is created in a way not provided by a superior norm, as Kelsen would put it, or, as we may put it, by an exercise of legal powers that does not meet all the relevant validity criteria.[25]

Now the life of the law is less neat than Kelsen's scheme, as outlined, reproduces. Many norms created by means of an incorrect or defective exercise of powers are regarded by the community to exert binding force. They are efficacious (followed, relied upon, and so on), and referred to as valid. Furthermore, it is also a fact that legal systems confer on courts the power to invalidate defective norms. Kelsen is thus confronted with a dilemma. On the one hand, legal norms are valid if and only if created in the form prescribed by law, yet, on the other, there are norms that exist without meeting that condition.

One consistent way out of this puzzle is to claim that defectively created norms are *also* in some sense authorized to exist. And this is the gist of Kelsen's answer. He postulates that every legal system contains a tacit clause which empowers persons to create norms by not meeting the relevant validity requirements. Central to Kelsen's answer is the idea that defectiveness does not entail inexistence (invalidity, voidness, nullity). Observe that, in structure, it is the exact opposite of the 'void ab initio' doctrine. We may well call it the 'valid ab initio' doctrine. In Kelsen's view a defectively created legal norm is only 'voidable' (ie 'valid until invalidated').

We should focus on two features of this answer. The first is that this tacit 'alternative clause', as I shall refer to it, empowers persons to exercise powers correctly

[25] Kelsen of course had the concept of legal powers (he referred to it as 'competence' or 'capacity') but when examining invalidity he mainly spoke of 'concordance' between 'higher' and 'lower' norms. The use of this vocabulary was a product of his interest in logical conflicts between norms.

and incorrectly without any restriction.[26] They can disregard *any* validity criteria, that is, proceed as however they see fit. For example, in jurisdictions which require legislation to be promulgated by the head of State, the tacit alternative clause would empower, say, members of the legislative assembly to promulgate it through any other means. Kelsen put it this way: 'the legislative organ has the choice between two paths: the one prescribed explicitly by the constitution [via the validity criteria it lays down], and the one to be decided by the legislative organ itself',[27] grounded on the authorization of the alternative clause.

A second feature of the alternative clause is that it competes, as it were, with the posited norms of the system which demand that power holders produce legal norms by meeting the conditions they lay down. To mark the contrast let us call these 'explicit clauses'. Explicit clauses impose a legal duty on persons to correctly exercise the conferred power, and the tacit clause concomitantly confers a power to do the opposite. There is a tension between these two routes towards norm-generation. The tension can be articulated thus: in following explicit clauses persons advance what Kelsen referred to as 'the authority of the constitution', [28] an authority which, conversely, is undermined by the use of the alternative clause.

Can the tension be reconciled? Kelsen says that, while the system is 'unable to exclude' the alternative clause, it 'prefers' that power-holders follow explicit clauses

[26] To be precise I should replace the word 'persons' with the term 'legal officials' because Kelsen does not refer to private transactions (in earlier work he made brief observations, as recounted in Yowell, 'The Negative Legislator: On Kelsen's Idea of a Constitutional Court' 147). Kelsen refers to legislation, administrative acts, and judicial rulings. I see no inconsistency in applying his solution to contracts, wills, marriages, and other such juridical acts. For all juridical acts yield legal norms, norms which belong to the system. I will assume, for the sake of argument, that Kelsen's solution applies to all juridical acts. One could interpret this omission as an instance of the fact that general theorizing on legal validity has left private transactions as a matter of 'residual concern' (see Köpcke, *Legal Validity: The Fabric of Justice* 7, 12.)

[27] Kelsen, *Pure Theory of Law* 274.

[28] Hans Kelsen, 'Judicial Review of Legislation' (1942) 4 The Journal of politics 183 184-85; Kelsen, *General Theory of Law and State* 157-58.

when exercising their powers.[29] The preference is exhibited in the fact that the use of the alternative clause triggers the possibility that the norm be nullified by a court. Kelsen also suggests that the use of the alternative clause be codified as a tort.[30]

Why *cannot* a legal system 'exclude' the alternative clause? The reason, I think, is this: a necessary condition for a norm to acquire binding force is the uninterrupted transmission of normativity from the basic norm. Since the normal operation of a legal system is imperfect, and powers are frequently exercised incorrectly, the forced conclusion is that there must be an authorizing clause to enable so. This is the only way to explain how it is the case that it in fact frequently occurs that persons understand defective norms to exert binding force. Here is the reasoning in Kelsen's words:[31]

> If a statute enacted by the legislative organ *is considered to be valid* although it has been created in another way or has another content than prescribed by the constitution, *we must assume* that the prescriptions of the constitution concerning legislation have an alternative character… *Otherwise*, a statute whose creation or contents did not conform with the prescriptions directly laid down in the constitution *could not be regarded as valid*.

It should be noted that the idea that lawful effects can be brought by unlawful means is not alien to legal thought. This rationale crosses institutions as diverse as adverse possession, theft that gives rise to ownership, and jury nullification. That persons can become owners by openly using another's land, or by buying what another has stolen, or acquit a defendant despite knowing that he or she has broken the law… legal thought sees no conceptual difficulty in claiming that such lawful effects are brought about by imperfect means. But for Kelsen there is a conceptual difficulty. His

[29] Kelsen, *Pure Theory of Law* 274.
[30] ibid 275.
[31] Kelsen, *General Theory of Law and State* 156 (emphasis added). See further Carlos Nino, *La Validez del Derecho* (Editorial Astrea de A. y R. Depalma 1985) 30.

reasoning process indicates that the lawfulness of the effect forces a recognition of the lawfulness of the cause, in the form of an authorization. Why? To repeat: because uninterrupted chains of validity are the but for condition for normativity to be transmitted.

Observe how this explanation stems from the Pure Theory's value-free methodological assumptions. The idea of uninterrupted chains of normativity is a product of the thesis that the normativity of the legal system is furnished by the basic norm. Since, in order to purify legal theory from morality, the legal system is conceptualized as normatively autarkic, possessing its own (non-moral) source of binding force, the only means for positive norms to acquire that force is by means of uninterrupted transmissions.

Remedies

The second component of the invalidity question concerns the remedial responses against defective exercises of legal powers. The first aspect to take note of is that Kelsen frames his views under the general heading of how legal systems *react* against the making of a defective statute. Kelsen says that if the constitution empowers legislators to create law by meeting validity conditions of procedure and content 'it must foresee the possibility that [they] may not follow these prescriptions'.[32] Legal systems must empower judicial authorities to respond to such actions. The reason I have already mentioned: to 'guarantee' the 'authority of the constitution'.[33]

[32] Kelsen, *General Theory of Law and State* 156.
[33] Kelsen, 'Judicial Review of Legislation' 184-85; Kelsen, *General Theory of Law and State* 157-58.

Kelsen identifies two mechanisms by which a legal system protects the authority of its constitution. His discussion wavers between a general account of how presumably any legal system should proceed and a description (as well as an evaluation) of the 1920 Constitution of Austria. The main means by which a legal system protects the authority of its constitution is by empowering a court to invalidate defective statutes.

The invalidation of a statute can operate in two ways. A court can invalidate for the concrete case, the case which gives rise to the revision, by disapplying the statute. The disapplication of the statute is regarded to be a nullification in the sense that the court invalidates the concrete proposition of law which obtains for the specific case, given specific facts, while leaving the general norm untouched. The second way is to invalidate the general norm. Through this nullification power the court functions as a (negative) legislator. The annulment of a norm, in this general way, is understood to stand on a par, and is of the same kind, as other institutional means by which systems allow for a legal norm to lose its validity, such as desuetude and a repealing statute.

In this context Kelsen confronts the question of who must be allocated the power to invalidate. Three alternatives are considered. The first is to centralize the decision in one court; the second to decentralize it by conferring reviewing powers to more than one court; the third to empower every citizen to disregard the defective norm. The third alternative is undesirable because it would virtually lead to a 'status of anarchy'. In passing Kelsen notes that such a 'primitive legal order' is not unusual, however, as it is found in the realm of international law where every State has discretion to determine whether a rule of international law exerts municipal binding force.[34] Kelsen regards it as politically valuable, at least for national law, to confer nullifying powers to one court. The 'disadvantage' of a decentralized judicial system of

[34] Kelsen, *General Theory of Law and State* 160.

nullification, he says, is that different courts may have different opinions on whether the reviewed statute is unconstitutional, which entails a 'great danger to the authority of a constitution'.[35] Hence his invention, as is well-known, of the idea of constitutional courts.

As to the temporal effects of judicial invalidation of statutes, Kelsen believes that they should be prospective only. This is because retroactive invalidation has 'critical consequences'—presumably Kelsen is thinking of the injustice involved in undoing legal configurations, which can include affecting expectations and vested rights, the creation of gaps in the law, fiscal chaos, and so on. Another reason to prefer prospective effects is that the invalidation of statutes involves a kind of clash between the judiciary and the legislature. Kelsen thinks that it is the legislator who should have the primary power to 'give effect to the constitution' through legislation. The legislative power of courts should, for this reason, be to some extent limited.[36] An additional technique to this end, which Kelsen considers useful, is to confer on courts the power to delay the publication of their rulings to give the legislator time to replace or correct the statue in order to avoid a legal gap.

A second means to protect the authority of a constitution—a 'very efficacious' one—was alluded to above. It is to stipulate that the use of the alternative clause constitutes a tort. By virtue of this stipulation legal systems make the power-holder liable for damages.[37] Now the imposition of personal or collective liability can coexist with courts having or not having review powers. If it so happens that the system does not empower courts to annul an enactment a tortious act can give rise to an indefeasibly valid norm. This may be 'undesirable' but it is not an anomalous feature of legal

[35] Kelsen, 'Judicial Review of Legislation' 185
[36] ibid 157.
[37] Kelsen, *General Theory of Law and State* 158.

systems. Kelsen exemplifies with cases where theft gives rise ownership as well as revolutionary constitutions.[38]

In summary, Kelsen's answer to the two components of the invalidity question is the following. On the question of the status of the defective act: every exercise of legal powers, correctly or incorrectly produced, creates a valid norm. As to remedies: Kelsen's thought, in the main, is that it is politically desirable for systems to provide for institutional means to react towards incorrect exercises of legal powers, including nullification—in various forms—and the imposition of a personal liability to the empowered persons or organ.

To conclude, observe that Kelsen's account of remedies differs from his account of the validity of defective norms in an important respect. He explains remedies as techniques to protect the authority of the constitution, which is a political value. There is a shift here from a value-neutral to a value-engaged methodology. This difference will turn out to be crucial for my critique of his account of legal validity. The point will therefore be examined at greater length in Chapter III.3.

3. The Reconstruction Theory

I now turn to a variant of Kelsen's answer to the invalidity question, developed by Bulygin.[39] Bulygin co-authored a significant number of writings with Carlos

[38] ibid.

[39] This answer has been recently expounded and further developed, with special reference to unconstitutional statutes in common law jurisdictions, in Robert Noonan, 'Declarations of Unconstitutionality in the Common Law Tradition: A Comparative and Theoretical Analysis', (Trinity College, University of Dublin 2019).

Alchourrón, to the degree that it has been said that their thoughts are not separable.[40] Yet in the main the invalidity question was examined by Bulygin and, for that reason, I shall consider him to be the principal author of this alternative answer to the invalidity question. Since Bulygin's views on this matter are convergent with Kelsen's the exposition that follows will be comparatively brief. The structure of the exposition will be the same. We will examine first Bulygin's methodological views; then his account of legal validity and legal system; and finally his proposed answer.

3.1. The Problem

Bulygin confronted a foundational predicament about the prospects of a sound legal theory equivalent to Kelsen's. Our minds indicate that there seems to be more to reality than what an adequate method allows one to theorize. He thought that a central feature of law is to guide action. Legal reasoning is reasoning about what to do, and to practical questions there are only practical answers.[41] From the perspective of the agent legal norms are prescriptions for action, ie oughts in the 'moral' sense, genuine normative propositions; and this is how the term 'norm' is employed in ordinary legal discourse.[42] Bulygin maintained that for prescriptions for action be cognizable there must be an ulterior set of facts which make them true—moral values.[43] Yet, with Kelsen, Bulygin believed that morality lacks truth-value. Like Kelsen, and in the spirit of Logical Positivism, more specifically, Bulygin adopted an empiricist view of morality according

[40] Eugenio Bulygin, 'My View of the Philosophy of Law', *Essays in Legal Philosophy* (Oxford University Press 2015) 355.

[41] Carlos Alchourrón and Eugenio Bulygin, *Análisis Lógico y Derecho* (Trotta 2021) 603.

[42] Eugenio Bulygin, 'Von Wright on Deontic Logic and the Philosophy of Law (1973/89)', *Essays in Legal Philosophy* (Oxford University Press 2015) 91-92.

[43] Bulygin, 'Norms, Normative Propositions, and Legal Statements (1982)' 198.

to which there is 'no reality' to which moral values correspond.[44] Since moral facts are not available for theoretical inquiry it is wrong for a legal positivist, who he considered himself to be, to even presuppose normativity. Bulygin in fact thought that Kelsen had engaged in a serious contradiction in his exposition of the legal ought.[45]

In grappling with this question Bulygin rejected the Kantian move. His starting point was that legal philosophy must be cleansed from *any* reference to normativity. Because inquiry into practical rationality is precluded legal philosophy must content itself with a reductive or deflationary analysis of norms, legal validity, and legal system. To develop such a theory Bulygin made use of Rudolf Carnap's method of 'explication' or 'rational reconstruction'.

The adoption of this method was motivated by the further conviction that the 'revolutionary' progress made in the formal and empirical sciences, with its distinctive methodology advanced largely by the school of Logical Positivism, needed to be extended to the realm of the social science of law. Bulygin thought that several legal problems, such as the membership of norms to a legal system, as well as the completeness (no gaps), independence (non-redundancy), and coherence (non-contradiction) of legal systems, which have long occupied theorists, can find more precise and exact answers through the logical analysis of legal norms and legal systems.[46]

Carnap held that proper philosophical inquiry lies in the examination of the logical components of experience, particularly as expressed through language. His

[44] Bulygin, 'An Antinomy in Kelsen's Pure Theory of Law (1990)' 237-38.

[45] ibid. Bulygin levelled a similar critique against Hart, saying that a purely descriptive—in his view legal positivist—theory 'leaves no room' for the internal point view, as conceived by Hart, due to the proscription of engaging with practical rationality. See Bulygin, 'Norms, Normative Propositions, and Legal Statements (1982)' 199.

[46] Carlos Alchourrón and Eugenio Bulygin, *Sistemas Normativos* (2nd edn, Editorial Astrea 2012) 25. For the English edition, see Carlos Alchourrón and Eugenio Bulygin, *Normative Systems* (Springer-Verlag 1971). Unless otherwise stated all translations from Spanish are my own.

method proposes to replace inquiries into the 'nature' or 'essence' of things with what he termed 'logical analysis'. To undertake a logical analysis the theorist must organize the to-be-analysed elements into a system. On Carnap's view reality 'has no sense' unless it is placed in a system.[47] Through explication the theorist produces the object of analysis. Carnap illustrates this idea by distinguishing between what could be called a 'metaphysical' and 'constructional' essence.[48] Only constructional essences can be meaningfully asserted and, for this reason, they must be explicated. Reality is examined indirectly, as it were, for the 'thing in itself' is excluded from cognition: what is retained is the 'logical form' of the experienced thing. Thus the studied object is not an object, strictly speaking, but a 'quasi-object'.[49] Quasi-objects are linguistic sentences and statements conceived without further consideration of what they refer to in reality. Logical analysis is, for Carnap, essentially the analysis of the formal rules of language, its syntax.[50]

One aspect of system-construction is the production of its operative concepts. The theorist needs to reconstruct these concepts because the words of ordinary language are too imprecise. The terms need to be translated or transformed into a formal language so as to provide the basis for logical analysis. Ordinary language is *replaced* with what are expected to be clearer and more precise concepts. In short, pre-theoretical knowledge is reconstructed, theoretically, as an artificial code.

The epistemic requirements for reconstruction of concepts are that the new concept be: 'similar' to the ordinary one (but with a high degree of flexibility: 'considerable differences are permitted'); as 'exact' as possible so as to fit well within the

[47] Rudolf Carnap, *Philosophy and Logical Syntax* (K. Paul, Trench, Trubner & co., Ltd 1935) 20.
[48] Rudolf Carnap, *The Logical Structure of the World* (Routledge & Kegan Paul 1967) 256-57.
[49] ibid 285.
[50] Carnap, *Philosophy and Logical Syntax* 42.

larger self-contained constructed language; 'fruitful' in that it should be useful for, or apt to, general theorizing, such as the identification of laws and sound logical relations between elements; and 'simple'.[51] Carnap exemplifies this exercise by replacing the qualitative concept of warmth with the quantitative concept of temperature.

Bulygin's exclusion of practical rationality from legal cognition tracks Carnap's idea of 'quasi-object'. The studied object in legal philosophy is, as it were, a shell of a norm. The theorist examines not the *prescription* for an action itself but the propositions which *describe* the fact that such a prescription exists within a reconstructed system. The theoretically meaningful assertion is not '*A* must Φ' but 'it is the case that the rules of this system prescribe that *A* must Φ'. Descriptive propositions of this kind bear truth-value relative to a system.[52] To this effect Bulygin distinguished between 'norm' and 'norm-proposition', the former being the prescription itself and the latter a descriptive assertion about its existence.[53] In reconstructed form the term 'norm' is stipulated to mean norm-proposition, ie the description of the prescription, not the prescription itself. A legal norm, thus, is reconstructed as a 'linguistic entity' which 'correlates' facts with a legal solution to those facts. That correlation yields what he termed a 'solution' to a case.[54]

The adoption of the reconstruction method for the analysis of legal phenomena enables a study of law without reference to values. The nature of that which directs human conduct through legal rules is left, as in the Pure Theory, out of the scientific

[51] See Rudolf Carnap, *Logical Foundations of Probability* (2nd ed edn, University of Chicago Press 1962) chapter 1.

[52] See Bulygin, 'Norms, Normative Propositions, and Legal Statements (1982)' 191; Bulygin, 'Legal Statements and Positivism' 138-39; Bulygin, 'On the Rule of Recognition (1976)' 119.

[53] Bulygin, 'Norms, Normative Propositions, and Legal Statements (1982)' 188-89; Eugenio Bulygin, 'The Objectivity of the Law (2004)', (Oxford University Press 2015) 304. Notice the parallel with Kelsen's idea of the verification of the existence of legal norms (see note 20, above). On verification, see especially Bulygin, 'On the Rule of Recognition (1976)' 199.

[54] See Alchourrón and Bulygin, *Sistemas Normativos* 5-6, 75, 80-82.

picture. Notice, therefore, that Kelsen and Bulygin converge in producing a reductive account of normativity or, more to be more precise, avoiding any significant explanation of its nature. They only differ in how to get there. Kelsen understood normativity as an assumption, Bulygin as a quasi-object.

3.2. Legal Validity and Legal System

Bulygin combined Carnap's method of explication with Alfred Tarski's mathematical notion of 'deductive' system. Together these views form a proper 'model' for the study of legal validity and legal system. Recall that on Carnap's account a system is composed of linguistic entities. Tarski, in what is relevant to our purposes, understood a deductive system to be a set of elements that contains all its consequences. Applied to law this model holds that a legal system is a set of posited norms (linguistic entities) and all its consequences. Among these consequences are 'normative' consequences. A normative consequence is a solution to a legal case.

At this stage emerges Bulygin's reconstruction of the concept of legal validity. Norms in reconstructed form exist as 'members' of the system. Legal validity is explicated to capture not the norm's binding force, which is its ordinary meaning in legal practice, but solely its belonging to a system. Norms are members of the system in two ways: if posited according to validity criteria ('genetic' criterion) or if logically deduced from a posited norm ('deductive' criterion).[55] Assertions to the effect that a

[55] See eg ibid 111-18; Bulygin, 'Time and Validity (1982)' 171.

norm is a member of the system are 'descriptive' because they correspond to something in reality: namely, that the asserted norm is genetically or logically related to the system.

Bulygin's notion of validity as membership has the explanatory power of accounting for the systemic nature of law. However, the notion of membership encounters problems when deployed to explain other aspects of legal systems. It is a pre-theoretical insight, which a theory of law must account for, that legal systems have a lasting existence. Law is a diachronic phenomenon. Now, if a legal system is explicated as an extensionally defined set of all its posited norms and their logical deductions, the identity of the set is determined by the identity of its components. Observe that this idea entails a counter-intuitive implication. For any creation or repeal of norms causes the elimination of the system by changing its identity.

Bulygin acknowledges that in the participant's experience there is no new system every time a norm is introduced or repealed. The citizen continues to speak of, say, 'the law of England' despite such changes. Bulygin seems to be uncomfortable with this explanatory shortcoming, but in consistency he is forced to conclude that, according to the model, the legal system (in a non-technical sense) of a given territory is a 'continued sequence' of legal systems (in a technical sense).[56]

Bulygin is not at ease with this view because legal systems do have a lasting existence which the model is unable to account for. If we trace the chronology of how Bulygin's thoughts on this matter unfolded we find a change of mind. In order to explain that legal systems have an enduring existence—that their identity does not change as frequently as the introduction or repeal of norms—he employed, with modifications, Raz's distinction between momentary and non-momentary legal systems. According to

[56] Alchourrón and Bulygin, *Sistemas Normativos* 133.

Raz a momentary system is the set of all valid laws at one moment; a non-momentary system, to which momentary systems belong, is the set of all laws in a specified interval of time, which includes currently valid norms, repealed, obsolete, etc.[57] Bulygin replaced the word momentary with 'system' and non-momentary with 'order'.

To account for a system's continued existence Bulygin defines a legal system as a set of norms, and legal order as a sequence of legal systems. A legal order is a sequential set of legal systems.[58] In strict logical terms, norms are not members of a legal order but of a system, and systems are members of an order.[59] Thus understood, changes at the level of individual norms entail a change in the identity of the system, which are of daily occurrence, but not of the order.[60] The identity of the order is in turn determined by its constitution.

An important cluster of cases that are better explained by the conceptual difference between system and order are those of repealed norms that are enforced after repeal, the so-called 'ultra-active' laws. The phenomenon of ultra-active statutes is common in criminal law. Criminal law operates under the principle that persons must be punished according to the statute in force at the moment of the perpetration of the crime. If a statute which imposes a crime is repealed it nonetheless continues to govern all the prosecutions of actions committed while the statute was in force. Were a legal order conceived of as a set of norms—the first Bulygin, so to speak—an act of derogation would result in the removal of the norm from the system. The court would

[57] Joseph Raz, *The Concept of a Legal System* (2nd edn, Clarendon 1980) 34-35. There are fundamental differences between their views on the nature of legal systems, especially on matters of identity and normative force. An exposition of those differences lies beyond the scope of the present inquiry.

[58] Carlos Alchourrón and Eugenio Bulygin, 'On the Concept of a Legal Order ', *Essays in Legal Philosophy* (Oxford University Press 2015) 127.

[59] See Pablo Navarro and Jorge Rodriguez, *Deontic Logic and Legal Systems* (Cambridge University Press 2014) 198-99

[60] Eugenio Bulygin, 'Algunas Consideraciones sobre los Sistemas Jurídicos' (1991) Doxa 23 267.

therefore find itself applying a norm that exists nowhere. If a legal order is alternatively understood as a sequence of sets (systems)—the second Bulygin—an ultra-active law is expelled from one of the multiple systems of the order, at a specific moment in time, but remains part of the order.[61] The norm which the court applies belongs not to the system existent at the moment of application but to the system existent at the time before repeal. This enables the theory to hold that the court applies a norm which exists somewhere—a norm not of the system but of the order.

To this amendment of his notion of legal system Bulygin added an amendment to his concept of legal validity. Bulygin now distinguishes 'senses' or 'concepts' of legal validity. Among them are membership and what he termed 'applicability'. Ultra-active statutes are in a sense invalid, because non-members, but in a sense valid because applicable. Applicable norms remain in existence *qua* applicable.

Now the notions of membership and applicability, while related to legal validity, are different. Recall that membership is a 'descriptive' concept. The notion of applicability, by contrast, refers to the fact that a norm ought to be enforced. Assertions to the effect that a norm is applicable thus include reference to its binding force. In this sense applicability is a 'normative' concept.

Since Bulygin's method excludes the possibility of direct reference to normativity, he reconstructed the concept of applicability following the same procedure employed for the concept of norm I outlined above (section 3.1). To explicate, Bulygin distinguished between two 'meanings' of binding force. The first captures the prescription itself, the directive for action. This is plainly a 'normative' concept. The second meaning is descriptive: it can state the existence of a prescription. Thus

[61] Bulygin, 'Time and Validity (1982)' 175-78.

'applicability' is reconstructed as a 'descriptive' concept and 'relative' to the system in that they are only applicable on the condition that the system confers on courts the power to apply them.[62] While Bulygin initially spoke of 'senses' of validity to introduce the notion of applicability he reserved the term validity for membership and in fact thought that to place them under the same rubric is misleading.[63]

3.3. The Answer to the Invalidity Question

Status

The concept of applicability is also able to explain two related phenomena. One is the fact that courts of municipal legal systems frequently apply norms of foreign jurisdictions by the operation of rules of private international law. The foreign norm is not a member, but has binding force within the municipal system. The phenomenon is explained by classifying such norms as 'invalid but applicable'. A second phenomenon is the invalidity question. On Bulygin's view, a defectively created norm is not a member of the system. However, if it is regarded as binding by the relevant community, and courts are bound to enforce it, then such a norm is 'invalid but applicable'. Bulygin's answer to the first component of the invalidity question, therefore, is that a voidable

[62] ibid 171-72. In a subsequent paper Bulygin classified the notion of applicability as 'normative' and retracted from his critique against Kelsen, now holding that there is space for a positivist theory of law to allow for the notion of binding force (see Bulygin, 'The Problem of Legal Validity in Kelsen's Pure Theory of Law (2005)' 320-23). Bulygin called this a change of mind (see further María Cristina Redondo, 'Bulygin's Analytical Legal Positivism' in Patricia Mindus and Torben Spaak (eds), *The Cambridge Companion to Legal Positivism* (Cambridge Companions to Law, Cambridge University Press 2021) 385). I am not sure how significant this allowance is, for, as I understand Bulygin's shift, he simply reframed the notion of applicability in descriptive terms in the same way as he explicated, from the very beginning of his career, the notion of a legal norm.

[63] Bulygin, 'The Problem of Legal Validity in Kelsen's Pure Theory of Law (2005)' 321.

juridical act is invalid but applicable.[64] He also held that there is a threshold for a norm to count as applicable: the exercise of powers must be sufficiently serious (plausible).[65]

Observe now how Bulygin's method informs his account. Legal systems need to be reconstructed in order to be rationally analysed because that is the means he thinks apt to theorize about law while remaining within the constraints of value-free description. Reconstruction, in other words, is a means to avoid evaluation. Since binding force *must* be extricated from the notion of legal validity, the notion of membership—a descriptive concept—becomes the basic explanatory device in terms of which validity can be analysed. Rational analysis is the examination of the logical relations that obtain between the components of the reconstructed system. Since the model of system which the Reconstruction Theory employs is taken from mathematical set theory questions of membership to the set are either/or. Defective norms cannot be in some sense part of the system. If legal norms resemble a kind of mathematical unit which belongs to the set then the conclusion must necessarily be that a defective norm is not a member.

Remedies

As far as I know Bulygin did not examine the second component of the invalidity question in any detail. The only remark he made on the matter was on mistakes in judicial rulings on the unconstitutional status of legislation. He maintained that if a court makes a wrong assessment of the revised statute, by mistakenly asserting that it

[64] See ibid 319-29; Eugenio Bulygin, 'Cognition and Interpretation of Law' in Letizia Gianformaggio and Stanley L Paulson (eds), *Cognition and Interpretation of Law* (G. Giappichelli 1995) 312-13. I should note that Bulygin speaks mostly of legislation and will assume, for the sake of argument, that his solution also applies to other kinds of juridical acts.

[65] Bulygin, 'Von Wright on Deontic Logic and the Philosophy of Law (1973/89)' 93.

has been created by a correct exercise of legislative powers, and declares it to be 'constitutional', this does not change the status of the statute. The statute is, in truth, invalid (but applicable).[66]

4. Conclusion

This chapter has offered a critical examination of two of the most complete answers to the invalidity question. Both can be rendered as attempts to furnish voidable doctrine with stronger conceptual foundations. They both attempt to explain and justify the fact that a defectively created norm can nonetheless acquire binding force. To grasp the core of the answers it was necessary to have a sense of some of the main features of those theories and their methodological assumptions. A central aim of the chapter was to show how the operative concepts of the Pure and Reconstruction Theories—legal validity, legal system, legal norm—are informed and shaped by the adopted value-free method. By extension, so are their answers to the invalidity question.

The Pure Theory holds that persons are empowered by law—by an implicit norm, the alternative clause—to create juridical acts without complying with the requisite conditions explicitly laid down. The tacit alternative clause is to be contrasted with explicit, positive clauses which fix validity criteria. Both empower persons to create juridical acts; they differ in the success-conditions established for their exercise. The implicit clause renders virtually all exercises of legal powers as legally valid. The Pure Theory's answer to the remedies component of the invalidity question is to propose a flexible set of tools to respond to the making of unconstitutional legislation, including prospective nullification and delayed declarations of invalidity.

[66] See Bulygin, 'Algunas Consideraciones sobre los Sistemas Jurídicos' 266-67.

The Reconstruction Theory's answer, in turn, is to maintain that defective norms are invalid, because non-members of the legal system, yet in some sense exist as legally binding in the sequential set of legal systems which compose what the Theory calls a legal order. Defective juridical acts exist as 'invalid but applicable'. The Reconstruction Theory does not engage with the remedial component of the invalidity question in any detail.

III. A CRITIQUE

1. Introduction

The aim of this chapter is to criticize the received answers. I will show that they are descriptively inaccurate, fall short in explanatory power, and lack an account of the ontology of legal norms. Sections 2 to 4 develop each critique in turn. Section 5 concludes by proposing a path forward.

To preface my argument I should note that while these answers fail in various respects there is also much to commend in them. No other legal theorist within the canon aside from Kelsen and Bulygin has devoted as much attention to this problem. If it is true that legal philosophy can aid legal practice by offering tools more conducive to clear thinking then Kelsen, in particular, has done much for it. Kelsen's answer supplies tools to make sense of the facts as they are. In particular, his views on remedies are a paradigm example of sound thinking, and evidence for this judgement is the influence they have had on the practice of judicial review of legislation, in general, and the idea of a constitutional court, in particular. My critique of Kelsen's views on remedies will not affect their substance.

More generally, Kelsen's answer is elegantly simple, consistent, clear, and comprehensive. It also meets other explanatory desiderata such as preserving aspects of the point of view of the participant of the practice. My aim in critiquing the received views is to learn from their strengths and weaknesses in order to develop a sounder

explanation. As the following chapters of this DPhil thesis will make plain Kelsen and Bulygin touch on elements out of which an adequate answer can be constructed.

2. Descriptive Inaccuracy

Social realities are made up of practices. Practices are constituted by agency—dispositions, attitudes, actions—and a vocabulary through which persons express their understanding of those dispositions, attitudes, and actions. Social practices are indeed partly composed of natural phenomena, say of causal relations and physical facts, but cannot be reduced to them. The social facts that make up a practice are understood by grasping how the persons engaged in the practice understand their activity. The description of a phenomenon of this kind requires what contemporary jurisprudence has termed a 'hermeneutic' method, one which regards the perspective of the participants of the practice as its primary data.[1] A description of a practice must therefore at least represent or characterize its constituent aspects as understood by those who are engaged in it. Following the hermeneutic method, the social scientist's description of human behaviour or decision-making will differ from, say, that of a biologist or neuroscientist.

Kelsen and Bulygin insisted throughout that their accounts of law were descriptive. Now, although they did not, to my knowledge, present a detailed explanation of what description is, the idea that social practices are grasped from within is more or less latent in their theories. As a result there is indeed much descriptive

[1] See, for example, HLA Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press 2001) 12-14; Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 46-53, 419-29; John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press 1998) 38.

accuracy in aspects of these theories. However, this is not the case with their views on the invalidity question. In this section I show the aspects in which description falls short.

2.1. The Pure Theory

The alternative clause aptly captures the reality that very many defective norms are referred to in legal practice as valid, and very many rulings on invalidity operate on juridical acts which are actually producing legal effects.

Now it would be a stretch of imagination to think that in the experience of legal officials and subjects legal systems include clauses that confer on them powers to create defective norms. Legal thought operates upon the idea that positive law, including laws that lay down validity criteria, must be followed. Criteria of validity are understood by persons to be *conditions* for the successful exercise of legal powers. The idea of a condition, or its synonym requirement, points to a kind of necessity, an authoritative demand on the power-holder. The meeting of the relevant conditions is a necessity at least in the sense that without being fulfilled the effect ought not to come about. The alternative clause proposes the contrary idea. Let us pay close attention to Kelsen's words. He frames the kind of power conferred by the alternative clause as follows: [2]

> The provisions of the constitution concerning the procedure of legislation and the contents of future statutes [ie criteria of validity] do not mean that laws can be created only in the way decreed and only with the import prescribed by the constitution. The constitution entitles the legislator to create statutes also in another way and also with another content. The constitution authorizes the legislator, instead of the constitution, to determine the procedure of legislation and the contents of the laws, provided that the legislator deems it desirable not to apply the positive provisions of the constitution… The legislator is entitled by

[2] Kelsen, *General Theory of Law and State* 156.

> the constitution either to apply the norms laid down directly in the constitution or to apply other norms which he himself may decide upon.

The alternative clause confers a general discretion on power-holders. The authorization does not specify the reasons for, nor circumstances under which, the constitution can be disobeyed. Kelsen's words are quite clear in the breadth of the scope: whatever the power-holder considers desirable will be valid law. The scope of the discretion is so wide that it can be described, as Raz would have put it, as an instance of a system of 'absolute discretion'. On Raz's view, a system of absolute discretion is a normative ordering where officials 'are subject to one instruction only concerning the reasons on which their decisions are to be based: they are always to make that decision which they think to be best on the basis of *all* the valid reasons'.[3] This power does not entitle persons to decide arbitrarily. Officials must decide on reasons 'but the selection of the reasons which determine the cases is within their own absolute discretion'.[4] The parallel with Kelsen's proposal, according to which officials decide upon what they 'deem to be desirable', is evident.

Now Raz devised this imaginary system as a thought experiment to contrast it with legal systems. Raz's point was to emphasize that a salient feature of legal systems is that official decision-making is guided by law. Systems of absolute discretion, by contrast, supply no guidance on the kinds of considerations upon which the decisions must be based. The alternative clause does not specify any such restrictions.[5]

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[3] Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1999) 138 (emphasis added).

[4] ibid 138.

[5] Richard Tur proposed a restrictive reading of Kelsen's alternative clause, according to which the discretion of the power-holder (he speaks of courts, specifically) ought to be guided by 'equity, policy, mercy and similar considerations' (Richard Tur, 'The Alternative Character of the Legal Norm: Kelsen as a Defeasibilist?' in Luís Duarte d'Almeida; John Gardner; Leslie Green (ed), *Kelsen Revisited* (Bloomsbury Publishing 2013) 245, 252. I agree that judicial discretion must be guided but, for the reasons I offer in this chapter, recurring to Kelsen will not contribute to substantiate that claim.

It is interesting to note that Kelsen exhibits a clear awareness of the fact that absolute discretion is an idea foreign to legal systems. There are several passages where he seems to restrict the use of the alternative clause. Immediately after stating the need for it, as I quoted above, Kelsen qualifies the scope of the conferred power by comparing it to two other institutions:[6]

> Just as the courts may be authorized, under certain circumstances, not to apply the existing statutory or customary law but to act as legislator and to create new law, so the ordinary legislator may be authorized, under certain circumstances, to act as constitutional legislator.

The two institutions to which the alternative clause is compared to are something like a common law court and a constitutional convention ('legislator[s]'). The comparison fails in the first case. When common law courts legislate they do so under constraining mechanisms. They reason by analogy; aim to be overall consistent with the rationale of the rules governing the facts, in particular, and of the system, generally; invoke the system's legal principles; and so on. By contrast, the alternative clause does not establish conditions ('circumstances') to determine when the power ought to be exercised. Further, common law courts hardly resemble a constitutional convention. Is it not a primary feature of the framing of a constitution to have a wide scope for judgement? The alternative clause is closer to a constitutional convention, not a common law court, and this similarity does not bring it closer to legal thought.

There are more passages that support the suggestion that Kelsen regards absolute discretion as something alien to legal thought and practice. Recall, as we saw in Chapter II.2, that Kelsen maintained that legal systems 'prefer' that persons exercise powers in conformity to explicitly laid down validity criteria by providing that the use

[6] Kelsen, *General Theory of Law and State* 156.

of alternative clauses constitutes a tort, on the one hand, and by conferring on courts the power to nullify defective legislation, on the other.[7]

These qualifications do not, however, restrict the scope of the discretion. The only sense in which the power is limited is in that an undesired consequence might follow if the power-holder decides to disregard the law. Kelsen's answer amounts to the following proposition: power-holder are empowered to act as they wish, but their act may be eventually invalidated, and they may eventually be ordered to pay damages.

2.2. The Reconstruction Theory

The Reconstruction Theory falls short in description in two main respects. First, it fails to account for the fact that persons use the term legal validity to signal the binding force of a juridical act. Second, when referring to voidable juridical acts, hardly anyone speaks of invalid but applicable norms. They use the word voidable, which means valid but liable to be avoided.

Bulygin would likely reply that his aims are not descriptive—to fit the facts, in Hart's suitable expression[8]—but reconstructive. Recall that in Bulygin's theory reality is examined indirectly. The theory picks out aspects of reality, transforms them, organizes them into a constructed system in order to, then, examine the logical relations that obtain between the components. Faithful to his reconstructive aims Bulygin is not uncomfortable with 'great[ly]' departing from 'ordinary legal discourse'.[9] Our hypothetical reply from Bulygin could hold that it is all very well for a practitioner to

[7] Kelsen, *Pure Theory of Law* 274; Kelsen, *General Theory of Law and State* 157
[8] HLA Hart, *The Concept of Law* (3rd edn, Clarendon Press 2012) 80.
[9] Bulygin, 'Time and Validity (1982)' 185.

speak of defectively created norms as legally valid, but if one were to conduct a properly theoretical inquiry on the matter things must change.

Does this reply succeed? Yes and no. Yes in the sense that if the aim was always to reconstruct rather than describe reality it follows that my critique is misdirected. Yet Bulygin claims that his aims are descriptive. He declares himself to be a legal positivist and, in his words, legal positivism 'consists basically of the distinction between describing the positive law and evaluating it as just or unjust'.[10] In the clearest statement of his methodological views, and echoing Bentham's distinction between 'expository' and 'censorial' jurisprudence, Bulygin maintains that[11]

> in order to be able to evaluate and to criticize the law, one must know the law, since knowledge of an object is logically prior to its evaluation. All of the most eminent legal positivists have understood this, from Bentham and Austin to Kelsen and Hart.

Legal science, Bulygin continues[12]

> is a set of true statements about this complex phenomenon we call 'law', that is, its function is fundamentally descriptive. I agree with Max Weber, Kelsen, and Hart on this. Without a doubt, the law is based on values, but it seems to me possible to describe these without evaluating them… Of course, not everything that jurists, judges, and lawyers do can be qualified as science. To the extent, however, that they describe the law and refrain from evaluating it, their activity is scientific.

Bulygin's description of his theoretical programme does not aptly describe how he in fact proceeded. For, rather than attempting to reproduce reality as it is, his scientific activity was to transform reality for the purposes of logical inquiry. There is an ambivalence here between what he does and what he declares himself to be doing.

[10] Bulygin, 'My View of the Philosophy of Law' 358.
[11] ibid 358.
[12] ibid 358.

He claims to describe but in fact he reconstructs. In so doing he equivocates between description and reconstruction.

We may go further and say that his proposal to frame defective juridical acts as invalid but applicable is so foreign to legal practice that there is a sense in which he is simply changing the subject. The reconstruction method transforms the to-be-analysed reality in a way in which descriptive accounts do not.[13] Neither Weber, Kelsen, nor Hart adopted anything like a rational reconstruction method. More specifically, observe that aside from Bulygin no prominent legal positivist has excluded the idea of binding force, however understood in the details, from the concept of legal validity. The reason is that binding force is a central feature of the concept of legal validity as employed by legal practitioners. If Bulygin is in fact reconstructing, it is a category mistake to make his theory compete with descriptive theories on the plane of description; and he termed that plane legal positivism. For this reason Bulygin's hypothetical reply would not succeed.

3. Explanatory Power

We have seen that the Pure and Reconstruction Theories do not share the exact same conception of legal validity. The main difference is that Bulygin detaches it from the notion of binding force, whereas bindingness is for Kelsen central. They converge, however, in conceiving of the validity or invalidity of a norm as a logical or conceptual entailment, a conclusion which necessarily follows upon the advent of a specified set of

[13] I am adapting a well-known critique against the reconstruction method: see PF Strawson, 'Carnap's Views on the Advantages of Constructed Systems over Natural Languages in the Philosophy of Science' in P. Schilpp (ed), *The Philosophy of Rudolf Carnap* (Open Court 1963) 506, 509.

facts: namely, the exercise of a legal power in the manner established by law. The Reconstruction Theory holds that if the attempt to produce a norm fails to meet any validity criteria it cannot but be invalid. The Pure Theory, by contrast, holds that it cannot but be valid. The idea of validity is thus understood as something akin to a theorem. In this section I show that this quasi-mathematical conception of validity causes a straightjacketed mode of thinking, resulting in explanatory weaknesses.

3.1. The Reconstruction Theory

The weakness is most apparent in the Reconstruction Theory, so let us begin there. The theory holds as axiomatic that the (reconstructed) legal norms of a jurisdiction belong to a system. However, Bulygin did not explain to which system invalid but applicable norms belong. Perhaps we could derive an answer from the two other examples of invalid but applicable norms he provides. These are foreign laws (applicable because of rules of private international law), and ultra-active laws (repealed statutes which continue to apply after repeal).

The analogies will not do. Invalid but applicable ultra-active laws are part of the legal order because members of a system which forms part of the sequence of systems that make up the legal order. Yet the invalidity question concerns norms that never become members, neither of the system nor of the order. The analogy therefore does not lend the required assistance. In turn, to compare defective norms with foreign rules applicable in a municipal system by virtue of rules of private international law is more of a disanalogy. Foreign rules do belong to a system—their own municipal system—but are applicable in another. Foreign norms, in other words, are indeed members of some

system. Yet the invalidity question concerns norms which emanate from the municipal legal system. To construct the analogy we need an explanation of where defective norms, produced by municipal power-holders, belong.

So the question I posed remains unanswered: where do (defective) invalid but applicable norms belong? Since Bulygin's examples do not succeed we must look elsewhere. One possible answer has been offered by theorists who have expounded upon his concept of applicability. They have maintained that legal systems can be reconstructed to be composed of sub-systems of valid (member) norms as well as of invalid (but applicable) norms.[14] This is a consistent move and in my view the only one available. The problem is that it pays the high price of weakening the reconstructed concept of legal validity. For what theoretical difference does 'membership' make if both defective and non-defective norms are members, in a sufficiently similar sense, of the system? The question can be framed in the terms of Bulygin's method: how 'fruitful' is this reconstructed concept?

Let us now turn to the Reconstruction Theory's view on remedies. Recall that on this matter Bulygin only remarked that the judgement of a court who mistakenly declares a defective (and thus invalid) norm to be valid does not change the status of the norm. The norm remains invalid despite a judicial pronouncement on the matter.

There is an important obscurity here. Bulygin's statement suggests that the question of whether a legal power was correctly or incorrectly exercised is a matter that can be objectively ascertained—a plain matter of fact. The problem is that validity criteria commonly contain 'substantive' (also termed 'moral') requirements, usually in the form of vaguely defined constitutional rights. Unlike 'formal' or 'procedural'

[14] Navarro and Rodriguez, *Deontic Logic and Legal Systems* 135, 137-38.

requirements, exactly what these criteria actually demand of the power-holder are a matter of contention, as the practice of constitutional litigation plainly shows. Do social rights demand specific kinds of economic policies? Does the right to life preclude or justify euthanasia? Does the right to free speech preclude or justify the making and distribution of pornography? Does the right to religious liberty make room for the exhibition of religious symbols in State-owned premises? And so on. Perhaps Bulygin had in mind something like Ronald Dworkin's 'one right answer' thesis. This is highly doubtful given his methodological presuppositions, for it would involve the idea that moral considerations can be objectively ascertained, which is incompatible with his metaethical views.

3.2. The Pure Theory

To grasp the weaknesses of Kelsen's view we should first note that there is an aspect of that answer, the proposal on remedies, that is entirely sound. Kelsen's success in explaining these techniques (prospective invalidity, delayed declarations of invalidity, and a centralized constitutional court empowered to grant them) is shown by how influential his ideas have been, and I will expound upon them in detail in Chapter VII.4-6.

The source of the strength of these ideas lies in the method deployed to develop them. Recall that the Pure Theory holds that remedies are set up to 'guarantee' the 'authority of the constitution'.[15] Legal systems 'must foresee the possibility that [power-holders] may not follow' the conditions that the law explicitly lays down for the exercise

[15] Kelsen, 'Judicial Review of Legislation' 184-85; Kelsen, *General Theory of Law and State* 157-58.

of legal powers.[16] A question that immediately emerges is why Kelsen uses the word must. Why *must* a legal system foresee cases in which power-holders do not follow the rules? His answer: because the enactment of legislation through the alternative clause is a 'politically undesirable' state of affairs.[17] Notice that Kelsen is now speaking with prescriptive, not descriptive terms. We are now entering into the realm of values.[18]

We may characterize this newly adopted methodological framework as constituted by a distinction of planes, where human techniques or technologies—remedies—are understood to be at the service of the realization of political values. This scheme is apparent in Kelsen's own characterization of political action:[19]

> Politics as the art of government, that is to say, the *practice* of regulating the social behaviour of men, is a function of the will and, as such, an activity which necessarily presupposes the conscious or unconscious assumption of *values*, the *realization* of which is the *purpose* of the activity.

How is this account of remedies, in particular, and institutional design, more generally, compatible with Kelsen's value-free aims? To answer we must observe that Kelsen distinguished between two kinds of values and only one of them is admissible under his methodological premises. Legal norms establish courses of action by commanding, authorizing, and permitting. There is a sense, Kelsen observes, in which legal norms function as standards for evaluating human conduct. If a commanding norm is not obeyed there is a sense in which the conduct is 'unlawful' and, conversely, if obeyed, 'lawful' (or 'legal', 'right', and related terms and cognates). These values

[16] Kelsen, *General Theory of Law and State* 156.

[17] ibid 158.

[18] This shift is identified in Yowell, 'The Negative Legislator: On Kelsen's Idea of a Constitutional Court' 145. For similar observations, see G. Maher, 'Custom and Constitutions' (1981) 1 Oxford Journal of Legal Studies 167 174.

[19] Kelsen, *What is Justice?* 350 (emphasis added).

Kelsen calls 'legal' or 'juristic'. Assertions about legal/juristic values bear truth value because they can be verified by testing whether there in fact exists a positive rule commanding the evaluated conduct. In this sense assertions about legal values are objective. Kelsen observes that in this sense, and in this sense only, it is possible to speak of value judgements within the Pure Theory of Law. Legal/juristic values are essentially different from judgements which cannot be verified by reference to a positive norm. The truth of such values, which Kelsen terms 'values of justice' (or 'moral' and 'political') is purely subjective. It is not possible to verify the real existence of such values, and they are thus inadmissible in a scientific theory of law.[20]

The kind of value judgements that Kelsen is asserting in relation to remedies correspond to values of justice (moral, political). Let us examine his assertions. Kelsen proposes that the power to nullify legislation be conferred on institutions, not on individual persons. The reason: there would be a serious risk of 'anarchy' of it were up to anyone to decide on the validity of a statute. Further, Kelsen proposes that there be only one court, not many, empowered to decide on the constitutionality of a statute. The reason: to avoid differing opinions, which can represent a 'great danger' in so far as it can undermine 'the authority of the constitution'.[21] Kelsen proposes that the nullification of legislation operate with prospective effects only. The reason: to avoid the 'critical consequences of all retroactive effects'.[22] However, it is reasonable, Kelsen thinks, to make the judgement retroactive for the litigating party. The reason: otherwise

[20] For the relevant passages, see Kelsen, *General Theory of Law and State* 47-49. See also Kelsen, *Pure Theory of Law* 17-23; Kelsen, *What is Justice?* Chapter 8.

[21] Kelsen, 'Judicial Review of Legislation' 190, 184.

[22] ibid 187.

persons would have no 'immediate and consequently sufficiently cogent interest to cause the intervention of the Constitutional Court'.[23] And so on.

Latent here is a fundamental shift in methodology. Under the Pure Theory's own premises these are not scientific statements because not value-free. Now these ideas were developed in writings that claimed to be non-evaluative. It seems, therefore, that Kelsen committed a performative contradiction. Of course this contradiction does not affect in any way the content of his claims. I suggest that what the performance exhibits, rather, is a testimony of the worth, usefulness and enabling power of a value-*engaged* method.

Kelsen did attempt to deploy a value-free analysis of the alternative clause, as I explained in Chapter II.2. And here is where the explanatory weaknesses of his answer to the invalidity question begin to emerge.[24] Observe that it is a common practice in legal systems to direct the political community to regard some legal norms as void ab initio. In many jurisdictions a deeply defective juridical act does not acquire binding force. Consider a bigamous marriage, a contract to sell slaves, or an administrative decision adopted in complete disregard of the formalities required by law. In contemporary jurisdictions they are deemed as void from the outset: they do not bind, have no presumption of validity in their favour, and cannot be enforced by a court.[25]

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[23] ibid 196. For further analysis on Kelsen's process of practical reasoning, see Yowell, 'The Negative Legislator: On Kelsen's Idea of a Constitutional Court' 145-50.

[24] For other important critiques, not directly relevant to my argument, see Carlos Nino, 'Marshall's "Logic" and Kelsen's "Problem"'; Juan Ruiz Manero, 'On the Tacit Alternative Clause'; Letizia Gianformaggio, 'Pure Theory of Law and Tacit Alternative Clause: A Paradox?', all in Letizia Gianformaggio and Stanley L Paulson, *Cognition and Interpretation of Law* (G. Giappichelli 1995); Ines Weyland, 'Idealism and Realism in Kelsen's Treatment of Norms of Conflict' in Richard Tur and William Twining (eds), *Essays on Kelsen* (Clarendon Press 1986); Navarro and Rodriguez, *Deontic Logic and Legal Systems* 220-22.

[25] See, for example, s44 of the German Administrative Procedure Act, and s47 of the Spanish Law of Common Administrative Procedure. The voidness ab initio of juridical acts is examined in more detail in Chapter VII.5.

Kelsen is of course well aware of this issue and contemplates the question of whether such 'sham' norms can be genuinely described as null from their inception.[26] Upon reflection he answers in the negative. His exposition of the argument is obscure. As I understand it, the claim is that such deeply defective juridical acts are not 'legally nothing', and will need to be annulled by a court. If no judgement to that effect is issued, the norms will bind. He uses a metaphor to conclude: 'just as everything King Midas touched turned into gold, everything to which the law refers becomes law, ie, something legally existing'.[27] Strictly speaking, then, every norm is valid. There is a striking parallel between the alternative clause and the void ab initio doctrine, which holds that all defective acts are necessarily invalid from the outset (Chapter I.2.). Kelsen's answer mirrors its logic: all defective exercises of legal powers necessarily produce a legally valid norm.

Kelsen's answer actually explains away the problem. It does not engage with the fact that the law itself declares them to not bind from the outset, enabling all members of the community to disregard it. Why, while seeing the problem, does Kelsen explain it away? My suggestion is that his reasoning is straitjacketed by his conception of validity as a logical or conceptual entailment rather than a practical choice.

What legal practice in fact exhibits is that a community, through its legal system, can choose to disregard legal norms whose defects are particularly grave (morally grave) from their inception. This choice is a conclusion of a moral or political judgement. And this kind of choice is of the exact same kind that Kelsen makes when he claims that it would strengthen the authority of the constitution (a moral value) to codify the use of alternative clauses as a tort. It is also the same kind of choice he makes when he proposes

[26] Kelsen, *General Theory of Law and State* 161.

[27] ibid. Cf his parallel discussion on whether discrepancy between the real and expressed will of a contracting party constitutes a vitiating factor (141).

that courts should annul statutes with prospective instead of retroactive effects, or delay a declaration of invalidity in order to give the legislature time to replace the state or correct the defect so as to avoid a legal gap.

Kelsen incurs in the following confusion. He thinks that if a deeply defective norm has some kind of binding force, because it may so happen that it is in fact regarded as binding by the community, then the only explanation available is that the norm was authorized to exist as legally valid due to the alternative clause. There is no space in his theory for a norm that is in fact regarded as valid but, by virtue of the rules of the system, should not be. Kelsen's view on validity thus closely resembles the idea that validity obtains automatically, as it were, as a conceptual necessity, rather than as the moral or political choice of the community to refuse to conceive of a deeply immoral norm as worthy of being regarded as a legal, rather than purely factual, reality.

To conclude, I should note that throughout most of his career Kelsen held the thesis that norms cannot enter into conflict. The alternative clause is indeed compatible with this thesis because, in allowing virtually every exercise of legal power to produce a valid norm, conflicts between 'higher' norms, which confer powers, and 'lower' norms, which are the product of defective exercises of powers, are excluded by definition.[28] However, towards the end of his life Kelsen shifted views and held that conflicts are possible.[29] To the best of my knowledge he did not explain how this change of view impacts his answer to the invalidity question. I suspect it does not because the primary justification for the alternative clause lies in the need for uninterrupted transmissions of normativity from the basic norm, a thesis which holds independently from the question

[28] Thus it has been noted that the alternative clause is an 'integral part' of Kelsen's theory because it 'ensures' that there is no contradiction between norms: Tur, 'The Alternative Character of the Legal Norm: Kelsen as a Defeasibilist?' 251.

[29] See Kelsen, *General Theory of Norms* 124-25, 214.

of whether conflicts between norms are a logical possibility or impossibility. Kelsen's alternative clause has been criticized on the grounds that it presupposes the implausible thesis that norms cannot conflict.[30] My critique holds regardless of Kelsen's views on the possibility of conflicts between norms.

4. Ontology

We have seen that the notion of legal validity is closely connected to that of legal existence. The notion of existence is prior to the notion of validity, for validity signals an existent act. In this sense existence is a more basic category within this scheme of explanation. A sound answer to the invalidity question, therefore, must also provide an account of what it is for a norm to exist. A third and final weakness that the Pure and Reconstruction Theories share is that they lack such an account.

4.1. The Pure Theory

To say that a norm comes into existence is an oblique form of speech. It suggests a movement from nothingness to somethingness. This image might bring to mind an event which occurs externally, as it were, outside the mind, like the reproduction of our species, or the creation of a dish by a chef. In law, however, that movement is not something external to the mind. What occurs, rather, is a mental activity by which a

[30] See fn 24, above.

physical event—a happening in the world out there, as it were—is recognized to count as a legal norm. In this sense norms 'come into' existence.

Kelsen offered a deep insight into this phenomenon by noting that norms are not physical facts and must be understood to exist through an intellectual activity which he called a 'scheme of interpretation'. Through this act physical facts—the utterances of a power-holder—are understood to yield ought-propositions. This gets close to a central aspect of legal ontology. It captures the salient ontological feature of legal norms that they are social constructs and exist because and in so far as thought of and followed by a people. In words that Kelsen did not use, but could have well endorsed, legal norms are institutional facts. Unfortunately Kelsen did not inquire further into this point, nor did he thematize the notion of existence as a distinct issue.

In addition to the idea of a scheme of interpretation Kelsen touches on the question of existence in developing a distinction between validity and efficacy. The distinction tracks the metaphysical division of the world between the realms of the ought and the factual. The central thesis is that in order to be brought into existence a norm needs to be created, through an exercise of legal powers, by meeting the established conditions—this is the 'reason' for the existence of norms, and what explains their exertion of binding force. In addition to this reason the legal power must be exercised within an efficacious legal system—this is the 'condition' for the existence of norms (see Chapter II.2).

The details of this distinction, however, were left unexplained. This silence, which with good reason has caused puzzlement,[31] is probably due to the fact that he took the distinction between is and ought to be self-evident. Further, since, according

[31] See, for example, Leslie Green, 'The Duty to Govern' (2007) 13 Legal Theory 165 170; Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press 1986) 131.

to Kelsen, matters of efficacy pertain only to the realm of facts, an inquiry into this question lies outside the confines of normative jurisprudence. As a result, and despite being so central to the existence of law, the notion of efficacy was left under-theorized.[32]

Consider, moreover, that according to the Pure Theory's metaphysical framework, which divides the world between the domains of physical and normative facts, there seems to be no space for the kind of reality that institutional facts are. For, according to that framework, legal phenomena partake of the world of physical facts and normative facts, yet institutional facts, while they operate in a sense upon physical facts, cannot be reduced to them: they are categorically distinct. As we will see in detail in the next chapter, an institutional fact may have a physical representation, but they are not the physical representation itself.

What these aspects of The Pure Theory show is the surprising conclusion that the ontological status of norms was not among its central theoretical concerns. The Pure Theory can be characterized more as an epistemology of law—an account of the conditions of intelligibility of legal norms—rather than a theory about its existence in a fuller sense.

4.2. The Reconstruction Theory

Bulygin explicitly refused to inquire into matters of legal ontology, which he considered to be too controversial and unnecessary for his purposes.[33] However, in his brief

[32] Not only by Kelsen but, interestingly, legal theorists more generally. For attempts to remedy this state of affairs, see Thomas Adams, 'The Efficacy Condition' (2019) 25 Legal Theory 225; Gerald J. Postema, 'Conformity, Custom, and Congruence: Rethinking the Efficacy of Law' in Matthew H. Kramer (ed), *The Legacy of HLA Hart: Legal, Political, and Moral Philosophy* (Oxford University Press 2008); Gerald J. Postema, 'Implicit Law' (1994) 13 Law and Philosophy 361; Liborio L. Hierro, *La Eficacia de las Normas Jurídicas* (Ariel 2003).

[33] Bulygin, 'Norms, Normative Propositions, and Legal Statements (1982)' 191. See further Bulygin, 'Von Wright on Deontic Logic and the Philosophy of Law (1973/89)'.

remarks on remedies he makes a substantial claim on ontology. Recall that he asserts that a legal ruling that mistakenly declares that a defective statute (ie invalid) is valid does not change the status of the statute. It remains invalid despite a judicial pronouncement on the matter. This brief statement tells us something which is worth dwelling on.

Bulygin seems to be saying that assertions of validity are true or false regardless of the opinion of the group—of judges, subjects, etc. This can form the basis of a rather paradoxical conclusion. On the one hand, he thinks, in unison with all legal theory, that there is an intimate connection between the notion of validity and the notion of existence, holding that valid norms are things that legally exist. On the other hand, Bulygin maintains that legal norms are artificial entities, things created by persons. Now artificial entities of this kind exist only if a sufficient number of persons regards them to exist: that, indeed, is the essence of the idea of an institutional fact. Thus Bulygin seems to hold that legal norms are conventionally true but their legal validity is not. These two propositions do not coherently fit.

It could be objected that I am making too much of this paradoxical aspect of the Reconstruction Theory. The statement I am deriving it from is made in passing. Further, the aim of the Reconstruction Theory is only to analyse the logical relations between norms, not provide an explanation of the existence of law in its fuller sense. Perhaps the rather buried paradox I have identified is more apparent than real. One might suspect that I am building an imaginary problem.

My reply is this. The suggestion that this paradox is worth dwelling on gains strength when one takes a look at the canon of jurisprudence on matters of legal validity with an eye to this issue. In fact Kelsen's account of legal validity has been criticized for

exhibiting the same paradox.[34] Perhaps this flaw is due to inattention. It has been rightly observed that legal theorists in general have shown little interest on the relation between the concept of legal validity and the ontological status of law.[35] Be that as it may, there is a notable instance where the paradox I am tentatively ascribing to Bulygin is explicitly articulated and endorsed by Neil MacCormick. This is particularly interesting because MacCormick showed a sharp awareness and sustained interest in the truth that law has no independent ontological status, that its existence, that is, depends on a people. MacCormick's train of thought has the benefit of bringing to the fore the rationale I have hitherto been attempting excavate. An inquiry into the tensions of his account, in the form of a brief detour, will further illuminate the paradox I am attempting to describe and will stress that an answer to the invalidity question needs to be clear on this very matter.

Let us begin by noting how MacCormick frames the invalidity question. He proceeds by distinguishing between a 'pragmatic' (also 'practical') and 'theoretical' (also 'ontological') point of view. He characterizes each as follows:[36]

> there is doubtless a strictly theoretical point of view from which all putative or purported rights and arrangements in law *either* have *perfect* and valid existence or do *not*… Such a theoretical view concerns itself… with pure ontological questions.

Now, in the 'practical world' this viewpoint is unavailable to persons, because participants of legal practices 'act within the limits of available information and foresight', may make mistakes in exercising powers and, importantly, rely on

[34] Sandro Nannini, 'Legal Validity and Conformity to Law' in Letizia Gianformaggia and Santley L Paulson (eds), *Cognition and Interpretation of Law* (G Giapichelli Ed 1995) 237-42. See also Paolo Comanducci, 'Kelsen vs. Searle: A tale of Two Constructivists' (1999) 4 Associations .

[35] See Sandro, 'Unlocking Legal Validity: Some Remarks on the Artificial Ontology of Law' 109.

[36] Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press 2007) 162 (emphasis added).

purportedly valid legal acts without noting that they are in fact juridically defective. From this practical viewpoint of the world defective legal configurations 'really took effect with all the appearance of validity over certain space of time'.[37] From this vantage, to be more precise, 'something that was defective in its constitution *did exist* over a period of time and did form a basis for some people's practical reasoning'.[38]

All this may be true, MacCormick concedes, but he maintains that the practical viewpoint is not based on 'a reliable proposition on legal ontology'.[39] He holds that a juridical act, and by implication its legal validity, have an existence which holds true regardless of anyone's (practical/pragmatic) perspective. MacCormick proceeds:[40]

> *Surely*, even when we deal with institutional facts rather than physical ones, we must be able to say that they are valid and existent, or invalid and non-existent, *whatever anyone actually thinks*. Once a flaw or mistake is discovered, we realise that the attribution of validity on the basis of which practical courses of action were undertaken was all along a mis-attribution… *In the same way* [ie mistaken attributions of validity], if medical science establishes and works with a hypothesis according to which (for example) poliomyelitis is treated as a waterborne disease, it may subsequently appear that this is a causal misattribution, and that the disease was communicated to and from the respiratory tract. Refutation of a causal hypothesis does not change the fact that people did act on that hypothesis, and administered treatments and took precautionary measures accordingly. These pragmatic truths [truths about physical facts] *do not force any ontological conclusion* such as that, while it was believed in, the hypothesis *was* valid. It was invalid all along if invalid now. *The same*, surely, *must obtain* in relation to *institutional facts* and arrangements.

MacCormick thus likens assertions of validity to scientific hypotheses about physical facts. To begin our interrogation of this argument let us ask the following. How does this account explain defective juridical acts the defects of which no one is aware

[37] ibid 165.
[38] ibid 165 (emphasis added).
[39] ibid 165.
[40] ibid 165 (emphasis added).

of? Or those juridical acts the defects of which persons are aware of but decide to disregard as juridically relevant, such as revolutionary constitutions? Or those juridical acts the defects of which persons are cognizant of but the law itself pre-empts their invalidation, such as the very many juridical acts which are exempted from judicial nullification?

In all these cases there is a tension between the ontological and practical perspectives. From the ontological point of view these acts are, on MacCormick's account, simply inexistent, yet according to the participants of the practice they have a very real existence. MacCormick does not solve the tension. In a rather puzzling move he proposes to answer the invalidity question by maintaining the truth of both:[41]

> Looked at in the perspective of normative ontology, [defective] norms and normative arrangements [] are not valid and do not exist, though [] it [may be] pragmatically prudent to treat [some defective juridical acts] as at least possibly existing until they have been declared non-existent. Imperfect arrangements do exist until such time as they are revoked or nullified.

The pivotal work of this answer is shouldered by the distinction between 'ontology' and 'the practical world', yet no justification of the distinction is offered. This is no truism, however. For the kind of ontology which the legal theorist is concerned with here—legal ontology—is not the study of the natural world but of the nature and properties of entities which emerge from social interaction with a view towards organizing and coordinating common action through institutions of law. In other words, legal ontology is the study of, precisely, the practical world: it is the study of *practices.*

[41] ibid 166.

In truth, MacCormick's pragmatic/practical perspective *is* a proposition of ontology, of social ontology. It holds that juridical acts and their legal validity are a matter of convention. In MacCormick's words persons 'treat' defective juridical acts as 'existent'. To *treat* a juridical act as existent is to *deem* it to be true, and to deem a juridical act to be true is partly to *constitute* it as existent. Conversely, to treat a defectively created juridical subsequently declared to be invalid is to deem it to not have existed. MacCormick's distinction between points of view could be more precisely framed as a distinction between the ontology of physical and social facts, the former being the 'ontological' perspective and the latter the 'pragmatic/practical'.

Now there is no doubt that despite the fact the assertions of validity do not describe a property of the physical world out there, as it were, awaiting to be discovered, there is indeed a sense in which assertions about institutional facts have a kind objectivity. It is possible to objectively maintain that Kelsen held a professorship at the University of California Berkeley and Bulygin at the University of Buenos Aires. In a sense statements about universities and professorships, which are not natural kinds, have a significant degree of objectivity. The same occurs in law, where there is space for objective assertions of legal validity. It seems clear that this is what MacCormick is trying to get at.

Legal systems provide objective parameters of reference by which persons can verify the correct exercise of a legal power—validity criteria. At least 'procedural' or 'formal' criteria, because the fulfilment of 'substantive' criteria can be easily contested. We say 'this contract is valid' and we correct persons who make wrong assessments on whether a power was correctly or incorrectly exercised. This is the usual business of courts. But there are also limits to this objectivity. The limits are imposed by the fact

that persons have the final word on the existence of institutional facts, and thus, I submit and will further argue in the chapters to follow, of assertions of validity.

Searle observed that an answer to how objective statements of institutional facts can be grounded on subjective opinions, and the degree to which subjective opinions control the objectivity of the institutional object, is an essential component for an account of the existence of non-physical entities.[42] A satisfactory account of the existence of law must explain the conditions of possibility of objective assertions of validity, yes, but also of the *limits* of possibility of assertions about legal existence, dependent as they are on subjective judgements. Neither Kelsen nor Bulygin addressed this question, and the fact that MacCormick, who did address it, decided to leave it unresolved, indicates that there is a problem in equating assertions of validity to assertions about the physical world.

5. Conclusion

This chapter has criticized the received answers to the invalidity question by substantiating three main claims. I have argued, first, that they are descriptively inaccurate, in that they fail to capture some salient features of how legal practice actually operate. Second, I argued that they exhibit certain explanatory weaknesses. Bulygin's notion of legal validity, when applied to account for the invalidity question, ceases to fit within his general notion of legal system. Kelsen's notion of validity, in turn, does not account for the existence of rules that direct the community to regard a

[42] John R. Searle, *Making the Social World: The Structure of Human Civilization* (Oxford University Press 2010) ix-x. For an argument to this effect on legal entities, in particular, see Andrei Marmor, *Foundations of Institutional Reality* (Oxford University Press 2023) Chapter 5.

defective juridical act as legally invalid from its inception. Kelsen's account, interestingly, which intended to supply the foundations for the voidable doctrine, ends mirroring the void ab initio doctrine. Third, I showed that both the Pure and Reconstruction theories lack a developed and sound account of what legal existence is.

I have also suggested that there is a telling connection between the first two flaws and the value-free method deployed to develop the conceptual framework out of which they are articulated. I have not argued that their views on the invalidity question are *necessarily* premised on value-free premises—perhaps a value-engaged method could arrive at the same conclusions. Nor have I argued that a value-free method *necessarily* leads to a failed explanation of the invalidity question—my critique does not offer a refutation of a value-free method. Nonetheless, the connection is telling, and I have emphasized it because a sound path forward can profit from a value-engaged method. It is through such a method, I propose, that a more accurate description and a stronger explanation of the invalidity question can be developed.

To that end I will rely on a set of overlapping theses developed by Finnis and Raz on methodology, according to which moral values are rationally intelligible, and that a sound explanation of legal phenomena must engage in moral evaluation.[43] A further consideration that lends support to my methodological proposal is that prominent legal positivists today hold the view that a value-free methodology is not a

[43] John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) Chapter 1; John Finnis, 'Describing Law Normatively', *Philosophy of Law: Collected Essays Volume IV* (Oxford University Press 2011); Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009) 69 (endorsing Finnis); Joseph Raz, *Ethics in the Public Domain* (Revised edn, Clarendon Press 1994) stating necessary connections between law and morality: that it protects human goods (168, 172-73), that it is a morally good thing that it structures authority (180), that Kelsen's purity thesis is 'clearly misconceived' (201-02), and that legal theory includes evaluation, albeit not necessarily moral (209, 235-37). For some methodological differences between Raz and Finnis, which do not affect my argument, see Julie Dickson, *Evaluation and Legal Theory* (Hart Publishing 2001) Chapter 2-3.

distinct proposition of legal positivism.[44] My account can therefore appeal to a broad audience.

The answer I will develop therefore begins from an entirely different presupposition. The key to understand institutions of law and institutional techniques is to ask for the (true) moral purpose they serve. While it is true that there is a real difference between factuality and morality, the elucidation and understanding of legal phenomena involves a full-blooded theoretical engagement with the goods that legal institutions and techniques advance.

[44] John Gardner, *Law as a Leap of Faith* (Oxford University Press 2014) 48-53; Leslie Green and Thomas Adams, 'Legal Positivism' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University 2019) 4.3. Following Raz's advice, I will avoid inserting my answer to the invalidity question within the positivism/natural law/non-positivism framework of argument. The meaning of these tags is unsettled and adopting them would likely lead to unnecessary confusion: Joseph Raz, 'Comments and Responses' in Lukas H. Meyer, Stanley L. Paulson and Thomas W. Pogge (eds), *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford University Press 2003) 253.

PART TWO

IV. EXISTENCE

1. Introduction

An answer to the invalidity question requires an account of the notions of legal validity and invalidity, as well as of the nature and forms of remedial reactions against defectively created legal norms. The concept of legal validity is closely tied to the notion of legal existence: for legal validity is predicated of existing legal entities. In this sense the notion of existence is distinct from and prior to the notion of validity. Therefore it will be well to follow this pattern and begin to develop my proposal by explaining first what it is for a legal entity to exist. The aim of this chapter is to provide that account. This will lay down the groundwork for my explanation of the notion of legal validity, to be developed in Chapters V and VI.

The idea of legal validity applies in its focal sense to acts created through exercises of legal powers.[1] These acts are sometimes referred to under the generic name 'juridical act' (or 'juristic act', 'legal act', 'act-in-the-law') and examples are contracts, wills, marriages, judicial rulings, administrative decisions, legislation, and even some constitutions. Juridical acts shape the normative situation of persons by configuring their legal relations. Persons relate juridically to each other by means of claims of rights,

[1] See Köpcke, *Legal Validity: The Fabric of Justice* 26, 59.

duties, permissions, powers, immunities, disabilities, which, for short, I will refer to as legal configurations.

Our inquiry will be into the ontology of this specific aspect legal phenomena: on the type of things juridical acts are, and how they come into and remain existence. The inquiry will be confined, in other words, to the juridical act, which, while sharing many features with related legal norms, such as precedent and custom, has its own particularities. Questions of legal ontology are so far reaching that answers to them can, as a whole, amount to virtually a general theory of law. No such attempt will, of course, be undertaken here. My aim is to produce a focused framework to answer the invalidity question. To that end it will suffice to identify and articulate the bare bones of some central features of the ontology of juridical acts.

The general thesis this chapter seeks to advance is that juridical acts have no independent ontological status: their existence depends on the continued mental states and volitional dispositions, and actions, of a group of persons. Legal systems are a function of the political community of which they are its law—their existence depends on the existence of a people, who continually think of, and by and large choose to follow, what they regard as their law. I shall argue that the coming into and remaining in being of juridical acts depends on an interplay of events: the manifestation of an intent to configure legal relations, on the one hand, and the continued recognition, by the relevant community, that the manifestation of intention counts as a successful configuration of legal relations, on the other. Since these events are expressions of intentional choices, this interplay can be characterized as an inter-action, which I shall term the logic of *action* and *reaction* in the law. Action and reaction in the law are, jointly, the necessary and sufficient existence-conditions of juridical acts.

The main conceptual tool by which legal theory has elucidated the ontological dependence of law is the notion of 'efficacy', understood as the fact that persons by and large obey the law.[2] The idea here is that positive norms exist because the group follows and conforms to them. The claim has been explained in largely convergent ways by otherwise divergent thinkers.

Bentham argued that 'the ultimate efficient cause' of the commands of the sovereign is the 'disposition on the part of those persons [the community] to obey'.[3] Hart followed Bentham's insight but slightly shifted his thesis by maintaining that law ultimately rests on a normative attitude not towards the person of a sovereign but to an institution (a set of 'rules').[4]

Aquinas, in a systematization rendered by Finnis, thought that law exists in the 'in the minds' of both 'ruler and subject'.[5] In a long-standing academic conversation with Aquinas' critics Finnis has fleshed out that proposition by observing that this presence involves the 'disposition and willingness' of a people to treat past exercises of powers as having the present juridical signification of authoritatively configuring legal positions. This, he maintains, is the 'ontological basis' of law.[6]

Through the vessel of the concept of efficacy the inter-active aspect of legal ontology has been thematized, at a systemic level, as a necessary condition for the

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[2] The category acquired its central status in contemporary jurisprudence through the works of Kelsen, Ross, and Hart. They disagreed on the details of the concept, but in general terms agreed in suggesting that a community and its law stand together in a kind of relationship. On how efficacy involves this relationship, see Adams, 'The Efficacy Condition' 226. On the rather unsettled meaning of efficacy, see Stephen R. Munzer, *Legal Validity* (Nijhoff 1972) 30.

[3] Jeremy Bentham, *Of Laws in General* (Collected Works of Jeremy Bentham, Athlone Press 1970) 18.

[4] Hart, *The Concept of Law Chapters* 4-6; Hart, *Essays in Jurisprudence and Philosophy* 359. Relatedly, Hart argued, that such a normative attitude is not of habitual behaviour but of rule-following, based on the 'acceptance' of a group of people that the legal norms exert binding force.

[5] Finnis, *Aquinas: Moral, Political, and Legal Theory* 256.

[6] Finnis, *Natural Law and Natural Rights* 269; John Finnis, 'Reflections and Responses' in John Keown; Robert P George (ed), *Reason, Morality, and Law: The Philosophy of John Finnis* (Oxford University Press 2013) 519. See also Finnis, 'Revolutions and Continuity of Laws' 428ff.

existence of a legal *system*. A system can only exist if it is in force, and it is in force only if the addressees of the norms conform to its norms. There remains, however, the task to apply and adapt that insight to the *discrete* creation of juridical acts. When the legal mind zooms into the retail level of legal existence it tends to exclusively focus on the action-dimension of norm-generation.

Some indications are found at the surface level of language. The words practitioners normally use to refer to the coming into being of acts-in-the-law capture the action-dimension only: 'promulgate', 'enact', 'command', 'issue', 'ordain', etc. That vocabulary is indicative of a deeper level, of how we grasp a phenomenon. Köpcke, for example, in developing an account of legal powers and legal validity on which much of my own answer to the invalidity question will build, asserts that exercises of powers change legal configurations 'ipso facto, upon being performed'.[7] This assertion is representative, I think, of much of our current thinking. There is truth to this claim, in the sense that the reaction of the community is, as we will see, normally silent, and presumed, in well-shaped legal systems, to always obtain. Yet omissions regarding the conceptual need for a legal reaction to an action nonetheless leave an important theoretical gap. A chief aim of my argument is to give the notion of recognition its proper place in a theory of the existence of juridical acts.

Section 2 explains the notion of juridical act in some detail and clarifies potential obscurities, and section 3 explains their artefactual character. Sections 4 to 6 develop the rationale of action and reaction in the law. In developing my account I will employ some terms that are not of widespread use. To avoid confusions I will signal this when needed. Section 7 concludes.

[7] Köpcke, *Legal Validity: The Fabric of Justice* 20.

2. The Juridical Act

The term 'juridical' or 'juristic' act is well-known to the civil law tradition, where doctrinal scholars have developed general concepts applicable both to public exercises of authority and private undertakings. The term allows the jurist the expository amenity of grouping very diverse things such as contracts, wills, administrative decisions, and legislation under the same name. This approach contrasts with that of the common law, which is typically characterized as exhibiting a less systematic character and more of a bottom-up method. The common lawyer has the concept juridical act, but the word is rarely employed. Since the notion of validity applies, in its focal sense, to entities produced by exercises of legal powers, it will help to have a single term to refer to that entity. To that I end I will use the term juridical act.

The use of the term in legal practice and theory equivocates between the exercise of a legal power and the product of its exercise, the bundle of legal configurations the exertion of the power effectuates. For example, there is a tendency to speak both of the entering into a contract, as well as the formed contract itself, indistinctly under the name juridical act.[8] The aim of this section is to explain the reason for this ambiguity, make some disambiguation, and, more generally, explain what a juridical act is. In providing an explanation I will also clarify relations with associated concepts such 'legal norm', 'source of law', and 'proposition of law'. An account of legal

[8] For comparative treatment, albeit without noting the equivocation, see Konrad Zweigert, Hein Kötz and Tony Weir, *Introduction to Comparative Law* (2nd rev edn, Clarendon Press 1987) 2-10. For a historical overview of the concept's trajectory, see Alejandro Guzmán Brito, 'Para la Historia de la Formación de la Teoría General del Acto o Negocio Jurídico y del Contrato, IV: Los Orígenes Históricos de la Noción General de Acto o Negocio Jurídico' (2004) Revista de Estudios Histórico-Jurídicos 187.

phenomena must partly reflect the point of view of those engaged with it and, thus, the vocabulary employed to express their thought and action. However, the terms we are concerned with do not have a stable and univocal use. Philosophical elucidation in social theory must inevitably proceed with some degree of stipulation.

2.1. Isolating the Notion of Juridical Act

To begin to isolate the notion of juridical act a distinction must be drawn between physical and voluntary facts. Both kinds of facts can cause the configuration of legal positions. In most legal systems physical occurrences typically give rise to rights and obligations. Consider, for example, the passage of time, births, or earthquakes. A right to property may be consolidated or lost after a period of time, in conjunction with other facts such as possession or lack thereof, or lack of interaction between right-holder and possessor; after birth human beings acquire the whole set of rights and obligations associated to personhood; and the natural event of a permanent shift of land may trigger acquisition of property through the method of accession. If a juridical act is a norm-generating fact—a fact that contributes to the creation of legal configurations—then physical facts seem to fall within the category. In contrast, however, the notion of an act-in-the-law involves the idea of personal *action*. It lies within the realm of agency.

Now, narrowed down to agency further distinctions must be drawn, for not all voluntary actions produce legal configurations in the same way. A customary rule may emerge and acquire the binding force of law if it meets the requirements laid down in positive rules of the system on the formation of legal custom; a judicial ruling may be issued aiming to solve a particular dispute but can result in changing the law for future

cases in ways unforeseen by the court; and so on.[9] Consider, further, the act of emigrating to another country with the aim of acquiring a more comfortable material living through the access to, say, social rights; or to enjoy more freedom to express political opinions. The legal position of a migrant can radically change by becoming a citizen or resident of another jurisdiction. Or consider the commission of wrongs such as a tort or a crime. Such an event can bring about the obligation to pay compensation, or be imprisoned. Wrongful acts can change, and again very radically, the legal position of the person.[10]

The foregoing are not, however, instances of juridical acts, as historically understood in legal practice and theory. The kind of intentional modification of legal positions proper to the notion of juridical act, rather, has the distinctive feature of being reflexive. The notion of a juridical act is associated to the action of bringing about the legal configuration by virtue of the very act of expressing the intention to bring it about. The institution that gives structure to this reflective form of agency is what legal theorists have termed a legal power (or capacity, or competence, as European theorists tend to prefer). Persons exercise a legal power to bring about a normative change, a change in legal positions, by expression (utterance, say-so).

The concept of a performative speech act aptly captures this movement. A speech act is an exercise in communication by which persons create an effect in the world. In thinking about legal powers in terms of speech acts, theoretical focus is brought to the communicative aspect of norm-generation. A juridical act under this

[9] See Leslie Green, 'Positivism, Realism and Sources of Law' in Patricia Mindus and Torben Spaak (eds), *The Cambridge Companion to Legal Positivism* (Cambridge University Press 2021) 40; Gardner, *Law as a Leap of Faith* Chapter 3; Köpcke, *Legal Validity: The Fabric of Justice* 114.

[10] I am expounding upon Joseph Raz, 'Voluntary Obligations and Normative Powers' in Stanley L Paulson (ed), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford University Press 1999) 452-53; Köpcke, *Legal Validity: The Fabric of Justice* 15ff.

light (or 'model', as it is commonly referred to) is a communicated message. The model of ordinary communication does not entirely capture the phenomenon, as we will see below, but aptly underscores the truth that norm-generation involves an interaction between addressor and addressee. Since attention to the inter-active aspect of norm-generation is central to our inquiry, it will be illuminating to make use of the communicative dimension.

2.2. Communication

Communication is made of up of a communicative act (the utterance or say-so) and the communicated content of the communicative act, which the speaker aims for the addressee to grasp. One ordinarily communicates to express a message by reasonably manifesting an intention to elicit a response. Ordinary communication obtains—succeeds—if the message uttered by the addressor is understood by the addressee, to which he or she reacts.[11] Examples of performative utterances, which are a kind of communicative act, are ordering, requesting, and declaring. The pair of concepts that evaluate performative utterances is not truth or falsity, for their function is not to conform to what there already is in the world, but success and failure. A successful performance is, to use a word laden with expression, 'felicitous'.[12]

If we apply this conceptual apparatus to the legal realm the phenomenon of norm-generation can be articulated as follows. The say-so of a person (the 'legal', as opposed to ordinary, communicative act) is uttered, to be understood by a specific

[11] See Köpcke, *Legal Validity: The Fabric of Justice* 41.
[12] J. L. Austin, *How to Do Things with Words* (Second edn, Harvard University Press 1975) 14.

audience, to configure legal positions. Within this scheme the legal configuration is the 'meaning' of the legal communicative act. In exercising a legal power persons manifest an intention to achieve something by the act of manifesting an intention. The exercise of a power is thus a reflexive *act* with a *juridical* signification. Terms that typically capture exercises of powers are buying, selling, adjudicating, enacting, marrying, and so on.

In the idea of exercising a legal power we find the most literal sense of the term juridical act. The term is frequently employed by jurists to capture this sense. Now an adequate analysis of norm-generation requires distinguishing between the exercise of a power and the product which results from its exercise.[13] In exercising a legal power the holder proposes the bringing about of a project, an intelligible pattern of practical rationality in the form of a plan for action designed to regulate and/or constitute normative relations between persons (sales of goods, consumer credits, regulation of financial markets, criminal sentencing, licencing permits, taxation schemes, etc.). The term juridical act is, interestingly, also employed to capture this sense. The idea of product is generally denoted by legal practitioners as the legal 'effects' or 'consequences' of an exercise of a power. The main equivocation in the use of the term juridical act lies in the fact that it captures cause and effect. The notion of validity, as we will see in Chapter VI, is primarily predicated of the product of the exercise of the power rather than the exercise of the power itself. Therefore, to preserve the distinction between cause and effect I propose to fix the word juridical act to capture the product of an exercise of powers. Buyer and seller come together to produce a contract, a judge produces a judicial ruling, a legislature produces a statute, and so on. Contracts, rulings,

[13] See G. H. von Wright, *Norm and Action: A Logical Enquiry* (Routledge & Kegan Paul 1963) 35ff, 116.

statutes… these are the entities I propose to refer to by the terms juridical act or act-in-the-law.

The distinction between legal cause and legal effect is not aptly explained by the model of ordinary communication. Köpcke has helpfully explained how this conceptual apparatus fails to account for an important feature of legal phenomena. Legal communicative acts, unlike ordinary communicative acts, last in time. Soon after posing a question the speaker cannot be said to remain asking; whereas in the legal domain the giver of the utterance may remain bound to a promise, say, for many years.[14] Recall that the 'legal meaning' of an exercise of powers is a plan designed to direct and guide future conduct. It is intelligible to speak of the effects or consequences of a (legal) speech act because the legal configurations are meant to last in time. Another way of stating this point is to say that the 'meaning' of a legal utterance becomes detached from the performance of the speech act. Upon the advent of the exercise of a legal power juridical acts acquire a self-standing status. They circulate, as it were, as enduring entities in the juridical traffic of social interaction.[15]

The project contained in juridical acts are propositions for action which I shall refer to as propositions of law. It is common in legal theory to distinguish between propositions about law and propositions of law. Propositions about law state the fact that a juridical act exists and that it has such and such propositional content. Propositions of law state the propositional content of the juridical act; and this is the plan for action. Propositions about law describe propositions of law. A proposition about law would say, for example, 'this juridical act states that *A* is under an obligation to Φ', whereas a proposition of law would say '*A* must Φ'.

[14] Köpcke, *Legal Validity: The Fabric of Justice* 51.
[15] ibid 51-54, 85, 131, 147.

Juridical acts are normally redacted in the indicative mood rather than the imperative. The deontic operator is generally implicit in the formulation of a legal norm. For example, crimes are commonly codified not as 'Murder is forbidden', but 'Any person who kills … shall be guilty of an offence'.[16] The identification of the proposition results from an act of interpretation. Propositions of law are not, therefore, the verbal formulation of the juridical act itself but their meaning.[17] A newly created juridical act which simply restates in other words the content of an existing juridical act does not bring a plan for action into existence. Now exercises of powers do not occur in a vacuum but within a functioning, efficacious legal system. In crafting a juridical act power-holders determine, by way of stipulation, the reach and scope of the propositions for action that make up the project. But the impact of the set of practical propositions for action that a juridical act introduces into the world is partly determined—co-determined, let us say—by the propositional content of other juridical acts, as well as propositions for action which are not themselves entirely embodied in juridical acts, such as precedent, customs, conventions, and moral standards.[18]

The normative propositions that are part of the legal order, at the moment in which a power is exercised, co-determine the meaning of the created juridical act by contributing to the specification of its reach and scope. The existing propositions for action that relate to the incepted juridical act are, to use a popular expression, determinants of its legal content.[19] Where the propositional content of the juridical act

[16] Eric Voegelin, *The Nature of the Law and Related Legal Writings*, vol 27 (The Collected Works of Eric Voegelin, Louisiana State University Press 1991) 25-26; Finnis, *Natural Law and Natural Rights* 282-83. I take the example from Finnis.

[17] An idea sometimes expressed by distinguishing between 'norm' and 'norm-formulation': see, eg, Bulygin, 'Norms, Normative Propositions, and Legal Statements (1982)'.

[18] I am following the general account in Köpcke, *Legal Validity: The Fabric of Justice* Chapter 6 on how juridical acts are interwoven in the identification of legal meaning.

[19] The term has been popularized by Mark Greenberg, 'The Moral Impact Theory of Law' (2014) 123 The Yale Law Journal 1288 1295.

is silent or ambiguous its meaning can be understood in light of the propositional content of other norms of the system. Where its meaning is clear and settled it can also be also qualified, enhanced, restricted, and overridden.[20]

Here is an example. A standard student tenancy agreement in Oxford invokes regulatory schemes that lie far beyond what is stipulated by the juridical act itself (say on: the obligations to repair the premises,[21] how possession is to be recovered,[22] taxes are to be paid,[23] how the tenant's personal information must be handled by the landlord,[24] how the deposit paid by the tenant ought to be protected throughout the duration of the tenancy,[25] etc.). Many other legal rules that affect the contract might not even be in the forefront of the minds of the parties (eg on the procedure to adjudicate a dispute, the rights of the tenant in case of harassment by the landlord, etc.).

A juridical act is thus not an entirely freestanding entity.[26] Propositions for action, it may be said, take shape once introduced, and that configuration is liable to be continually affected by the advent of future propositions for action. The identification of propositions for action, which may be called the content of law, is a function of various acts in continued interaction.[27] Legal propositions regulate relations between persons in relation to a subject-matter, which are framed as sets of facts. The emergence of facts in the everyday social interaction of a political community trigger

the need to identify the propositions for action which apply to them. There are as many legal propositions for legal action as there are legally answerable questions.[28] Legal

[20] See Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press 2012) 126. Ekins speaks of legislation but his point can be extended, I think, to all exercises of legal powers.
[21] Landlord and Tenant Act 1985 s11 to 16 (as amended by the Housing Act 1988).
[22] Housing Act 1998 s21.
[23] Income Taxes Act 2007.
[24] Immigration Act 2014.
[25] Housing Act 2004
[26] Köpcke, *Legal Validity: The Fabric of Justice* 142-43 .
[27] Raz, *Ethics in the Public Domain* 300-10.
[28] Finnis, 'Just Votes for Unjust Laws' 451.

reasoning, in attempting to identify propositions of law, therefore operates by placing the present meaning of propositions for action into a temporal trajectory in which considerations about past, present, and future legal acts come together in relation to a specified set of facts.[29]

In summary, the 'meaning' of propositions for action is not single-authored but co-determined by the many authors which act in the joint enterprise we call a legal system. The meaning of a juridical act is, in short, systemic.[30] Legal reasoning attends not only to the discrete juridical acts produced by power-holders but, primarily, to their meaning in the context of the entire system. Law guides systemically and diachronically. This feature of legal reality is well-known to legal practitioners. Students of law learn early on that 'the law' is identified by recurring to the many legal acts—the legal materials, as we may call them—which make up a legal system. Textbooks written by doctrinal scholars in this sense enhance, or contribute to, legal guidance by systematizing what would otherwise be a vast array of disconnected things.

2.3. Sources of Law and Law

Now it is a fact of legal reality, a fact in need of explanation, that legal configurations do have a fixed, datable character and are not in a permanent flow of modification. Indeed, it is a feature of legitimate authority that the issued directives for action be easily identifiable. Otherwise law could cause confusion in the community and come short in its guiding function, impeding its capacity to settle what ought to be done—the very

[29] Gerald J. Postema, 'Time in Law's Domain' (2018) 31 Ratio Juris 160 165-66.
[30] Köpcke, *Legal Validity: The Fabric of Justice* 123.

point of having authority. Jurists are in possession of an explanatory tool to account for this: the distinction between 'sources of law' and that which proceeds from the source, 'law'. The analytic distinction between source and law tracks the distinction between the say-so, uttered by the power-holder, and its meaning. This distinction presupposes two different planes of reality. One is the plane of acts-in-the-law, of 'sources'; the other is the plane of legal meaning, of the 'law' which springs from the source.[31]

The term is of course a metaphor. The word source is taken from the physical realm, as many other terms which make up jurisprudential vocabulary (eg force, weight). The metaphor evokes the image of a fountain from which water continually flows. Of the two represented items in the image one is static and the other in movement. The fountain represents the discrete unit brought about by the exercise of the legal power; the water, in turn, symbolizes the set of propositions which are contained in—and in this sense we may say spring from—the source. The image of source highlights the fixed, self-standing status of the created legal entity, which functions as a stable point of reference as the datable originator of legal meaning. Legal meaning, in turn, because of its systemic and lasting character, is, like the flux of a stream, susceptible to modification.

As a place-holder the term juridical act can flexibly cover the two interconnected realities of source and law. Technical terms such as contract, statute, and will, capture both the juridical act as well as its propositional content. Attention to the discursive context will indicate what exactly a participant of the practice may be

[31] On the distinction of planes, see ibid 147-49. Although Köpcke is clear in distinguishing between the act of exercising a power and the product of that exercise, on occasions she seems to use the word source to refer to the former (eg at 83-84) as well as the latter (eg at 85). Köpcke does not thematize the concept of source, nor that of a juridical act, in the way I am doing here (passages at 52 and 59 seem to evidence this), but I do not think there is any necessary incompatibility between this aspect of my proposal and her account.

referring to when employing these words. The fact that the technical terms practitioners employ do not clearly differentiate between source of law and law is not a shortcoming of legal practice but rather a function of the nature of how law guides. For law guides systemically, but systemic guidance is a product of (very many) discrete exercises of power, exercises which produce an identifiable unit whose meaning is co-determined by multiple other units.

As a point of clarification, observe that my use of the term 'source', which I take to be standard, differs from a popular sense stipulated by Raz. Raz conceptualizes source broadly, to capture norm-generating events, including among others, exercises of powers and wrongful acts.[32] He purposely conceptualizes 'source' broadly because his concept of source forms part of an explanation of authority. Raz has referred to the tripartite distinction I am developing by using other words. What I refer to as exercise of power he calls 'source'; what I call juridical act he calls 'law'; and what I call proposition of law he calls 'legal statement'. Although Raz's notion of source is broader, the difference between his view and the one I am proposing is more semantic than conceptual.

We may now conclude the first part of our inquiry. The notion of juridical act serves as a conceptual tool to capture the product of exercises of powers. To explain the truth that legal plans for actions last in time I've suggested that the notion of juridical act must be disaggregated into the notions of source and law, which capture both what is fixed and in motion in the phenomenon of norm-generation. Finally, observe that in legal theory the terms source of law, law, and propositions of law, are frequently used interchangeably with the terms 'rule', 'norm', and 'ought'. In this respect at least the terms rule, norm, and ought do not have a sufficiently stable and fixed meaning. (A by-

[32] Raz, *The Authority of Law* 62-63.

product, I think of the fact that the concept source of law has been largely overlooked in contemporary legal philosophy.[33]) It seems to me that the most natural fit is to locate these three terms as synonymous with propositions of law. Having established that juridical acts are the effect of exercise of powers we can now inquire directly into their ontological status.

3. Juridical Acts are Artefacts

Juridical acts are artefacts. The philosophical notion of 'artefact' has been deployed by many theorists to explain legal reality.[34] I shall assume rather than justify that the idea of an artefact is a sound tool for the study of the ontology of juridical acts. The insight that the ontological character of a juridical act is artefactual will enable us to answer the main question this chapter seeks to address: namely, how and why legal acts come into and remain in being, and who causes their existence. The aim of this section is to outline the basic aspects of a framework.

An artefact is a thing created by persons. Artefacts are intentionally made in order to accomplish a purpose. The basic components of the concept are usually traced

[33] For instructive discussion, noting as well the absence of attention, see Fábio Perin Shecaira, 'Sources of Law Are not Legal Norms' (2015) 28 Ratio Juris 15; Giorgio Pino, 'Sources of Law' in John Gardner, Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law Volume 4* (Oxford University Press 2021) 58-60.

[34] There is a growing body of literature. Some important works, on which I here build, are: MacCormick, *Institutions of Law: An Essay in Legal Theory*; Luka Burazin, 'Can There Be an Artifact Theory of Law?' (2016) 29 Ratio juris 385; the essays contained in Luka Burazin, Kenneth Einar Himma and Corrado Roversi, *Law as an Artifact* (Oxford University Press 2018), authored by Brian Leiter, Frederick Schauer, Andrei Marmor, Kevin Toh, Corrado Roversi, Luke Burazin, Kenneth Einar Imma, Kenneth Ehrenberg, Verónica Rodriguez-Blanco, and Dan Priel; Andrei Marmor, 'Law as Authoritative Fiction' (2018) 37 Law and Philosophy 473; Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press 2019) Chapter 8; the essays contained in Luka Burazin and others, *The Artifactual Nature of Law* (Edward Elgar Publishing 2022), authored by Luka Burazin, Kenneth M. Ehrenberg, Jonathan Crowe, Petar Popovic, Zuzanna Krzykalska, Miguel Garcia-Godinez, Pawel Banas, Lucila Fernández, Izabela Skocen, Noam Gur.

back to Aristotle, who distinguished between things that exist 'by nature' and 'by craft'.[35] According to Aristotle's framework of thought the questions how and why entities come into being can be answered by reference to four kinds of explanations ('causes'): material, formal, efficient, and final. Each of these explanations answer specific questions. The question of matter: what is the entity made of? The question of form: what specifies the essence of the object? The question of efficiency: what causes the movement of creation? The question of finality: what is the end for which the efficient cause moves? Things exist 'by craft' if the efficient cause is the act of a person, a designer, whose plan gives shape, as it were, to the matter.[36]

Aristotle's framework can be applied to juridical acts as follows. Who creates the entity? Empowered persons. Out of what are the entities created? Words that express intelligible patterns of practical rationality. What in-forms this matter? The patterns of rationality in the form of a plan to configure legal positions. Why does the power-holder initiate the movement? To coordinate future action for a community's well-being. This orderly scheme has a powerful explanatory capacity. It aptly shows how law partakes of different and irreducible domains of reality: juridical acts are artificial *techniques*, thought of by persons, brought about through the use *language*, for a specific set of reasons, to then serve as future reasons for action, which operate, in practical deliberation, as considerations that count in favour of the realization of *moral values*.

Now a distinctive feature of legal artefacts such as juridical acts is that they are meant to organize (jural) relations between persons—of rights, obligations, permissions, powers, and so on. The plan for action must be present not only in the mind of the power-holder of the act but also in the mind of the addressee. In order to exist the plan

[35] See Beth Preston, 'Artifact' in Edward N. Zalta & Uri Nodelman (ed), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University Winter 2022) Section I.

[36] Aristotle, *Metaphysics* 1032a26-1032b30.

for action, conceived in the mind of the addresser, and made known through his or her say-so, must be received, in a sense to be explained, by an addressee.[37]

Legal existence comes about by an interplay between power-holder and addressee, an inter-action, where action stands for the exercise of a legal power and reaction for the recognition that the activity of the power-holder produces legal configurations. This movement is what I termed above the rationale of action and reaction. We may say that both addresser and addressee are, jointly, the efficient cause of the juridical act.

The Aristotelian scheme, as roughly reproduced, does not, however, sufficiently illumine the receptive aspect of norm-generation. And, for the reasons laid down in the introductory remarks to this chapter, our inquiry requires focusing on the inter-active aspect of norm-generation, especially its receptive dimension. Now conceptual frameworks are themselves artefactual, designed for specific purposes and based on distinct presuppositions. There is no perfect framework. One may provide a clearer lens into a dimension of reality, another into a different dimension. We are presented with a choice. I shall therefore employ an alternative conceptual scheme to develop the rationale of action and reaction, based on Searle's theory of institutional reality, which I take to be a standard account within the literature, and much recurred to in thinking

[37] Who addresses and who is addressed? That will depend on the number of parties who partake of the speech act. The addresser of unliteral acts, such as legislation and some administrative decisions, are the relevant public authorities, and the addressee the specified subject governed by the juridical act, as well as the community at large. In bilateral or multilateral juridical acts, say a contract, the parties are both addressers and addressees; and additional addressees are, typically, affected third parties, as well as the community at large against which the relevant juridical act can be held. To avoid confusions I should clarify that my argument is not about who must participate in the formation of the contract. The notion of addressee, as understood here, is not to be equated with the person to whom an offer to form a contract is directed, although that person will indeed be among the addressees.

about legal artefacts.[38] I will also add some refinements to explain certain distinctive features of legal reality which Searle's theory insufficiently accounts for.

Searle's theory begins by drawing a distinction between brute and institutional reality. Brute facts are physical things and exist, to use Aristotle's terms, by nature. Institutional realities, by contrast, are deemed realities. They exist because and in so far as thought of by a group of persons. According to Searle institutional facts are built upon other facts, which are, in relation to them, more basic. Persons use facts, as it were, in order to produce institutional facts. The mode of use is an ascription. Persons ascribe to (assign, impose on, deem) facts the performance of a function. These more basic facts can in turn be brute or institutional, although institutional facts ultimately bottom down in brute facts.[39] Most institutional facts are compounds of brute and institutional facts.

To begin to develop the framework let us take further note of the compounded character of institutional reality. Consider, first, how brute facts can be used to create institutional facts. Persons make brute facts perform functions that they would not, naturally, that is by their intrinsic properties, perform. An illustrative example, which I shall only outline in crude and simplified form, is that of fiat currency. A piece of paper can by its own properties perform a series of functions: when it burns, the cellulose in the paper reacts with oxygen from the air to form carbon dioxide, water vapor, and other combustion by-products; this reaction releases energy in the form of heat and light. Now paper can also be used to perform functions that are extrinsic to its nature. Philosophers of money disagree on the exact functions imposed on it, but for our

[38] See the references cited in footnote 34, above. Some have expressed doubts on the aptness of this conceptual tool in relation to legislation, specifically, on the grounds that collective intentions do not operate in the same way as individual intentions: see, eg, Mark Greenberg, 'Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (Oxford University Press 2011) 235, 239, 252-53.

[39] John R. Searle, *The Construction of Social Reality* (Penguin 2007) 120ff.

purposes it suffices to note that it can be used as a medium of exchange and a measure of value. These extrinsic functions are, according to Searle, collectively assigned by a people to achieve a set of purposes.

Secondly, an institutional fact can also emerge from ascribing a function to another institutional fact. As we will see below, an utterance (a brute fact) can produce an exercise of powers, and an exercise of powers (an institutional fact) can be recognized to produce a further institutional fact (a juridical act). This scheme is only a simplified version of what occurs in legal reality. But even in simplified form we can see the complexity—the compounded character—of legal artefacts, where each in a sense build on the other, and what counts as brute on one level counts as institutional on another.

The central components of the conceptual apparatus that explains institutional reality are the notions of 'institutional function' and 'recognition'. Institutional functions are the extrinsic functions ascribed to more basic facts. By virtue of a declaration, which is a speech act, a group establishes that provided that certain conditions obtain, some specified act-description will be deemed to perform an institutional function. For example, the utterance 'I will donate my pen to you' counts, in certain legal contexts, as a promise. (Performative speech acts are rarely formulated in any kind of canonical form.)

This reality can be expressed through the formula 'X counts as Y in context C'. X stands for the brute or institutional fact, depending on the case; Y stands for the assigned institutional function; and C stands for the institutional background that constitutes and regulates, among other things, the specific conditions that must obtain for X to count as Y. In Searle's terms institutional realities are normally created against an antecedent set of 'constitutive rules' which specify the conditions under which

institutional reality can be created.[40] Institutional functions are collectively assigned by a group. Searle gives the name 'recognition' to this act of ascription. I shall henceforth call the group 'recognitional community'.[41]

4. Action and Reaction

This account helpfully underscores that the coming into, and remaining in, existence of legal artefacts is a movement, a sequence of acts, as I have observed, of action (the say-so) and a continued reaction (the recognition). The exercise of a legal power only introduces an event into the world, an event which will result in the configuration of legal positions if the community reacts in the appropriate way, recognizing it to perform the function of producing a juridical act. Talk of legal powers creating juridical acts must always be understood as short-hand for power-exertion plus recognition.

As a first step to articulate the rationale of action and reaction I will deploy the outlined framework and apply it to legal artefacts. Section 2 explained that, in the activity of norm-generation, action is carried out through exercises of legal powers and that such an exercise produces an entity which I called juridical act. The notion of juridical act, in turn, must be analytically disaggregated into the notions of source of

[40] Searle, *Making the Social World: The Structure of Human Civilization* 97-98; Searle, *The Construction of Social Reality* 27-29, 43-48, 190-91.The notion of constitutive rules has given rise to much debate the contents of which need not concern us. The institutional context is, as a matter of fact, normally rule-structured, but not always, nor need it be (see John R. Searle, 'Constitutive Rules' (2018) Argumenta 52).

[41] I take the term from Matthew D. Adler, 'Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?' (2006) 100 Northwestern University Law Review 719. Adler is in turn taking the term from Hart's idea of the group of persons that ground the rule of recognition. I will establish parallels with Hart's account below; the number of persons which form the recognitional community, and the capacity in which they act, is a contested question the answer to which is not necessary for our purposes. For discussion, see Mikołaj Barczentewicz, 'Constitutional Change and the Rule of Recognition', (DPhil Thesis, University of Oxford 2019) Section III.

law and law. I shall call 'legal recognition' the act of assigning a say-so the function of a legal power, and therefore to its product that of a juridical act. These three elements—power, source, law—are themselves institutional facts. They can be expressed through the formula 'X counts as Y in context C' as follows.

> *Legal power*: a written or verbal utterance/say-so (X), counts as an exercise of a legal power, ie the initiating movement to cause a juridical act [source of law and propositions of law] (Y), in this particular legal system (C).

> *Source of law*: an exercise of powers (X), counts as a source of law, ie the datable originator of propositions of law (Y), in this particular legal system (C).

> *Proposition of law*: the meaning of the propositional content of the source of law, co-determined by the propositional content of the relevant norms of the legal system (X), counts as its set of propositions of law, ie the configurator of legal positions (Y), in this particular legal system (C).

Propositions of law are plans for action designed by persons to craft institutionalized arrangements. Propositions of law are in a relevant sense a form of institutional design. Now propositions of law relate to reasons for action. Institutional reality interlocks with practical rationality, but they are distinct and irreducible

domains, as Searle aptly ascertains.[42] Values, and the reasons which favour the realization of values, are not artefacts. It is therefore important to distinguish what I have called a proposition of law from the normative positions which it configures. A proposition of law is not in and of itself the duty, right, permission, etc. that it establishes. I shall explain this point by contrasting propositions of law from obligations.

The idea of obligation is frequently explained in terms of reasons for action. The concept itself is very difficult to grasp in the details and I shall not make any such attempt here.[43] Nor shall I lay any claim on how the existence of a juridical *gives rise* to an obligation, say by 'constituting' reasons for action, or 'triggering' underlying reasons for action.[44] To explain the difference between the domain of artefacts and that of obligations it will suffice to observe that a defining element of the concept of obligation is the notion of 'rational necessity'.[45] A necessity in this context is 'that without which some good will not be obtained or some evil averted'.[46] Person *A* is under an obligation when he or she is in a situation where there is a rational need to follow a specified course of action (Φ). Persons are in a rational need to pursue certain values constitutive of their well-being, and the notion of obligation picks out those aspects that are required of them, which hold true regardless of their subjective motivations.

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[42] Searle, *Making the Social World: The Structure of Human Civilization* 124, 139, et passim. Searle's theory of how institutions give rise to reasons for action aims to be 'naturalistic' in character, making no reference to objective moral values (see John R. Searle, *Rationality in Action* (MIT Press 2001) 170-71). Since Searle's account of practical reason can be detached from his theory of institutional facts without distortion, I depart from his view, in this respect, and adopt a fully-fledged moral foundation for legal institutions.

[43] Anscombe goes as far as to say that the related notion of a right 'is very fundamental and philosophically very intractable' and 'no one has succeeded' in explaining it: G. E. M. Anscombe, 'On the Source of the Authority of the State' (1978) 20 Ratio 138.

[44] See Ruth Chang, 'Do We Have Normative Powers?' (2020) 94 Aristotelian Society Supplementary Volume 275 292ff; David Enoch, 'Reason-Giving and the Law' in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law: Volume 1* (Oxford University Press 2011).

[45] See G. E. M. Anscombe, 'Rules, Rights and Promises' (1978) 3 Midwest Studies in Philosophy 320; G. E. M. Anscombe, 'On Promising and its Justice, and Whether it Need be Respected *In Foro Interno*' (1969) 3:7-8 Critica 68-69.

[46] Anscombe, 'On the Source of the Authority of the State' 139.

The idea of rational necessity helpfully locates the notion of obligation in the domain of practical rationality. The force that legal (and moral) norms exert is the force of reason, the force, that is, that compels persons to act in accordance with reason. A legal obligation can be characterized in these terms as the rational necessity under which an agent is in the face of a course of action (Φ) proposed by a juridical act. A proposition of law states the obligation, and supplies as it were its content, but is not itself the practically rational need which compels a person to follow the course of action proposed by a juridical act. The Roman jurists might have had this in mind when they conceptualized obligation as 'a legal tie which binds us to the necessity of making some performance in accordance with the laws of our state'.[47]

The truth of an obligation is its binding character, and obligations exert the force of reason because and in so far as they are in accordance with right reason. The truth of a proposition of law depends, by contrast, on whether it has been produced by the inter-action of power-exertion and legal recognition. This is another way to state the thesis that there is a real difference between the existence of law and its merit.[48] A juridical act may exist—it may be deemed to perform a function—but its content may be too unjust and thus not warrant a rational necessity to follow the course of action it proposes. I will return to this distinction in Chapter VI, as it is central to the understanding of the obligatory or non-obligatory character of defectively created juridical acts.

[47] Justinian, *Institutes* 3. 13 pr. To conceptualize obligation in terms of its appeal to reason rather than as attaching a punishment gives intelligibility to the idea that unenforceable acts ('natural obligations') are nonetheless obligatory. I touch on this distinction in more detail in Chapter V.6-7.

[48] Or, in other words, between the 'intra-systemic' and 'moral' sense of legal validity (see Raz, *Practical Reason and Norms* 127-29; Raz, *The Authority of Law* 150-52; Finnis, *Natural Law and Natural Rights* 314ff). This account, as I am articulating it, has, I think, implications on the current debate between 'positivists' and 'non-positivists'. For reasons of space and pertinence I cannot pursue them here.

The word recognition immediately calls to mind Hart's theory of law, and the framework I am developing has important resemblances with his idea of the rule of recognition, in connection with the emergence and lasting existence of a legal system; so I will signal these resemblances. Hart famously argued that a set of norms becomes a system due to the introduction of rules of recognition. Rules of recognition lay down validity criteria and impose a duty on the recognitional community to 'accept' the juridical acts validly created by power-holders (ie in conformity with such criteria). Rules of recognition may be posited or customary and, at the foundations of the system, the ultimate rule (or rules) of recognition is always customary, as I adumbrated in section 1 above. To accept a rule is to regard it as a special kind of reason for action, which he characterized as 'content-independent' and 'peremptory'.[49]

Hart did not attempt to provide a full-fledged theory of the ontology of legal norms, but the main tenets of his views are largely compatible with Searle's.[50] Searle's notion of recognition of function, which, in applying it to the legal domain, I have called legal recognition, resembles Hart's notion of acceptance, but it is wider.[51] Searle's notion of recognition refers to the assignation of an institutional function. This activity, in turn, entails the emergence of a reason for action—the obligatory character of the course of action proposed by the recognized juridical act. Hart's notion of acceptance, by contrast, captures the reason-giving aspect of norms only; no reference is made to the activity of assigning a say-so an institutional function. I agree with Hart's thesis that rules of recognition impose a duty on the community to accept the created juridical act. In fact the duty-imposing character of rules of recognition will turn out to be an

[49] HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press 1982) 243.

[50] See Marmor, *Foundations of Institutional Reality* Chapter 1.

[51] In fact Searle sometimes uses the terms recognition and acceptance interchangeably.

important element to my answer to the invalidity question, and I will develop it in further detail in Chapter V.5.

These are the barebones of a conceptual framework of the ontology of juridical acts. I suggest that this framework can suffice to provide the groundwork to explain how defectively created juridical acts can be meaningfully said to exist and, in many cases, be obligatory.

Before I turn to develop that thesis it is important to refine our concept of recognition. It may be true, as a matter of theory, that exercises of legal powers and legal recognition are equally necessary for the existence of a juridical act. At the phenomenal, pre-theoretical level, it seems quite plain that exercises of powers are necessary. The manifestation of an intent, through the giving of a sign, is apparent to our senses. It seems less plain, however, that legal recognition is also required. For many, if not most, of the private and public juridical acts that govern a people are unknown to the recognitional community. They do not seem to be present in their minds. If known, their propositional content is frequently not understood, or misunderstood, except by a small class of highly trained lawyers; and even they would acknowledge that engaging in the legal profession requires continuous study, and a main activity of lawyers is to debate what is the right interpretation of the propositional content of juridical acts. Yet there is no doubt that such juridical acts do exist. How can this truth coherently coexist with my claim that all juridical acts need to be recognized in order to exist? The aim of the next section is to answer that question.

5. Modes of Recognition

A first point to take note of is that the existence condition of juridical acts depends on the recognition of their *function*, qua artefacts, of operating as source of law and law.[52] Disputes about the *merit* of a juridical act, or of the legal *meaning* of the propositions of law which from the source flows, are not disagreements on the *existence* of a juridical act but on its *content*. Legal questions about content presuppose recognition of function. Recall that it takes an interpretation to yield the content of a juridical act, and that the interpretive act is systemic. The logically posterior issue of whether that meaning is just or unjust is, again, parasitic on an existing thing—the course of action proposed by a juridical act. The recognitional community cannot err on the function of the utterance.

What degree of awareness in the community is requisite for recognition to obtain? The answer to this question lies in observing that the act of recognition admits of two different modes. The criterion that differentiates the modes is the object to which the recognitional community directs its attention. Recognition can be directly or indirectly aimed at a discrete juridical act.[53]

An act of direct recognition focuses on an individualized, discrete exercise of powers. Indirect recognition operates as follows. Legal systems are made up of institutionalized schemes of posited legal norms. Within these systematized schemes juridical acts hang as it were together. The existence of such schemes affords the possibility for those juridical acts whose existence is generally unknown to be recognized

[52] On recognition of function, see Marmor, *Foundations of Institutional Reality* 93-104.

[53] Nicholas Southwood, 'Laws as Conventional Norms' in Scott J. Shapiro David Plunkett, Kevin Toh (ed), *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (Oxford University Press 2019) 27, 31 distinguishes between direct and indirect recognition of social rules. I am taking his distinction and adapting it to the framework I have developed.

as a by-product of a direct engagement with the basic institutional apparatus itself. Juridical acts are parts of a whole and recognition of the whole implies recognition of its constituent parts.

Direct recognition is, of course, far less common than indirect recognition. Consider two simple examples. A political community chooses to amend their constitution by incorporating a charter of rights. Suppose that the rules of the systems require that the change be introduced by a legislative assembly, and that the political debate around it has been followed by most of the adult community. In this case, since much attention is being devoted to the introduction of the constitutional amendment, it is likely that the exercise of legislative powers is directly recognized by the community. Now consider the alternative examples of two private citizens who enter into a contract of sale of land. In this case the juridical act is likely to be directly recognized by the parties and indirectly recognized by the community at large, as the community is unaware of the transaction, yet aware, albeit indirectly, of the system's law of contracts. As we will see in the following chapter, part of the function or purpose of validity criteria is to make the exercise of powers knowable, thereby contributing to facilitate their recognition. In many jurisdictions sales of land, for example, require notarization and registration in official books.

The distinction between direct and indirect recognition can similarly be expressed in terms of attitudes of acceptance towards norms. Consider the distinction between *de dicto* and *de re* normative attitudes.[54] An attitude is *de re* when its object of attention is the normative proposition and act-description contained in a specific juridical act. The agent focuses on what the specific norm proposes. A *de re* attitude towards the main institutions of a legal system renders a *de dicto* attitude towards the

[54] Geoffrey Brennan and others, *Explaining Norms* (Oxford University Press 2016) 46-50.

unknown norms of the system possible. Through this attitude, the agent recognizes whatever is produced by the institutions he or she knows and accepts as authoritative. Such a recognition is thus not of what is specifically stated but of whatever particular proposition a norm dictates.

Discussions on the desideratum of 'promulgation' in exchanges of views on the Rule of Law can illumine our understanding of the two modes of recognition. For making a statute known is only partially achieved by the giving of the legal utterance. A fuller realization of this desideratum requires printing copies of enactments, making them easily accessible online, as well as the existence of a professional class of lawyers who 'know their way around the books' and are readily available to advise all who want to know about their legal situation.[55] The 'written characters' of a juridical act are, in a sense, its continued promulgation—the continued giving of the utterance.[56] The motivation behind the codification movement in the late 18th Century can be seen, in this context, as a means to enable the stable and enduring indirect recognition of laws by strengthening the public knowledge of those acts and projecting them into the future.

Observe, finally, two aspects of this account of recognition. The first is that there is an objectivity to institutional existence. Because they depend on continued acts of function-assignation, legal systems are in this respect dependent on subjective judgements, but when these sets of artefacts become sufficiently well-established, stable, and embedded in the mind of a community, they acquire a relevant degree of objectivity.[57] Of course there must be a limit: the law of contracts of a particular

[55] Finnis, *Natural Law and Natural Rights* 271.

[56] Thomas Aquinas, *Summa Theologiae* Ia IIae q 90 a 4. Aquinas adds a nice etymological insight: 'Hence Isidore says (Etym. v, 3; ii, 10) that "lex [law] is derived from legere [to read] because it is written".'

[57] By 'subjective' I mean it in contrast to that which exist without need of thought. On how to reconcile the subjective and objective dimensions of social reality, see Searle, *Making the Social World: The Structure of Human Civilization* ix-x.

jurisdiction is not on the same ontological category as, say, the laws of physics. Institutional facts are, ultimately, mind-dependent. A juridical act can exist even if there is widespread error as to its function, but if the error becomes universal the act ceases to exist.

Now cases of universal error are extremely rare. Thought experiments, while not the soundest conceptual tool are, in this case, the clearest way to show the point. Imagine that the population of the United Kingdom were to suddenly suffer a general and continued amnesia, forget the concept of a statute, case law, a contract, etc., and thus cease to understand that brute facts can be ascribed an institutional function. In permanently losing the notion that some things can perform extrinsic functions the British people would cease to collectively ascribe any function. What they would have previously called legislation, judicial rulings, contracts, etc. are now nothing more than ink on paper.[58] The legal system of the United Kingdom would, for all relevant purposes, cease to exist.

A second implication is that there are norms of more ontological import, as it were, than others. Engagement with the norms that structure the main institutions of the State is more relevant to the existence of a legal system than those which govern matters less central to the existence of the community as such, especially those relating to private affairs, such as contracts.[59] It is common, in this connection, to find a division of labour between members of the community, based on large-scale patterns of trust. Regarding public exercises of powers—legislation, administrative action, judicial rulings—legal officials are in a better position to directly recognize the activities carried out by State institutions, whereas ordinary citizens tend to adopt a more passive attitude

[58] For an analogous line of reasoning, see John Rawls, 'Two Concepts of Rules' (1955) 64 The Philosophical Review 3 25.

[59] Cf Raz, *The Authority of Law* 100-01; Marmor, *Foundations of Institutional Reality* 82.

of recognizing the results of those activities.[60] Private citizens tend to rely on the patterns of conduct of persons they consider to be better informed.[61] Conversely, when private acts are created, legal officials rely on private citizens being sufficiently responsible in organizing their legal affairs—that is, in exercising legal powers in the right manner.

Let us close the discussion. I have posed the following question: how is it intelligible to ascertain that the unknown or misunderstood juridical acts of a system exist? The answer is: because the legal powers that bring them into being are exercised against an institutional background, a legal system, which is itself recognized to perform a set of institutional functions. Now, as I hinted in expositing the thought experiment, it is not possible to draw clear demarcating lines between legal existence and inexistence. Recognition is based on the subjective judgement of persons, and the judgement of persons inevitably fluctuates. At the level of generality at which we are here operating we can do no more than identify central and borderline cases. The analysis of concrete historical cases will inevitably be casuistic. To conclude this chapter I provide a brief overview of some central and borderline cases.

6. Central and Borderline Cases

In my introductory remarks to this chapter I suggested that the notion of legal recognition tracks the jurisprudential concept of efficacy. Efficacy, understood as the sheer fact that norms are followed and applied, can be seen in this light as the outward manifestation of an inward attitude of recognition. This connection helps to emphasize

[60] Hart, *The Concept of Law* 61.
[61] Lon L. Fuller, *The Morality of Law* (Rev. ed. edn, Yale University Press 1969) 51.

that recognition, like efficacy, is a matter of degree. In this sense the degree of efficacy of a legal system serves as a thermometer of its degree of recognition. Recognition is more apt to be measured as a spectrum rather than as an either/or matter. The more the juridical act is recognized, the more stable will its existence be.

For this reason it is more conducive to clear thinking to not talk of degrees of existence but of *stability*. Juridical acts whose existence are unclear do not more or less exist but have a more or less stable existence. It is not, however, possible to determine with mathematical precision when a juridical act has been withheld recognition. This impossibility is not a deficiency of analysis but a function, as I observed above, of the truth that juridical acts exist as deemed by persons (ie assigned an institutional function).

A community has strong reasons to legally recognize purported exercises of powers if the existence and exercise of such powers are just. The next chapter will substantiate that claim. Assume, for now, that my argument succeeds in establishing the truth of that claim, and consider the implication: namely, that indirect or *de dicto* recognition is more likely to ensue in well-functioning legal systems, where the institutional apparatus as a whole enjoys legitimacy. In such a context the recognition of exercises of powers is likely to operate immediately or automatically.

There is a sense in which failure to note the need for recognition is not a shortcoming. What is more, in so far as it indicates that persons need not wait for the reaction of other members of the recognitional community in order to be certain as to whether the juridical act has been brought into, or is being maintained in, existence, such inattention is indeed morally desirable.[62] Institutions work best when they are

[62] Hart makes a similar point in comparing a 'simpler form of society' governed by a set of rules which lacks a rule of recognition with a set of rules furnished with a rule of recognition (ie a legal system proper). In the former case, Hart observes, we must 'wait and see whether a rule gets accepted as a rule or not', whereas in a community governed by a legal system it suffices to check whether the power,

taken for granted. This is the main reason why recognition can be easily overlooked as equally central to the creation of juridical acts as are exercises of legal powers. In thinking about law we tend to focus, and for good reason, on the central case of a legal system. The central case of a legal system is an efficacious and stable set of rules that directs the community towards its well-being or common good. Political communities flourish if the relations between their members, and members and their institutions, are rightly ordered. Right ordered relations are those governed by the values, inter alia, of justice, equality, and civic friendship. Under such circumstances a legal system is more likely to be stable.

Kelsen once said that 'the essence of law and the community constituted by law is most clearly revealed when their existence is in question'.[63] By this he meant that some salient features of law are most aptly identified by attending to states of affairs where right ordered relations between persons are threatened. Limit situations like these often reveal what the normal operation of legal systems can conceal. Borderline cases emerge when relations of justice, equality, and friendship begin to break down. Under these circumstances the community may have reason to withhold recognition. I shall illustrate by reference to three types of borderline cases.

Consider, first, the overthrow of a tyrannical regime. Tyrants are not legitimate rulers. Provided that some further circumstances obtain, a political rebellion may be justified. Rebellions typically include the deposing of the persons in government and a replacement of the unjust legal regulations. This is usually carried out by means not contemplated in the system's constitutional rules of change: that is, those who establish

exertion of which introduced the rule, was exercised in conformity to the relevant validity criteria: Hart, *The Concept of Law* 235.

[63] Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* 59.

new rules normally have not been allocated the legal power to do so; or, if they have, do not normally follow the procedure fixed by validity criteria.

At a normative level there are better and worse reasons to justify a rebellion. At a factual level a justified rebellion may or may not succeed. In this context it is apt to say, in an evocative formulation, that nothing succeeds like success and, conversely, nothing fails like a failure.[64] A clearly failed coup d'état is likely to not even count as a borderline case: for the legal recognition of the existent regime evidently continues. Small-scale rebellions, by contrast, are more of a borderline case. Although this is a matter of degree, there will be uncertainty as to the strength of refusal to confer legal recognition, an uncertainty which will remain until the rebellion has either gained large-scale support, and succeeds in stably ordering the community, or been supressed by the threatened regime.

A second example of a borderline case are norms that have fallen into disuse. We use the term desuetude to refer to the emergence of an efficacious customary rule whose propositional content is incompatible with the propositional content of a posited rule. The posited rule in effect loses its efficacy and ceases to be used as a binding standard for action.[65] Do disused rules exist? To answer this question we should distinguish the plane of facts from the plane of values. What may in fact happen in a concrete case may or may not be morally desirable.

The last word on the existence of a juridical act is, in the final analysis, always of the recognitional community. And this will be in a sense a matter of fact. By following the new customary rule whose content is incompatible with a statute the community

[64] Cf S. A. de Smith, 'Constitutional Lawyers in Revolutionary Situations' (1968) 7 Western Ontario Law Review 93 102.

[65] Notice that disuse is not the same as loss of memory, for a disused norm may well remain in the mind, as it were, of the community. Forgotten laws may become a borderline case, but I will not discuss that phenomenon here.

may be directly withholding its legal recognition. Since situations of sheer fact, like these, bring uncertainty, and certainty is a value highly ranked in a legal ordering, it is desirable that legal systems establish rules to regulate the recognitional behaviour of the community. Although it was a common mode of operation in Roman times few legal systems contain, today, rules of obsolescence, by which courts are empowered to disapply the disused norm for a concrete case, or invalidate it altogether. The value advanced in establishing these rules is a moral matter and it involves weighing considerations such as whether to entrust courts with such a power, or to enforce norms that no longer reflect the social morality of a community.[66] The absence of rules of desuetude serve in this respect to strengthen the norms of the system, communicating to the community, by way of omission, that as long as they are not repealed by the legislature the disused statutes will remain enforceable. Of course this strengthening device has limitations: the legislature always has power to derogate statutes, and the more reasons the community has to believe that the legislature will eventually repeal the norm, the more unstable it will become.

Be that as it may, whatever the posited rules regulating custom may propose, the recognitional community will in fact always have the last word. It is not impossible for a community lacking rules of desuetude to cease to recognize the existence of outdated legislation. Think of the decline in the enforcement and moral legitimacy of statutes that criminalized homosexual conduct before they were repealed. From this it follows that assertions to the effect that a rule cannot lose its 'validity' as a product of a loss of its 'efficacy' unless the system includes rules that permit so[67] must be understood

[66] For an overview of the conflicting values, see Note, 'Desuetude' (2006) 119 Harvard Law Review 2209; Note, 'Judicial Abrogation of the Obsolete Statute: A Comparative Study' (1951) 64 Harvard Law Review 1181.

[67] Hart, *The Concept of Law* 103; John Finnis, 'Law, Universality, and Social Identity', *Intention and Identity: Collected Essays Volume II* (Oxford University Press 2011) 101 n2.

not as claims on the ontological nature of norms but as moral opinions about sound institutional design. It is interesting to note that Kelsen contradicted himself on this point, claiming on the one hand that custom always override written law, and that desuetude (the product of a 'negative custom') cannot.[68] Kelsen did not have in mind the distinction I am here drawing.

The third example of a borderline case is a defectively created juridical act. A defective exercise of powers, as I will show in the next chapter, is an injustice, an injustice which may give the community reason to withhold recognition. What is the ontological status of a defective juridical act? The answer is structurally equivalent to the one for desuetude, with a small but important difference.

The difference is that incorrect exercises of powers are much more frequent than the disuse of juridical acts. For this reason the norms established to regulate what to do in the face of an incorrect exercise of powers are highly efficacious and normally followed by the community. Chapter VII will examine this point at length. For now let us note only that, in general, modern legal systems typically react towards the defective making of a juridical act in three main ways. They may establish, first, that the recognitional community has a duty to immediately withhold recognition. The act here is 'void ab initio'. Second, the laws of the system may impose on the community the defeasible duty to confer recognition. Here the law empowers courts to invalidate the act provided that it is challenged through the specified judicial procedure, before the time limitations have expired, and by persons enjoying standing. Most defective exercises of powers fall under this category and are usually referred to as 'voidable'. The higher the likelihood that the act will be avoided, the more unstable its existence will

[68] See Kelsen, *Pure Theory of Law* 9 in relation to Kelsen, *General Theory of Law and State* 119, 260. For instructive discussion on how customary law did not sit well within the Pure Theory of Law more generally, see Hierro, *La Eficacia de las Normas Jurídicas* 185ff.

become. Thirdly, the legal system may impose on the community the indefeasible duty to confer recognition. Such acts are simply 'valid' and unlikely to count even as a borderline case.

7. Conclusion

This chapter distinguished between a legal power and the result of its exercise. I explained the notion of juridical act and proposed to use it to refer to the product of the exercise of a legal power. I outlined some central features of the ontology of juridical acts. I argued that juridical acts come into and remain in existence by the inter-action of an action and a reaction. The initiating movement is caused by power-holders, who through their say-so intend to configure legal relations. That event, in turn, may or not be recognized by the community to count as a kind of action that produces a juridical act. Legal reality is, in this sense, contingency upon contingency, as it depends on human choices.

Attention to this truth enables us to explain how a defective juridical act can be said to exist. It will exist if the community chooses to recognize it the institutional function of configuring legal positions. In well-shaped legal systems the recognition of defective juridical acts should be in line with the requirements of the common good. In thinking about the common good we begin to approach the right framework to conceptualize legal validity.

V. POWERS

1. Introduction

Juridical acts are artefacts. They come into existence through the initiation of a movement, an action, by which a power-holder purports to configure legal relations by saying-so; that action is followed by a reaction, the content of which is to assign the say-so the institutional function of performing a legal power, which produces a juridical act. Now action and reaction in the law are products of human choices. These choices must conform to requirements of justice. Achieving justice in the enterprise of norm-generation is a central aspect of the common good. To secure, advance, and realize these requirements political communities have developed sophisticated legal techniques, throughout centuries of refinement and intelligent institutional design. These techniques provide order by directing and structuring those choices. The technique of legal powers orders action in the law. Reaction in the law, in turn, is ordered by the techniques of legal validity and invalidity, as well as the various remedies deployed to respond towards defective exercises of legal powers.

In this chapter I show how the technique of legal powers contributes to a just action in the law. This explanation will provide the basis for our inquiry, in the next two chapters, into validity and remedies. I shall proceed in this chapter as follows. In section 2 I show how the technique of legal powers enables persons to further their well-being. Justice requires that powers be allocated to the right persons, exercised in a

reasonable way, and produce a juridical act with a reasonable content. Validity criteria are a central means to realize those requirements, and sections 3 and 4 explore, with examples taken from contract, administrative, and constitutional law, how conformity to validity criteria contribute to the just generation of norms. An incorrect or defective exercise of powers, I shall argue, is normally an injustice. In section 5 I argue that persons are normally under an obligation (duty) to exercise powers in conformity to validity criteria. Sections 6 and 7 explore further aspects of the relation between powers and obligations (duties). Section 8 concludes.

2. The Value of Legal Powers

Legal powers are capacities to change the normative situation of persons by the act of manifesting an intention to produce the change. Legal powers are normally allocated by posited legal norms. Through institutionalized schemes of empowering legal norms—what Hart called power-conferring rules—legal orderings become systemic: that is, reflexive, self-contained units, that provide for their own autarkic living by, as Kelsen aptly put it, regulating their own creation. In this section I explain why there is moral value in setting up schemes of empowering norms.

There are certain goods, common to the entire political community, that cannot fulfil their beneficial potential for all without some kind of appropriation (or allocation) to particular persons, classes of persons, or bodies of persons. The appropriation of common goods with the aim of allowing for those goods to benefit the community and its members is a matter of justice, which, employing a classical framework, we may call 'distributive'. Matters of distributive justice concern the appropriation of common

goods: the central question of distributive justice is to whom and under what conditions common goods ought to be reasonably apportioned.

The subject-matter of our concern is, of course, not the common stock of a community, say its natural resources and assets, but the rather intangible goods associated to the common enterprise of action which the existence of political communities affords their members.[1] When a community is formed new conditions arise for persons to collaborate with others through projects towards the improvement of their well-being. These projects can take very diverse contents and forms, ranging from the exchange of goods and services to the regulation of wrongs (theft, murder, fraud, etc.), the protection of the environment, the establishment of the place of religion in the public sphere, and the organizational structure of the State. We are not concerned, therefore, with how to make the most beneficial use of water, land, or forests, but with the enabling conditions that social life furnishes. Among such benefits are the good of shaping one's own affairs in autonomous ways, and the coordination of social interaction through acts of authority.

The opportunity to undertake projects in the form of juridical plans for action, whose point is to configure legal relations, is, then, a good common to the community. To make the common good of juridical collaboration benefit the entire community the capacity to design and pursue juridical acts must be apportioned (allocated) to private citizens and authorities. The central technique by which this allocation is carried out is called legal powers. Let us broadly distinguish between two irreducible kinds of powers:

[1] The importance of this aspect of justice was famously emphasized by Rawls in arguing for the 'fair' distribution of public offices and social positions: John Rawls, *A Theory of Justice* (Revised edn, Harvard University Press 1999) 52-64.

the power to bind oneself, through promises, and the power to bind others, through acts of authority.[2]

The mark of self-mastery is to be guided by, and be responsive to, moral values. To voluntarily bind oneself, and to submit to authoritative directives, is a rational act. The justification of legal powers is the set human values which the possession and exertion of those powers can advance. Promise-making and order through authority are valuable because and in so far as they further well-being. Legal powers are, in short, an institutional technique that enables a community to govern itself according to reason.[3]

The exercise of an allocated legal power is the result of a choice. Choices can be more or less reasonable, depending on whether they realize true moral values. Reasonable choices will more likely come about through the deliberation of well-informed persons who, in addition, have habituated themselves to act in accordance with the requirements of practical reason. Now habitual conformity to reason is difficult and not everyone is sufficiently familiarized with the facts of the relevant subject-matter, adequate cognition of which can enhance the freedom of the relevant choice. Additionally, persons tend to disagree not only on what moral values, if any, are worthy of pursuit, but also on what they may concretely require given specific and contingent circumstances. A distinctive feature of the phenomenon of power-exertion is that the moral stakes are high: for, unlike many but not all speech acts in ordinary communication (say requesting, warning, apologizing, congratulating), legal

[2] I name these because of their prominence, but they do not exhaust the universe of normative powers, of which legal powers are a type. Other examples are permitting, gifting, waiving, forgiving, demanding, and claiming.

[3] The main contours of this account can be found in Joseph Raz, 'Normative Powers', *The Roots of Normativity* (Oxford University Press 2022); Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 Minnesota Law Review ; Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) Chapters 2-3; as well as in Finnis, *Natural Law and Natural Rights* 231-33, 245-52, 298-307, among other writings.

manifestations of intent can affect and shape aspects that go to the core of a person's well-being. Moreover, such changes are not optional, and can, in many cases, be enforced by the State through violent means. The magnificent enabling capacity of legal powers, by which communities can advance the common good in ways otherwise unattainable, can simultaneously become a tool for serious injustice.

The weight of the moral goods that the exercise of legal powers can contribute to realize, as well as the risks involved in their abuse, provide strong reasons to carefully select *who* the power ought to be allocated to, and avoid leaving the *manner* in which to exercise the power, as well as the *content* of the plan for action to be proposed, to the absolute discretion of the power-holder. The general common good of a community, in other words, is more aptly advanced by allocating powers to the right persons and laying down conditions for their exercise. These conditions aim to secure reasonableness in the process of exercising the power and in the outcome or content of the produced juridical act. These schemes of rules have become increasingly formalized in modern times, and the conditions do not have a settled name. They are sometimes referred to in legal practice as 'requirements' and 'conditions', generally. More specifically, to give two examples, they are frequently categorized as 'vitiating factors' or 'defects of consent' in the law of contracts, or 'grounds for judicial review' in administrative law. In contemporary jurisprudence they carry the name, as I've mentioned, of 'validity criteria'.

In this connection it is useful to distinguish distributive justice from 'corrective' (or 'commutative') justice.[4] Matters of commutative justice pertain to the right interactions between persons in relation to aspects which do not concern the appropriation of common goods. Observe that the allocation of powers is a matter of

[4] For present purposes I will assume that corrective and commutative are equivalent notions.

distributive justice, whereas the requirement of justice to exercise powers in the manner specified by law, once allocated, may be distributive as well as commutative. The exercise of a power is a way to engage or deal with persons and their goods (including their rights, duties, etc.), and in this sense it involves commutation.[5] The exercise of a power also creates a common subject-matter—the project contained in the juridical act—and in this sense involves distribution. Finally, I should highlight that the distinction between these two kinds of justice is not confined to the division between 'public' and 'private' powers. For private citizens who hold property, say, also have duties of distributive justice, and courts also have duties of commutative justice.[6]

We can set aside for present purposes inquiries into which requirements of distributive and/or commutative justice specific legal powers realize (to contract, enact, adjudicate, marry, execute, and so on). No need to go into details on questions of classification. The aim of this section has been to establish the thesis that the technique of legal powers—including the determination of who they are to be allocated to and how they are to be exercised—is necessitated by justice, from which it follows that validity criteria secure requirements of justice. We can now turn to examine in more detail how validity criteria make those requirements of justice operative. To that end I will distinguish between those aspects of justice involved in power allocation from those involved in power exertion, examining each in turn.

[5] In the literal sense of a change (alteration, mutation) in relations between persons, as indicated by its Latin root 'commutatio'. According to the Oxford English Dictionary this sense of the word is now obsolete in the English language.

[6] This exposition on justice follows the account in Finnis, *Natural Law and Natural Rights* 165ff (on power-allocation), and 177-79, 183-84 (on power-exertion); for discussion on the use of the terms 'corrective and 'commutative', and their differences, see 178-79.

3. Power Allocation

It is morally desirable that powers be allocated to persons who can exercise that enabling freedom with responsibility and competence. I will overview how this value is secured by following the distinction traced above between powers of authority (public powers) and promissory powers (private powers).[7]

The 'state' of a political community has the primary responsibility for pursuing the set of conditions that facilitate the realization of the good of the community and its members.[8] To make the most of the enabling capacities of legal powers, and avoid arbitrariness in their exercises, a personal aptitude for action is required.[9] Such an aptitude is constituted by a wide range of aspects, including a degree of practical wisdom, moral virtue, technical expertise, and proximity to the state of affairs and groups of persons that can be affected by the exercise of a power.

To make it more likely that the power-holder will be sufficiently morally mature legal systems typically require a minimum age to hold public office, say, or to vote for the representatives who are to hold them, when elections of representatives are judged desirable. The social life of modern political communities has become so complex that an adequate understanding of specific domains and states of affairs can require a high degree of expertise—consider the regulation of the economy, and the establishment of healthcare and pension systems. To increase the likelihood that decisions be made by

[7] I am simplifying: the distinction between public and private powers cuts across the distinction between authority and promissory powers. In what follows I partly draw from Köpcke, *Legal Validity: The Fabric of Justice* Chapter 5 (for private and public powers); Endicott, *Administrative Law* 14-24 (for public powers).

[8] See Jacques Maritain, *Man and the State* (Catholic University of America Press 1998) 12-19; Yves R. Simon, *Philosophy of Democratic Government* (University of Notre Dame Press 1993) Chapter 1.

[9] Along the lines of Max Weber, 'Politics as a Vocation' in H. H. Gerth; Wright Mills (ed), *From Max Weber: Essays in Sociology* (Taylor & Francis 2009).

competent persons legal systems typically require of them to have acquired the relevant training. Judges must normally be lawyers, for example, and members of regulatory agencies may need to hold a degree in the science that studies the relevant subject-matter. The law may reasonably require that members of central banks be economists. And so on. Considerations of expertise and 'institutional capacities' have informed recent debates, which we will touch in Chapter VII.4-6, on the pertinence of empowering courts to pronounce on the validity of legislation and administrative action.[10]

The exercise of authority for the common good also involves very diverse tasks, including that of creating and applying rules. To avoid arbitrariness in exercises of authority political communities have normally divided this labour by allocating legislative, executive, and adjudicative powers to separate bodies, enabling them to operate with relative independence from each other. These considerations are studied, in modern political and constitutional theory, under the rubric of the 'separation of powers'. Finally, proximity to the persons who will be affected by an exercise of authority can also be required in justice. The related doctrines of 'subsidiarity' and 'federalism' propose, in rough outline, that the value of self-direction demands that smaller communities decide how to conduct their own affairs; proximate agents are more likely to understand of the needs of their communities, have easier access to the necessary data to settle communal courses of action, and a higher degree of personal identification with those whom they represent.

The purpose of powers to undertake promissory obligations is different. Citizens in their private capacity partake in the pursuit of the common good by advancing their

[10] See, for example, Paul Yowell, *Constitutional Rights and Constitutional Design: Moral and Empirical Reasoning in Judicial Review* (Hart Publishing 2018) Chapter 4; Jeff King, *Judging Social Rights* (Cambridge University Press 2012) Chapters 5-9.

own good and that of the persons they associate with. They do not, however, have the primary responsibility to create and sustain the general conditions that make those pursuits possible. This is one significant respect in which private and public powers differ. Another respect is that private powers enable the important moral good of self-constitution. Human well-being requires that persons be active—not merely receptive—in the participation of human goods. There are certain aspects of a person's well-being that tend to flourish when they are striven for, through their own effort and toil. For these reasons powers to undertake voluntary obligations are normally allocated to anyone who has fulfilled a minimum requirement of age and enjoys a sufficient degree of cognition. These considerations are typically framed by the technical legal category of 'capacity'.

In the public domain it is normally desirable that public bodies hold powers by virtue of empowering norms that determine with precision the extent and scope of the conferred power. In the private domain the rationale is the inverse, where the default principle is that persons are empowered in the absence of a few, but morally significant, impediments. A further consideration is that the freedom to shape one's affairs includes the space to make mistakes. This is why citizens are not normally required to have a sufficient degree of technical expertise to enter, say, into a contract. The good of self-constitution through free choice would be impaired, for example, if the power to contractually engage in the stock market would require training as a trader. The instantiation of this value does not of course preclude qualifications: a person who loses a sufficient degree of freedom to manage their estate, say by developing an addiction to gambling, may lose their contractual powers through institutional techniques known as interdicts, in civil law jurisdictions, or injunctions, in common law jurisdictions.

Since part of my answer to the invalidity question will, in due course, focus on the need for, and design of, remedial responses against incorrect exercises of powers, the justification of the power to challenge the validity of a juridical act, typically referred to as 'standing', deserves special attention. I will argue later on that remedies are justified because of, and in so far as, they correct the injustice brought about by defective exercises of powers. For now let us only take note of the fact that the law typically requires that a right be infringed, or (under certain circumstances) a legitimate expectation frustrated, in order to make a legal remedy available. For this reason the power to challenge the validity of an act is normally allocated to persons whose rights and/or expectations have been affected, a notion which in the jurisprudence of courts and doctrinal scholarship is normally captured by the proposition that persons must have a 'sufficient interest in the outcome'.[11]

4. Power Exertion

Once powers are allocated political communities have, in addition, reason to establish, through legal rules, conditions for their successful exercise. In modern legal systems the exercise of a power can be subject to many and varied conditions, conditions which may be more or less specific, and which are not normally orderly listed in statutory instruments under the heading of 'validity requirements' (or its cognates): they are, rather, scattered in different sources, dating as well from different times, appearing under different names, and may in fact derive not from an explicit rule but a

[11] For further analysis on the moral values secured by rules of standing, see Timothy Liau, *Standing in Private Law: Powers of Enforcement in the Law of Obligations and Trusts* (Oxford University Press 2023) Chapter 11.

background legal principle.[12] Like the identification of any proposition of law the identification of the relevant validity criteria will result from an act of interpretation. For expository purposes I will follow a standard classification that distinguishes between *how* the power is exercised ('formal' or 'procedural' criteria) from *what* the produced juridical act proposes as a plan for action ('substantive' criteria). I will illustrate with reference to contracts, administrative decisions, and statutes.

4.1. Procedures and Formalities

The considerations outlined in relation to power allocation explain why formalities in the domain of public powers, compared to private powers, are more important. The growth of the executive power in the 20th and 21st Centuries has produced a vast number of regulatory and adjudicative bodies. The powers of these bodies are normally regulated in detail by statutes. The most important procedural requirement for administrative bodies is that the juridical act be produced within the scope of the conferred power, a power normally required to be conferred by the legislature.

Other procedural requirements, common to many public powers, include the need to produce the decision in writing; that the decision be signed and promulgated by the relevant authority; prior hearing and/or consultation of the parties affected, or potentially affected, by the decision; the giving of reasons that justify the decision; that errors be corrected before the decision becomes final; and notifying stakeholders and the general public of the adopted decision; among others. Enabling public bodies and legal officials to advance the common good, and reducing the chances of arbitrariness

[12] See MacCormick, *Institutions of Law: An Essay in Legal Theory* 160.

in so doing, is the general good that these requirements realize. Specific values these requirements secure are that decisions be arrived at through fair, unbiased and transparent processes; that discretion be exercised according to the principles and considerations laid down for that purpose; that the making and application of those decisions be consistent; that the general public may participate in political decision-making; and that comity reigns between public bodies.

The production of legislation is similarly regulated in detail, typically by constitutional and legislative provisions. In the United Kingdom, for example, a complex web of interlocking norms establishes a long and intricate process that bills must go through to become law.[13] Salient aspects of that staged process include: the drafting and introduction of the bill (either by the initiative of Government, Members of Parliament, or Lords); a first reading of the bill before the relevant house; a second reading where the principles and themes of the bill are debated, after which a first vote is taken; if the bill is passed a detailed scrutiny of the clauses is carried out by committees with the aid of experts, where amendments are made; the amendments are then discussed in the chamber, followed by a general vote; if the bill is passed it is sent to the other house for a similar process to be carried out, in a to and fro ('ping pong') movement, as both houses must be in agreement on the contents of the bill; if the bill succeeds at that stage it is sent to the Monarch who is requested to give his or her assent, whereupon the bill is promulgated as legislation. This process of power-exertion can take years.

[13] Eg Parliament Acts 1911 and 1949; Interpretation Act 1978; standing orders of the House of Commons and House of Lords Standing Orders; the Cabinet Manual; and constitutional conventions such as the Salisbury Convention. See further Michael Zander, *The Law-Making Process* (Eighth edition. edn, Hart Publishing 2020).

The moral goods which these conditions secure are the benefits of a slow process of deliberation and exchange of ideas. Processes of this kind help to place the passions of political debate in their proper place, and allow for different voices to be heard (including experts, minorities, and under-represented citizens). The institutional structure of legislative assemblies, as open and public forums, compel representatives to give reasons for their views, reducing the chances of secrecy and action for selfish and arbitrary purposes. The existence of democratic procedures can also contribute to laws being coherent, clear, non-contradictory, among other Rule of Law desiderata. And so on.

In the realm of private powers the good of self-constitution is more aptly realized if the person manifesting their intention to undertake an obligation is sufficiently serious, free from external pressure, and sufficiently cognizant of the terms of the contract. Judges and scholars have developed doctrines to explain how these values are and must be instantiated: 'consideration', 'duress' and 'undue influence', 'mistake' and 'misrepresentation'. These values are procedural in that they enable the contract to be 'formed' in a just way.[14]

In addition to these conditions the law of contracts typically requires the meeting of formalities such as the following: that the voluntary undertaking be recorded in writing; signed (sometimes in a specially protected form called 'qualified electronic signature'), as in loan agreements and mergers and acquisitions; that the documents be

[14] In the civilian tradition these conditions are not studied as procedural requirements but under the separate, and logically prior, heading of whether there actually was an agreement between the parties. For this reason considerations of mistake, duress, and so on, are conceptualized as 'defects of consent'. At play here is a conception of the concept of contract as a subjective meeting of minds, such that if the minds do not meet there is no agreement at all. The common law tradition has a more objective approach to the agreement that constitutes the contract, the standard being what a reasonable person would have done or understood given the particular circumstances. See John Cartwright, 'Defects of Consent and Security of Contract: French and English Law Compared' in Bernard Rudden, Peter Birks and Arianna Pretto-Sakmann (eds), *Themes in Comparative Law: in Honour of Bernard Rudden* (Oxford University Press 2002) 153-59. This difference, while worth bearing in mind, is of secondary importance for present purposes.

signed before witnesses, as in wills; that the contract include specific clauses, as in contracts of employment and adhesion; or be notarized, as in trusts; and be officially registered, as in sales of land. These formalities can serve to record and register information that would otherwise be lost due to the fragility of memory, and assist as evidence and proof—especially necessary for litigation—for those who did not directly witness the exercise of the power.

Formalities also put the parties on notice: the work and attention needed to meet them compels the parties to reflect and deliberate more carefully about what they are about to do. The paperwork involved also serves the purpose of informing more vulnerable parties of the details of contractual terms which they might not otherwise be cognizant of. When the financial risks are significant, such as in consumer credits and insurance contracts, legal systems tend to require high degrees of formality. Similar considerations apply to donative promises. Finally, formalities can also serve to mark the transition from the stage of negotiation to the stage of contract. The truth of the information provided in the stage of negotiation ('representations'), or a failure to disclose relevant facts, may not necessarily make the party liable to damages; but in the process of drafting a contract the information provided becomes part of the terms of the contract. These techniques can be summed up as a set of means to contribute to enhance the power-holder's freedom of choice, provide evidence for it, and facilitate third-party awareness of transactions.[15]

Formal procedures are onerous and take time to be met. This can impede the rapid exchange of goods and services and adds barriers for persons to associate with

[15] On the morality of formalities, see Hein Kèotz, Gill Mertens and Tony Weir, *European Contract Law* (2nd edn, Oxford University Press 2017) Chapter 5; Arthur T. von Mehren, 'Chapter 10: Formal Requirements' in K. Zweigert and U. Drobnig (ed), *International Encyclopedia of Comparative Law* vol VII (Brill | Nijhoff 1998) 11-13.

other to pursue common enterprises. The goods advanced by meeting formalities and procedures must be placed on a balance with the often countervailing goods of efficiency in commerce and social traffic, values which the law of contracts predominantly regards as central for the adequate operation of markets. In fact the historical development of private law shows a tendency to avoid formalization.[16]

To conclude, observe that schemes of voluntary undertakings and communal projects presuppose an interdependency between persons. The success of this presupposition depends partly, but crucially, on trust. Joint projects are more likely to be pursued if it is generally assumed that persons act (including assert, omit, forbear) responsibly, such that they may be relied upon. In modern political communities it is reasonable to institutionalize this trust through techniques such as presumptions of validity, the de facto officer doctrine, the legitimate expectations doctrine, and rules on voidability more generally. I will return to this point in Chapter VII; for now suffice it to note that to this end legal systems make allowance for the configuration of legal effects which persons did not entirely foresee or intend. This is tolerated for the sake of maintaining large-scale patterns of trust. Under this light formalities and procedural requirements serve that good by lending an intentional appearance to what may in fact be an unintentional act.[17]

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[16] It is interesting to note that in early Roman Law formalities were regarded as having a different function in the configuration of some legal positions (eg in stipulatio). The legal configurations were thought to be brought about not by the act of *deeming* a say-so to produce an artefact (the juridical act), but by a kind of super-natural force. The reason for this, as some have proposed, was the quasi-religious or magical (the concepts are used interchangeably) character that Romans ascribed to formalities (see Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* 68-72, 82-85; Geoffrey Maccormack, 'Formalism, Symbolism and Magic in Early Roman Law' (1969) 37 Tijdschrift voor Rechtsgeschiedenis 439). Notice the interesting parallel with the effectuation of Divine graces, according to the Catholic faith, bestowed by the mind-independent action of God, through the mediation of powers conferred to priests (eg to remit sins, transubstantiate, and other 'sacraments'). Canon lawyers, naturally, have paid much attention to the validity of the administration of sacraments. Their contribution to our concept of legal validity is significant: see Maris Köpcke, *A Short History of Legal Validity and Invalidity: Foundations of Private and Public Law* (Intersentia 2019) Chapters 5-8.

[17] See Köpcke, *Legal Validity: The Fabric of Justice* 85.

4.2. Content

So much for formal and procedural conditions of power exertion. Substantive criteria, on the other hand, aim to make it more likely that the content of the produced juridical act be just. It is intuitive to think that substantive criteria are valuable because formalities have no bearing on substance. The intuition, however, overstates the point. Formal requirements can well contribute, even if indirectly, to the production of juridical acts reasonable in content.[18] In so far as the word substance connotes, however subtly, the idea that considerations of content are more morally significant than considerations of procedure, it is misleading. Now the intuition may be overstated but of course contains a kernel of truth. The experience of the first half of the 20th Century, when Fascist regimes developed their tyrannical schemes, by (generally) meeting the formalities laid down by the existing rules of recognition, to use Hart's terms, triggered a movement towards fixing content criteria in constitutions, in the form of rights, thereby requiring legislation to respect and contribute to the realization of those rights.

In many jurisdictions the enshrining of rights in constitutions was coupled with the institutional choice that the enactment of legislation should be further controlled by a kind of judicial enforcement of such rights. Courts have been empowered to invalidate and disapply 'unconstitutional' statutes, and judicial review of legislation has, ever since, proliferated. The story is well-known and we need not rehearse it here.

[18] A central theme for Lon Fuller. See, eg, Lon L. Fuller, 'Means and Ends' in Kenneth I. Winston (ed), *The Principles of Social Order: Selected essays of Lon L Fuller* (Revised edn, Hart 2001) 64-66, 68, 73, 71. For further analysis, see Finnis, *Natural Law and Natural Rights* 273-76; Gardner, *Law as a Leap of Faith* Chapter 8.

The law of contracts imposes a lower degree of control on content but it does typically establish some limitations. Consider two constellations of cases.

One concerns unjust disproportions between performances and counter-performances. The related doctrines of 'unconscionable bargain' and 'laesio enormis' are among the techniques that aim to secure fairness in contractual exchanges. These two doctrines are different but share certain commonalities. They both maintain that too gross of a disproportion in the terms of a contract may justify rendering a contract either void or voidable. The doctrines differ in that an unconscionable bargain requires an additional element of exploitation by one of the parties, who takes advantage of the other's position of weakness, due to factors such as economic distress, urgent needs, ignorance, inexperience, or lack of bargaining skill. While the idea of fairness in contractual exchange emerged with the doctrine of laesio enormis in Roman times, it has lost its appeal in our days and only few jurisdictions retain it (eg France, Belgium, Austria), and only in relation to specific types of contracts (typically sale of land). Most countries adopt the view that mere inequality is not enough to warrant an invalidation.[19]

These differences in approach indicate that the value in securing transactions reasonable in content must be balanced against the goods of certainty, efficiency, and speed in the operation of markets. The protection of this latter set of goods requires tolerating a degree of speculation on the success of the transaction, as well as the taking of risks, which may result in a party being left in a more disadvantaged position.

[19] Thomas Finkenauer, 'Laesio Enormis' in Jürgen Basedow and others (eds), *The Max Planck Encyclopedia of European Private Law* (Oxford University Press 2012) 2-3. See, further, Capper David, 'The Unconscionable Bargain in the Common Law World' (2010) 126 Law Quarterly Review 403; Kèotz, Mertens and Weir, *European Contract Law* 111-17. The law of consumer protection, which generally operates on the assumption that there is an inequality in bargaining power, is informed by the same rationale: see Edwin Peel, *Treitel on The law of Contract* (Fourteenth edition. edn, Sweet & Maxwell 2015) 10-043ff.

Jurisdictions differ in how much weight they ascribe to each of these values, as we will see in more detail in our examination of remedies.

A second constellation of cases concerns the ends pursued by the contract, which, if especially detrimental to the common good, may counsel treating them as either void or voidable. Examples are agreements whose object is murder, theft, bribery, fraud, restraint of trade, monopolistic practices, and price-fixing, among others. These are typically grouped under the notion of 'illegality'.[20]

Now the consequences imposed by the doctrine of illegality, as we may call it, are in fact not uniform. As we will see in detail in Chapter VII.6, under certain circumstances the remedy of nullification may be worse than the disease: treating the act as void ab initio or voidable may, all things considered, bring about more injustice than allowing for its validity. In such cases the law may attach an alternative technique, other than invalidation, to re-establish the equilibrium of just relations that the formation of some 'illegal' contracts upsets. The most common alternative technique is a sanction, which may take either the form of a penalty, or of disabling one of the parties from enforcing the contract.

In such cases the contract will be entirely valid, even if a sanction eventually ensues. The law prohibits persons from entering into contracts pursuant to certain morally vicious ends, and to secure compliance with that prohibition it may attach a sanction. Those contracts may be characterized as valid but prohibited (and thus illicit, illegal, and other cognates). Now this combination of validity and illicitness may, on its face, convey a sense of absurd contradiction. However, on closer inspection, it can be a sound technique for a legal ordering and is, in fact, not entirely uncommon. To get a

[20] I use the term broadly to cover cases of violations of 'public policy', 'morality, 'good mores', 'public order', and other related categories used across common and civil law jurisdictions.

firm grip of this phenomenon I will first need to explain the distinction between holding a power and being under an obligation, and establish the thesis that there is a moral obligation to exercise powers in conformity to validity criteria. I will turn to that in the following sections, after offering some concluding thoughts on the nature of validity criteria.

4.3. On The Nature of Validity Criteria

Validity criteria are artificial requirements, posited by institutional designers in order to secure non-artificial (in the sense of mind-independent) requirements of justice. Validity conditions operate as the internal, intra-systemic criteria of correctness of a legal order, and the correctness of those criteria themselves depends on an ulterior, extra-systemic order of rationality composed of what I have here referred to as moral values or human goods.

Now the justice of validity criteria partly depends on the shifting needs of a political community. There are some needs that are universal, applicable to anyone and everywhere, such as freely consenting into an agreement, and there are some that are contingent, such as making agreements public, say, through registration. The sound working out of a legal system demands of rulers a continued attention to the justice of the relevant validity criteria so that these can be adequately refined, modified, or adjusted when the necessity arises.

To illustrate, recall that the use of validity criteria of form and procedure has decreased in the law of contracts because meeting them can be costly—of time and money—and this can undermine the values realized when markets operate speedily and

efficiently. Naturally, contingent as they are, these considerations can be defeated. The relatively recent rise of mass commerce, for example, has made consumers vulnerable to abuse and increased the difficulty of sellers to keep their stock and credit in order. A need has emerged to introduce new validity criteria to protect consumers and facilitate the logistics of sellers, displaying a novel trend towards formalization. The same idea is exhibited in the recent introduction of substantive validity criteria, such as requiring legislative enactments to respect constitutional rights. The reason behind this movement, as we have seen, is the danger in unchecked power, a power which, in modern times, has been significantly extended, touching now almost every aspect of social life. The phenomenon called 'constitutionalism' can be characterized, in these terms, as the gradual extension of the technique of legal validity from the realm of private interaction to that of public affairs.[21]

5. The Principle of Responsibility

I have argued that in well-shaped legal systems the setting up of schemes of legal powers, and conformity to validity criteria in exercising powers, realize distributive and commutative requirements of justice. Validity criteria, when they are just, make it more likely that exercises of powers and their resulting products are just. By the same token, an incorrect or defective exercise of a legal power is normally in injustice.[22] A corollary of the foregoing discussion I wish to make explicit is the following.

[21] See Köpcke, *A Short History of Legal Validity and Invalidity: Foundations of Private and Public Law* 128ff. See also Amnon Rubinstein, *Jurisdiction and Illegality: A Study in Public Law* (Clarendon Press 1965) 62.

[22] A reality that, it should be noted, is partly reflected in our discourse. Jurists generally refer to defective administrative decisions under the generic terms 'unlawful', 'illicit', or 'irregular', all of which connote a morally undesirable state of affairs.

There is a relevant sense in which persons are rationally compelled to pursue their well-being. Persons flourish when they conform their actions to requirements of justice; there is thus a sense in which they are rationally compelled to conform to justice in their actions. Since the enterprise of just norm-generation requires meeting validity conditions in exercising powers, it follows that power-holders are required, in justice, to exercise powers by meeting those conditions.

A recommendation or an advice gives rise to reasons that favour but do not demand an action or forbearance. The rational force of the practical ought I am drawing attention to in relation to power exertion is that of a demand or requirement. I maintain that conformity to validity criteria is normally a rational necessity: that without which some good will not be obtained or some evil averted. Rational necessity is a defining feature of the notion of obligation (see Chapter IV.3). Correct exertion of powers is a means to advance the valuable end of justice in norm-generation and may therefore be characterized as morally obligatory.

In short, because empowerment can significantly affect the well-being of persons and their community, and power allocation and exertion are justified because they can advance and realize requirements of justice, and the pursuit of justice is at the option of power-holders, empowerment involves responsibility: the responsibility to freely choose the morally right course of action. In this connection it is worth flagging that the term 'validity criteria' can conceal the necessity. For the word 'criteria' can easily carry a value-neutral connotation. The word 'requirement', by contrast, more aptly tracks the truth that there is normally a practical need to exercise powers in the established way.

I shall outline some central features of this obligation (or duty) in terms of a principle of right action, which I term the 'principle of responsibility'.[23] The principle of responsibility holds that legally empowered persons have a moral obligation to use their powers in a way that accords to right reason; specifically, to conform to requirements of commutative and distributive justice, requirements which, in a functional legal system, are codified into the law as validity conditions. The obligation imposed by the principle of responsibility may be more or less weighty, depending on how central the subject-matter is to the well-being of persons and the community. It is clear, for example, that the power of a private citizen to enter into a tenancy agreement is less central to the common good than the power of a head of state to declare war. The heaviness of the criticism that failure to conform to validity criteria may invite, if any, is normally, or at least should be, proportionate to the weight of the obligation.

Depending on the strategic importance of the violated validity criterion, and the sphere of action in which the power-holder is empowered to move, a defective juridical act can, indeed must, be described as a (more or less) 'unjust law'. Legal systems do not explicitly codify the principle of responsibility into the law, but it can be construed as a *legal* principle out of the justification for the institution of legal powers as well as the specific legal techniques deployed by the system to secure responsible action and correct the injustice caused by irresponsible action—remedies.

[23] I use the term 'responsibility' broadly, and perhaps rather loosely, to capture the idea of being under a duty. For disambiguation on the senses of the term responsibility, a matter which need not concern us here, see Joseph Raz, *From Normativity to Responsibility* (Oxford University Press 2013) 227-29.

6. Power and Obligation

In thinking about the principle of responsibility it is vital to not confuse the notions of powers with that of obligations, nor the function of the rules that confer and impose them, respectively.[24] Legal powers are capacities vested upon persons to change legal configurations. Obligations are necessities, under which persons are, whose content is to act or forebear from acting on a specified subject-matter. It is one thing to have the capacity to change the legal position of oneself or others and quite another to be rationally compelled to act or forebear from acting.

The principle of responsibility presupposes this distinction: it holds that persons are under a rational necessity to correctly exercise a conferred capacity. The soundness of the distinction between powers and obligations seems to be well-established in legal theory, yet the thesis that persons are normally under an obligation to exercise powers correctly has been largely overlooked.[25] To gain a clearer grasp of the principle of responsibility I will deploy the distinction between power and obligation to make two further points.

First, in well-shaped legal systems law guides conduct through legal norms by making persons participate in the understanding of the plan for action contained in a juridical act.[26] In its central case law does not manipulate persons but directly communicates to its addressee(s), in the form of propositions, the values involved in the

[24] See Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* 160-61; Raz, 'Voluntary Obligations and Normative Powers' 454; and, adding important historical insight, Köpcke, *Legal Validity: The Fabric of Justice* fn 22 at 20, 31-32; Köpcke, *A Short History of Legal Validity and Invalidity: Foundations of Private and Public Law* Chapters 3, 5 and 8.

[25] There are exceptions, of course. Resemblances of the moral duty I am developing have been put forth, for example, in the realm of fiduciary powers: see Lionel Smith, *The Law of Loyalty* (Oxford University Press 2023) 127, 136-38.

[26] Voegelin, *The Nature of the Law and Related Legal Writings* 44-49.

having and executing of the relevant plan for action. The means by which sound legal orderings address their addressees, in other words, is by treating them as co-participants in communal projects. The law thus treats persons as autonomous agents capable of understanding what is morally right and wrong, and as sufficiently disposed to will to shape their lives in accordance with what reason proposes.[27]

This truth about how law orders conduct connects with the thesis, which I am assuming here to be true, that legal norms exert force on persons by appealing to their reasoning powers. I am assuming, in other words, that the notion of legal obligation is not essentially tied to commands and punishment. Sanctions or other undesirable consequences are only attached to a norm when the motivation of conduct is unlikely to succeed in the absence of the threat of a sanction. Persons can be responsible for an action without being legally liable to any kind of undesirable consequence. This difference, between what may be called the 'directive' and 'coercive' force of law,[28] is not a difference in kind, for the prospect of a sanction being imposed remains an appeal to reason—even if in fact the recalcitrant may commonly be moved to act by sub-rational considerations, such as fear.

Second, modern jurisdictions exhibit various techniques to motivate persons to exercise powers correctly, as well correct the injustice which breach of the duty imposed by the principle of responsibility causes. The most common technique is to prevent the product of the purported exercise of a power from acquiring binding force by rendering the act void, either upon its attempted inception (void ab initio) or the decision of a court (voidable). When rendering the act void or voidable is judged unjust or

[27] See, further, Francisco Urbina and Fernando Contreras, 'Derecho y Ordenamiento de la Conducta' (2019) 16 Jurídicas 108, developing the rationale of Fuller's distinction between authority and 'managerial direction' (Fuller, *The Morality of Law* 207ff). The distinction focally applies to exercises of public powers but can be extended to private powers.

[28] Aquinas, *Summa Theologiae* q 96 a 5.

unreasonable the law may employ other techniques. Among them are the imposition of penalties, as adumbrated in section 4 above, and the establishment of institutional channels to exert political and social pressure against the power-holder, for example when the matter is regarded 'non-justiciable'. The design and application of such techniques is a prudential matter.

I will explain and justify these and many other techniques in Chapter VII. For the present I must address a potential concern arising from a prior point. A reader may wonder why I am placing penalties and voidness on a par, as techniques linked to the correct exercise of a legal power. Am I not incurring in the conceptual mistake, sharply shown by Hart, of understanding voidness as a punishment?

To respond let us first recall Hart's argument. The context in which the argument is developed is his critique against theories of law that place coercion as an essential component of law, such that all legal norms must be understood as connected, in way or another, to a punishment. That thesis would collapse the distinction between power-conferring and duty-imposing rules. Hart maintained that the effect of incorrectly exercising a power is that the desired juridical configuration will not normally come about as desired (because void or liable to be avoided), whereas the normal consequence of the breach of a duty is a sanction. Only at the price of distortion, the argument goes, could the unsuccessful production of legal effects be described as a sanction.[29] Hart's argument seems to suggest, I infer, that to understand voidness as a punishment is to incur in something similar to a category mistake.

I think that Hart is correct in proposing that nullity is not a punishment, but my account is not incurring in any such confusion. To see why we should spell out the claim

[29] Hart, *The Concept of Law* 33-35.

carefully. The proposition that deprivation of legal effects is not a punishment does not presuppose the idea that action in conformity or disconformity to validity conditions is *morally indifferent*. Whether this truth was in the background of Hart's mind I do not know. For our purposes, which are not exegetical, the claim itself, in its nude form as it were, is compatible with the claim I am here developing. The point can be stated thus: nullity and penalties share the feature of being reactions against unreasonable action.

If we understand the breach of a contractual duty, say, as a reason for the imposition of a sanction, in order to re-establish the fractured equilibrium of just relations,[30] we can similarly characterize the breach of the duty to meet validity criteria as a reason for depriving the contract of its intended legal effects. Against this backdrop we can understand why civilian lawyers commonly, and meaningfully, characterize the notion of nullity as a 'sanction'.[31] In this sense both punishment and nullification can be both described as remedies, and in this sense, then, it is not a category mistake to examine them on a par. I have exemplified here with contracts, but the argument can be applied to any juridical act.

7. Validity and Prohibition

To recapitulate: powers are distinct from obligations; empowerment entails obligations governing how to exercise the conferred power; and legal systems may employ different techniques to correct the injustice caused by irresponsible legal action. I developed the

[30] On the dialectic structure of reasons and punishment, see Grant Lamond, 'Coercion and the Nature of Law' (2001) 7 Legal Theory 35 53.

[31] See, for example, Renard and Vieujean, 'Nullité, Inexistence et Annulabilité en Droit Civil Belge' 243, 260-62, and references therein.

principle of responsibility by arguing that the allocation of a power imposes a duty to exercise the power by meeting the relevant validity conditions.

Observe, now, that this is one among other types of obligations imposed by the principle of responsibility. There are other, more exceptional duties which the principle may also entail. One such instance is the duty to forebear from exercising a conferred power pursuant to a specified set of ends.[32] I touched on this point towards the end of section 4 in discussing the doctrine of illegality. I shall now return to that question. There I observed that persons may be empowered to conclude contracts yet simultaneously under the obligation to refrain from entering into contracts pursuant to a specified set of subject-matters on the pain of consequences other than invalidation. The obligation to forebear from exercising a conferred power amounts to a prohibition.

In some cases the law combines two different techniques to prevent violations of the principle of responsibility, or correct the injustice if the violation in fact occurred. The contract, in effect, may be rendered *valid* and the law may concomitantly attach a *sanction*. I mentioned that the idea of a valid but prohibited contract may seem contradictory. We are now equipped with an adequate conceptual apparatus to understand why there is no contradiction and, indeed, the combination of these techniques can serve the common good.

First, a terminological point. The expression 'valid but prohibited' is evocative but not entirely precise. It is inexact to the extent that these terms do not refer to the same object: the *juridical act* is valid and the *exercise of the power* is prohibited. The legal

[32] Another instance is the sheer duty to exercise a conferred power. Consider that public prosecutors, who hold powers to prosecute, are on some occasions, and in some but not all jurisdictions, under an obligation to initiate criminal proceedings. The decision to refrain from so doing may be reviewed by a court. Courts themselves, who are empowered to adjudicate, are normally bearers of a duty, under penalty of disciplinary punishment, to not refuse to decide a case (provided that the plaintiff has met certain requirements of procedure and standing).

configuration is valid but the act of bringing it about is prohibited. Hence talk of 'illegal contracts' is in fact misleading.[33]

A common technique used to impose a sanction on the conclusion of a valid contract the entering into which is prohibited carries the name 'unenforceability'. A valid but unenforceable contract is one where the rights and duties it configures exist but the guilty contracting party is pre-empted from enforcing them. This technique therefore precludes that party from claiming specific performance, damages for non-performance, and restitution of goods and moneys transferred under the (valid) contract.

Similar but less common techniques provide that the contract will be valid *and* enforceable, but hold the guilty party liable to a penalty. A contractor who does not have a licence to perform works, for example, is exposed to a penalty but not precluded from enforcing the contract.[34] Similarly, a court may be enabled to modify the terms of the contract to bring them in line with what the law permits (for example, the judicial reduction of an excessive price to the limit fixed by the law).[35]

At play in the combination of these techniques is a balance of conflicting values. These considerations should be carefully weighed in order to fashion the adequate technique. The main value that counts against allowing for the validity of the contract is the injustice involved in the irresponsible exercise of the power. On the other hand, a value that counts in favour of making allowance for the validity of the contract is the protection the innocent party's reliance. If, however, the injustice involved in the sheer

[33] The distinction is helpfully brought out in Robert Stevens, *The Laws of Restitution* (Oxford University Press 2023) 339. See also Basil Markesinis, Hannes Unberath and Angus Charles Johnston, *The German Law of Contract: A Comparative Treatise* (Second edn, Hart 2006) 242-46.

[34] See further Jack Beatson, A. S Burrows and John Cartwright, *Anson's Law of Contract* (29th edn, Oxford University Press 2010) 382.

[35] See Zweigert and Drobnig, *International Encyclopedia of Comparative Law* 37.

exercise of the power is ascribed sufficient weight, the all-things-considered judgement may yield the conclusion that the prohibited transaction should be void from its inception (void ab initio) or, if the injustice is less grave, valid but liable to be avoided (voidable). In this vein it could be argued that, as a matter of sound institutional design, all wrongs *mala in se* should not be merely unenforceable but entirely void.[36]

Of course some ends are more iniquitous than others. It is more unjust to pay someone to commit murder than, say, to conclude a contract to underrepresent the value of the thing so as to evade taxes, or for a labour contract to stipulate a salary below the minimum wage. This is an important factor which the design and application of these techniques should be sensitive to. If we picture injustice as a spectrum we may say that in agreements pursuant to not too grave of an injustice, and where one of the parties is innocent, it is reasonable to allow for the validity of the contract but bar the guilty party from enforcing it, thereby enabling the innocent party to retain, as a defence, the goods and moneys transferred under it. Reliance of innocent parties is, of course, not a moral absolute. Some political communities, who have considered too grave an injustice to leave the other party enriched, have solved the conflict by establishing that the defendant's gains ought to be confiscated by the State. This rather uncommon technique was adopted by the Prussian State in the late 18th Century and is currently in place in Poland.[37] Conversely, when the parties are *in pari delictio*, there is no good reason to enable them to enforce the contract: it is against the common good for persons to profit from their own wrong, and for courts to lend themselves to the pursuit of unjust ends.[38]

[36] Stevens, *The Laws of Restitution* 396-97.

[37] Birke Häcker, 'The Impact of Illegality and Immorality on Contract and Restitution from a Civilian Angle' in Sarah Green; Alan Bogg (ed), *Illegality after Patel v Mirza* (Hart Publishing 2018) 356.

[38] For further analysis of the conflicting goods and their moral weight see, ibid 368-70, and A. S. Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 488-89.

8. Conclusion

Part Two of this DPhil thesis began, in Chapter IV, by laying down the groundwork. I argued that juridical acts exist by virtue of a double movement, an action and a reaction. For the enterprise of norm-generation to be just, persons must act and react in accordance with the requirements of the common good. This Chapter has developed that line of thought, focusing on action in the law. Persons act in the law by exercising legal powers. I have argued that to make exercises of powers conform to the common good political communities allocate them to the right persons, and establish conditions for them to be exercised in a reasonable way, and propose a reasonable content. A just enterprise of norm-generation, in short, calls for the technique of properly allocated and well-exercised legal powers. When legal powers are justly instituted, they serve as a means to discipline the community's attempts, severally or jointly, to configure legal positions, so as to increase the likelihood that those attempts will conform to requirements of commutative and distributive justice.

To be vested with a power entails a moral duty to exercise it with responsibility. That duty is typically embedded in modern legal systems in the form of a legal principle. In developing the main contours of the duty to exercise powers in the manner established by law we finally began to touch on the ideas of legal validity and invalidity. In the framework I am developing these notions must be understood as forms of reaction towards exercise of legal powers. To that we may now turn.

VI. VALIDITY

1. Introduction

The previous chapter showed how a just enterprise of norm-creation calls for the institutional technique of legal powers. Legal powers, I concluded, serve as a mechanism to discipline attempts to configure legal positions. This increases the likelihood that those attempts will conform to requirements of commutative and distributive justice. The introduction of the technique of legal powers into a legal system, through highly formalized structures of empowering norms, in turn triggers the emergence of a further set of moral needs. The technique of legal validity is a prominent means to satisfy these moral needs. The aim of this chapter is to explain how legal validity discharges the task of satisfying such morally valuable ends. In explaining the function of legal validity, and the values it serves, we will get a deeper insight into the concept.

What are these needs, and what value is there in satisfying them? Here I focus on two, and both relate to the moral benefits of social coordination. It is desirable, first, that the recognitional community possess a single institutionalized means to express or channel the act of conferring (or withholding) legal recognition. Secondly, for coordination to succeed in its aims, juridical acts need to be easily identifiable as the salient plans for action among alternative courses of action.

The aim of this chapter is to explain some central features of the technique of legal validity. The technique can be generally characterized, as I have hinted in the conclusion to Chapter V, as a method of *reaction* towards attempts to configure legal positions. The phenomenon of reaction in the law includes the techniques of validity/invalidity and remedies. For ease of exposition I will divide my account of reaction in the law into two chapters. This chapter will focus on legal validity, the next on remedies. Part of the aim of these chapters is to locate that account within the existing theoretical landscape; thus, I will also signal equivalences and resemblances with other views on legal validity.

I shall proceed, in section 2, by arguing that the recognitional community is normally under a moral duty to confer legal recognition towards a just exercise of legal powers. Given certain circumstances, the community may also be under a duty to confer provisional or definitive recognition upon some defective exercises of powers. As a result, a defective juridical act may have the status of being defeasibly or indefeasibly valid. Very exceptionally, when the exercise of a power is too unjust, the community may have reason to withhold recognition altogether, from the very beginning, in which case the act will be invalid ab initio. The moral duty to confer recognition is the counterpart of the principle of responsibility. Now not any type of defective say-so can be conferred legal recognition. There is a threshold that it must pass in order to count as a candidate for recognition. Section 3 explains where that threshold lies. Sections 4 to 6 outline some main features of legal validity: that is, of the tasks that this technique discharges in order to achieve morally valuable ends. Section 7 concludes.

2. The Duty to Recognize

The fixing of just validity conditions, and the fulfilment of those conditions in exercising legal powers, contribute to making the enterprise of norm-generation just. An incorrect exercise of powers is normally an injustice. The just production of legal norms is an aspect of the well-being of persons and their community, that is of their common good. There is a rational need for persons to contribute to the common good and conform to its requirements. The rational need to contribute to this aspect of the common good bears both on power-holders and the recognitional community, albeit in different ways.

The rational need bears on power-holders by providing a strong reason to meet the relevant validity conditions in exercising their powers. This need, which I framed as an aspect of the principle of responsibility, is imperious enough as to be characterized as a necessity, and it therefore qualifies as an obligation (or duty), even if normally no punishment ought to ensue in case of breach (Chapter V.5-7). On the other hand, and as the counterpart of the principle of responsibility, the rational need for a justified production of norms bears on the recognitional community by giving them strong reason to confer legal recognition on norms that have been correctly created, as well as withhold recognition on norms defectively produced. This rational need is similarly imperious enough to be characterized as an obligation. Since it is the choice of the recognitional community that ultimately settles whether a juridical act will come into existence, the community, like power-holders, also wields a kind of power: namely, the power to confer recognition. This power is not *legal*—it is not a manifestation of intent to configure legal positions—and may be characterized as a genuine political or moral capacity. Again, power involves responsibility: hence the moral duty to responsibly confer or withhold recognition.

We can translate this general thesis into the familiar scheme, introduced by Hart, of rules of change and recognition. Rules of change allocate powers and rules of recognition fix the conditions for their exercise. Rules of change are power-conferring and rules of recognition duty-imposing.[1] Validity criteria, when the criteria are themselves just, work as public parameters of reference for the community to evaluate the justice in an exercise of a legal power. If a manifestation of intent to configure jural relations meets the criteria fixed by the relevant rules of recognition, then the recognitional community has reason to believe that the exercise is just, and will be under a duty, imposed by that rule of recognition, to confer legal recognition on the intent manifested by the power-holder.

This duty I am drawing attention to has a close connection with the obligation to obey the law, but they are not the same. The content of the duty to confer recognition is to assign a say-so an institutional function, whereas the content of the duty to follow the law is to conform to the course of action proposed by an already recognized juridical act.

The duty to confer recognition is prior to the duty to follow the law, and in well-shaped legal systems the latter normally follows from the obtainment of the former. There are instances when the duty to confer recognition and follow the law may come apart, that is when a recognized juridical act does not yield an obligation to follow its propositional content. The primary reason why is that the existence of a just scheme of

[1] Hart apparently wavered on whether rules of recognition were duty-imposing or power-conferring. The matter was discussed and then clarified by Raz: see Raz, *The Concept of a Legal System* 198-99; Raz, *The Authority of Law* 92-93, and fns 24 and 25. Raz helpfully formulates the rule of recognition in logical form thus: 'all law-applying officials [this is the recognitional community of Hart's theory] have a duty to apply all and only laws that satisfy the following criteria…'. The formulation must be refined because the term 'laws' normally means legislation, whereas officials are obliged to apply any type of juridical act. This small imperfection is likely due to the fact that contemporary theorizing on legal validity has focused on legislation while leaving private transactions, as Köpcke has remarked, 'as a matter of residual theoretical concern': see Köpcke, *Legal Validity: The Fabric of Justice* 7.

norm-generation cannot preclude the possibility of injustice. The just operation of a legal system also requires that persons be responsive to the requirements of responsible action. The finest institutional design can only do so much to secure the responsible exercise of powers. It is indeed possible that even within a by and large just legal system a power-holder may exercise a power in the established manner and yet produce a juridical act extremely unjust in content, such that it should not generally be followed. Such states of affairs may even occur by the action of well-motivated power-holders who, in good faith, have a misperception of the reality they are governing, or fail to see negative side-effects of their acts. For example, the application of a generally just rule to situations unforeseen by the legislature could result in an injustice, an injustice which the legislature itself would have avoided if it could have anticipated the situation (as in Aristotle's notion of 'equity'); similarly, the application of reasonable rules of evidence within a reasonable procedure may result in the condemnation of the innocent.[2]

The fact that a juridical act is too unjust in content, even if produced through a correct exercise of power, might provide the community with reason to withhold recognition altogether. That judgement, however, is prudential. For there may emerge certain moral considerations that counsel obeying an unjust law to a higher or lesser degree. Primary among these considerations are the maintenance of the efficacy of the system of a whole, as well as the respect for its authority. In such cases the unjust juridical act ought to be conferred recognition, and the duty to follow it may be lessened, or not obtain in some concrete cases, but may still exist in others.[3] A similar example of a case where a juridical act is recognized to exist but does not necessarily yield an

[2] John Finnis, 'Aquinas and Natural Law Jurisprudence' in George Duke and Robert P. George (eds), *The Cambridge Companion to Natural Law Jurisprudence* (Cambridge University Press 2017) 46-47, expositing examples put forth by Aquinas.

[3] On the obligatory character of unjust laws, and the many nuances involved in the phenomenon, see Finnis, *Natural Law and Natural Rights* 352ff.

obligation to obey is found in the law of contracts. In England, a bargain concluded by an agent without authorization of the principal does not oblige unless and until ratified by the principal. Prior to authorization, the contract could only misleadingly be described as inexistent (or 'void'): it is, rather, existent but not (yet) obligatory.[4]

From the proposition that just exercises of legal powers ought to generally be conferred legal recognition, it could be inferred that the opposite equally holds. That is, that all incorrect exercises of powers, which are to that extent unjust, ought to be withheld recognition. This conclusion, as a general claim, would take the rationale too far, for justice in the activity of norm-generation is but one aspect of the common good, and it is not an exceptionless moral value.

As I implied in referring to considerations that counsel obeying an unjust law, other aspects of the common good, relevant to this question, are that the legal system be sufficiently stable and efficacious, which presupposes the need for a continued respect for its authority, if it is legitimate. The common good also requires a high degree of trust among members of the community. The success of large-scale schemes of coordination depends, partly but crucially, on a personal and institutional reliance on others. It must be possible to assume that those who engage in social interaction act responsibly. Certainty and predictability in legal relations are largely a result of a sustained and enduring sense of reciprocity between persons, and persons and institutions.[5] For this reason it is unreasonable to ask of persons to plan their affairs and conduct their lives by inquiring into the details of how each and every juridical act under whose government they are were produced. It is plain that this would make social life

[4] See Dominic O'Sullivan, Steven Ballantyne Elliott and Rafal Zakrzewski, *The Law of Rescission* (Third edn, Oxford University Press 2023) 1.39-44.

[5] As continuedly emphasized by Fuller. See Fuller, *The Morality of Law* 19-26, 39-40, 61, 182, 209.

impossible. Further, to permit private citizens to continually inquire on the grounds of the authority on which officials act would likely undermine the kind of order that acts of authority aim to bring about: it would cause uncertainty, confusion, and erode civil peace. It is prudent, in sum, both at a personal and institutional level, for persons to assume that public officers and private citizens normally exercise their powers in the right way.

The outlined considerations justify why there is a duty to confer recognition on many defectively produced juridical acts. In assigning legal recognition to a defective say-so the community ascribes it the status enjoyed by a valid act, either defeasibly or indefeasibly. Here lies the moral justification of diverse and complementary techniques such as rules on 'voidness', 'voidability', 'presumptions of validity', the 'res judicata' and 'de facto officer' doctrines, and the protection of 'legitimate expectations'. These techniques are fashioned to best meet the demands of the common good, demands which, in the case of incorrect exercises of powers, may enter into conflict, such as when the value of justice in power exertion conflicts with the goods of certainty and predictability in social interactions.

It is important to bear in mind that the phenomenon of defective norm-generation is always a sub-optimal situation. Ascriptions of validity to defectively created juridical acts are a second-best solution, as it were, one which attempts to maintain the integrity of the political community and its legal system given the imperfection of human choices and action.

The duty to confer legal recognition is firstly moral, but it is typically codified into the law through presumptions of validity and rules on voidability and remedies. It is important to highlight this moral aspect because the conferral of recognition results from a moral judgement. Legal existence is the result of successful power exertion, and

success depends on recognition. There is always a gap in the sequence of events that take place between the giving of the say-so and the coming into being of a juridical act. That gap is the free choice of the recognitional community. The first word on the existence of a juridical act is the utterance of the power-holder and the last word is the recognitional community's acceptance or refrainment therefrom.

The foregoing discussion sheds further light on the nature of validity criteria. They direct the community to make a reasonable choice. In addition to specifying conditions that contribute to securing the just exercise of powers (Chapter V.2-4), validity criteria serve as public guidelines. They guide power-holders on how to exercise a power. They also guide the recognitional community on how to practically deliberate about conferring or withholding legal recognition. This guiding-function of validity criteria can be characterized as a means to coordinate conduct, or, in other words, to make it converge in a single course of action. Thus we can see that juridical acts themselves, on the one hand, as well as the rules that establish how to create them, on the other, coordinate social interaction. The juridical act coordinates by establishing a plan for action; validity criteria coordinate by showing how to produce such plans for action and confer recognition upon them.[6]

3. The Threshold

The foregoing discussion has been normative. It has focused not on what in fact happens but should happen in a well-shaped legal order. As a matter of fact, however, an extremely unjust exercise of powers may be conferred recognition, and just exercises

[6] On these two modes of convergence, see Köpcke, *Legal Validity: The Fabric of Justice* 86-87.

of powers withheld recognition. The latter case is quite exceptional, but for the former examples abound. Leaving aside the moral evaluation of such states of affairs, observe that at the factual level there is a threshold that a manifestation of intent must pass in order to firstly count as a candidate for recognition. The recognitional community may make a moral mistake when conferring or withholding recognition, but not any kind of entity can be the subject of that moral judgement.

Recall that the institutional function of a legal say-so is to propose a configuration of legal positions. Recall also that institutional functions must be collectively assigned by the recognitional community (Chapter IV.3). Now assignment of function is impossible if the utterance has no meaningful propositional content. The say-so, through which the intent to configure jural relations is externalized, must be *capable* of performing its institutional function. Here lies the threshold.

To grasp this idea it will be useful to recall the parallel between norm-generation and ordinary communication, a device I recurred to in developing the framework on the ontological status of juridical acts. Persons ordinarily communicate to express a message by reasonably manifesting an intention to elicit a response. Ordinary communication obtains—succeeds—if the message uttered by the addressor is understood by the addressee, to which he or she reacts.[7] Analogously, juridical acts are uttered with the intention to cause legal meaning, a meaning that aims to guide the conduct of the addressee(s).

There are stages of success in ordinary communication. The addresser must, first, utter words with some meaning: something must be said; further, the meaning intended by the addresser must be grasped by the addressee; having grasped the

[7] I follow Köpcke's account of communication: see ibid 39-41.

meaning the addressee responds in some way.[8] Analogously, in the legal domain there is success in the production of legal communication when the recognitional community recognizes it to perform a function, a recognition which presupposes a basic understanding of its communicative content.

A manifestation of legal intent that conveys no content cannot become a juridical act in any meaningful sense. Consider a statute that criminalizes an unclearly described conduct,[9] an administrative decision that imposes a fine without specifying the amount, a contract of sale that does not stipulate the object of the transaction or the price to be paid (and does not specify who ought to determine the price and/or on what information to base that decision). These purported exercises of powers fail to propose a course of action.

Conversely, an incorrectly created juridical act that succeeds in proposing a course of action may in turn succeed in being recognized to perform its institutional function. The range of act-types that ought-not-but-could-be conferred recognition is wide. These can vary from fairly evident failures to meet validity criteria, such as a judicial ruling issued by a group of Members of Parliament, to potentially less evident failures, which may bear a 'colour of law' or 'appearance of legality', such as a contract entered into under fraud.

Juridical acts that do not pass the threshold are in truth merely putative, the result of purported but entirely unsuccessful exercises of a legal power. Such acts may be reasonably characterized as 'void', in the sense that they produce no juridical signification: they have caused an effect in the world, but in the eyes of the law these

[8] ibid .

[9] Unclear is not synonymous, in this context, with vague. A vague act-description could be rendered clear via interpretation.

have no legal relevance. They are empirically there, as it were, but strictly speaking legally inexistent.

Now this sense of 'void' must not be confused with the term used by a judicial ruling which *renders* a voidable act void. A voidable act is legally recognized as existent—it does contain a genuine propositional content—but, upon a judicial determination, no longer deserves to be treated (recognized) as existent. As I will argue in more detail in section 5, rules that regulate how to invalidate voidable juridical acts do not *declare* an existing state of affairs, empowering a court to utter as it were a mere description of what is already the case, but *direct* the entire community to *treat* an act capable of performing a function to have no present, future, and/or past existence, depending on the case.[10]

4. Basic Functions of Legal Validity

The technique of legal validity discharges multiple tasks or functions. These can be schematically organized by distinguishing between basic and ancillary functions. The aim of this section is to explain how the validity technique discharges two basic tasks. These are to enable the recognitional community to react towards the making of a juridical act by expressing their judgement of legal recognition; and to identify the recognized juridical act. In the next section I examine two additional tasks, which flow from the basic tasks. Their point is to aid in adequately discharging legal validity's two basic tasks and can, thus, be characterized as ancillary.

[10] For a similar idea about the nature of rules of voidability, albeit without a developed background notion of legal recognition, see Finnis, *Natural Law and Natural Rights* 353: 'legal rules about void and voidable acts are "deeming" rules, directing judges to treat actions, which are empirically more or less effective, as if they had not occurred (at least, as juridical acts), or as if from a certain date they had been overridden by an intra vires act of repeal or annulment'.

4.1. Expression of Recognition

A first task that the technique of legal validity discharges concerns the act of legal recognition itself. In contexts of large-scale patterns of social interaction it is helpful to possess a socially recognizable device to express acts of recognition. An arsenal of canonical words to manifest in simple terms a more complex normative attitude enables the community to convey the message in a way that is familiar to all. This is itself a coordinative benefit, for it allows the community at large to regularly understand each other at the healthy pace requisite for social life to unfold. These terms typically emerge through convention, gradually acquiring a stipulated, technical meaning.[11] The historical trajectory of the notion of legal validity shows a progressive process of stabilization, reaching in our time the status of a term of art.[12] As such, I argue, it enables modern communities to express the act of legal recognition through a single channel.

The technique of validity functions as a technological structure to conduct the assignation of institutional function towards a manifestation of legal intent to configure legal relations. Through this vessel a people manifest (externalize, declare, convey, evince) that they confer or withhold recognition. They manifest their recognition by referring to the produced juridical act as legally valid; and, conversely, an act which has been withheld recognition can be referred to as invalid.

[11] On the need for, and benefits of, these conventions for institutional facts generally, Searle, *Making the Social World: The Structure of Human Civilization* 75-76.

[12] See, generally, Köpcke, *A Short History of Legal Validity and Invalidity: Foundations of Private and Public Law*. See also Munzer, *Legal Validity* 37.

It is important, in this connection, to not lose sight of the distinction between the exercise of a power and the legal configuration it attempts to produce (the legal effects). An exercise of powers may be correct or incorrect (defective), and to that extent just or unjust, if the validity criteria are themselves just. But the effects it produces or attempts to produce come into existence by virtue of the reaction of the recognitional community. The terms validity/invalidity are focally employed to refer to the *product* of the exercise of the power, not the exercise of the power itself. Sometimes in legal practice exercises of powers are referred to as validly or invalidly carried out. This mode of speech must be understood as an extension of the term. It seems more conducive to clear thinking to refer to incorrect or defective exercises of powers as 'unlawful' or 'unconstitutional', say, in so far as that indicates that the power was exercised in defiance of the law and/or the constitution. This explains why it can be meaningfully maintained that an unlawful administrative decision, or an unconstitutional statute, is valid, either defeasibly or indefeasibly. I will return to this point on vocabulary in section 5.

In expressing itself in this manner—in referring to a juridical act as valid—the recognitional community performs a type of speech act akin to what philosophers of language have termed a 'commissive'. A commissive is a statement whose point is to commit the speaker to a future course of action.[13] The following are examples of commissives: to bind oneself, give one's word, adopt, espouse, agree, engage, contemplate, consent, side with, embrace, favour.[14] These verbs share the feature of reflecting a speaker's normative attitude to accept the binding force of a proposed course of action. Assertions of legal validity can, in certain contexts, operate as

[13] Austin, *How to Do Things with Words* 157; John R. Searle, 'A Classification of Illocutionary Acts' (1976) 5 Language in Society 1 11.

[14] Austin, *How to Do Things with Words* 158.

commissives. Expressions like 'this [juridical act] is valid' can mean 'I recognize that this say-so produces sources and propositions of law, and assent to their binding force'.

Notice that I say 'can mean' and not 'means' because an expression with the same syntactical structure can carry a different force (in the linguist's sense of 'force'): namely, the force of a description. A speaker who asserts 'this [juridical act] is valid' can mean that he or she is simply reporting a fact. That is, she conveys the information that a particular exercise of a power has produced a juridical act. Because these utterances have a surface resemblance their force—performative or descriptive—must be grasped by attending to the intention of the speaker in the relevant discursive context.

The performative dimension of validity statements has been mostly overlooked in legal theory. Building on a set of largely convergent theses developed by Kelsen and Hart legal theorists have tended to explain the notion of validity in terms of the more basic notions of 'existence' and 'membership', which track the descriptive dimension of validity statements. To say that a juridical act is valid, in this sense, is to say that in its production the power-holder has met the relevant criteria and, as a consequence, the norm exists and is a member of the legal system. This dimension of validity statements forms the basis of a sufficiently large body of literature and the essential elements of it have been analysed in Chapters II and III.[15] Given this state of affairs it will be well to make some further observations on the performative dimension.

[15] The references to the relevant passages by Kelsen and Bulygin will be found in those chapters. On Hart's account of legal validity as membership, see Hart, *The Concept of Law* 109-12. For a careful analysis of Hart's notion of validity as membership, see Grant Lamond, 'The Rule of Recognition and the Foundations of a Legal System' in Luís Duarte d'Almeida, James Edwards and Andrea Dolcetti (eds), *Reading HLA Hart's The Concept of Law* (Hart Publishing 2013) 186-90, 201-03. For a general overview of contemporary thinking on how legal validity builds on the framework developed by Kelsen and Hart, see Köpcke, *Legal Validity: The Fabric of Justice* 12. For a more specific overview on how the notions of existence and membership function with that framework, see, for example, Waluchow, 'Four Concepts of Validity: Reflections on Inclusive and Exclusive Positivism' 139-40; Bulygin, 'Time and Validity (1982)'; Sandro, 'Unlocking Legal Validity: Some Remarks on the Artificial Ontology of Law' 100ff. It is important to note that the post-Hartian debate has focused less on the concept of validity itself and more on the nature

Legal artefacts not only need to be created but also maintained in existence. Searle put it this way: institutional existence involves 'initial creation' as well as 'subsequent continuation'.[16] The community must continually recognize utterances to perform their legal function. Performative assertions of validity contribute to the continued existence of juridical acts, for they evince a constant acknowledgement of their being deemed to perform their institutional function. In this respect we may say that legal validity performs a constitutive task.

The more the recognitional community continually asserts the validity of a juridical act the more stable its existence becomes. The assent may be conveyed explicitly, by way of words, or tacitly, by way of deeds. In the former case the relevant portion of the community says 'this act is legally valid'; in the latter case they follow the course of action proposed by the act. Furthermore, given that legal norms interlock in vast webs, webs we call a legal *system*, the continued acknowledgement of the validity of a specific norm (or set of norms) implicates the recognition of other, related norms of the system, such that by reinforcing the strength of one area of the web others are in effect fortified as well. For example, when the community confers legal recognition on a judicial ruling it lends indirect recognition to the rules that set up the courts of the system (see Chapter IV.5).

Now while it is true that theorists have overlooked the performative dimension of validity statements, two ideas that have circulated approximate it, and I will conclude this first line of thought on legal validity by sketching the resemblance. One of these ideas has enjoyed wide circulation, the other less so, and both were developed by Hart.

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of validity criteria, as exhibited, for example, in the debate between 'inclusive' and 'exclusive' positivists (see Köpcke, 7).

[16] Searle, *Making the Social World: The Structure of Human Civilization* 93ff.

The first is Hart's connection of the internal point of view with assertions about the validity of a rule. Statements from the internal point of view express the acknowledgement of the rule's binding force, a phenomenon which he called 'acceptance'. Hart maintained that 'the word "valid" is most frequently' used to make a statement from the internal point of view. To say that a rule 'is binding' can be 'paraphrase[d] by the assertion that the rule in question is a valid rule'. According to Hart, the statement 'this is a valid rule' asserts a description of the fact that the relevant power has been correctly exercised and that as a consequence the norm has become a member of the system. However, such statements, articulated through the 'normative use of legal language', also assert that the rule exerts binding force. This idea is what enables Hart to say, against the legal realists he criticized, that in a judicial context the statement of a judge 'that a particular rule is valid' is, as he famously put it, 'part of the reason for his decision'.[17] This reason-giving aspect of rules is something that legal realists, being preoccupied with prediction of judicial behaviour, cannot, according to Hart, explain.

It must be acknowledged, as I have indicated, that Hart focused more on the membership aspect of legal validity than the one I am drawing attention to, but in shedding light on how statements of validity express the acceptance of a rule he came close to the performative dimension of many such statements. My claim becomes even more apparent when we turn our attention to the analysis and further development of legal statements advanced by Raz. To understand Raz's analysis, to which I now turn, it is important to bear in mind that it emerges from an attempt to refine Hart's notion of the internal point of view, including as well a critique.

[17] For the relevant passages, see Hart, *The Concept of Law* 103, 105, 117, 216; and also 137-40, 210.

Hart had argued that a person can accept a rule for many kinds of reasons. No moral endorsement of the rule is necessary for a rule to be accepted. A rule in effect may well be accepted by a people because they believe it to be objectively justified (ie required regardless of the agent's desires, aims, or other subjective motivations), and it may also be accepted because of 'an unreflecting inherited or traditional attitude', as well as for more self-regarding reasons such as 'long-term interest; disinterested interest in others; or the mere wish to do as others do'.[18] This wide variety of acceptance-reasons is crucial for the coherence of Hart's theory, for it was central to his methodology to establish that law and morality are not necessarily connected.[19]

Raz criticized Hart's view that all these types of reasons stand on an equal footing. He argued that the internal point of view must involve a moral endorsement of the rule. There is, in this sense, a necessary connection between law and morality. When a speaker states that a rule is valid he or she is genuinely (or at least pretendedly) morally 'committed' to it. This is not to say that a theory of law must endorse such statements. There remains space for a theory to simply state in a 'detached' manner that the participants of the practice are committed to the moral value of the relevant rule. However, detached statements are always 'parasitic' on internal, 'full-blooded normative' statements.[20] If I understand Raz correctly, this means that detached statements are intelligible through committed statements: the moral acceptance of a rule has explanatory priority. Thus, the considerations in virtue of which persons accept a rule do not stand on an equal explanatory footing.

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[18] ibid 114, 231-32.

[19] Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* 160-61; Hart, *The Concept of Law* 107-08, 114, 231-32, 257, 244.

[20] Raz, *The Authority of Law 154-57*; Joseph Raz, 'Hart on Moral Rights and Legal Duties' (1984) 4 Oxford Journal of Legal Studies 123 129-30; Joseph Raz, 'Two Views of the Nature of the Theory of Law: A Partial Comparison', *Between Authority and Interpretation* (Oxford University Press 2009) 54 n14.

It seems clear, from the context in which the discussion is carried out, that the main theme Raz had in mind in developing the distinction between committed and detached statements was the relation between law and morality. He framed his thesis on committed statements as a way to refine the debate between natural law theorists and legal positivists. The natural lawyer can hold to committed statements, and the legal positivist can use detached statements in describing the law.[21] Raz's aim, in other words, was to establish that legal theory can be descriptive of validity statements, and thus remains within the constraints of Hart's value-free method, while simultaneously acknowledging that an explanation of the phenomenon of rule-following necessarily involves attending to moral considerations.

What is of interest in this debate, for our purposes, is that Raz invokes the idea of commitment to develop his thesis. In introducing the notion of 'committed' statements he comes close to the idea that some assertions of validity can have the performative dimensions I am here drawing attention to. For when committed participants of a practice (including the legal theorist) state that a rule is valid they do not merely describe the rule, they assent to their binding force. I do not know whether Raz had this idea in mind, but through a different route—because he was asking a different question—he comes close to underscoring the same truth.

The second idea that approximates the performative dimension of assertions of validity is found in a lesser-known view. In an early paper Hart suggested that we understand assertions of legal validity as 'ascriptions'. Hart defined ascription by opposing it to the act of describing mind-independent properties, such as physical facts.

[21] In his later work Raz increasingly distanced himself from the strategy of engaging in debates through the natural law/legal positivism lens. Prompted by Timothy Endicott, he made the point explicit in Raz, 'Comments and Responses' 253.

An ascription, rather, is a performance;[22] and there are some contexts at least in which validity statements do not describe things but in some sense constitute them. His remarks on validity are brief, as it was not the main focus of the paper, yet the example he provides to explain the point is nonetheless illuminating.

Here is the example. When a court is asked to pronounce on the validity of a contract it must assess whether the contract has been formed in compliance with the relevant validity conditions—that the intention to undertake an obligation was sufficiently serious, free from external pressure, etc. The claimant argues that the contract must be rendered void, by setting it aside, and the defendant that it must be upheld as valid. In its judgement, supposing that the court arrives at the conclusion that the contract has been correctly formed, the court contributes to the continued existence of the contract, which is up to then voidable, by ruling that it is valid. The statement by which a court rules on the validity of a contract is a performance, not a description. The court's decision may be assessed as right or wrong, good or bad, but not true or false, which are the pair of concepts that evaluate descriptions.[23] If the contract was in fact vitiated—contrary to the court's conclusion—the affected party may appeal and eventually 'defeat' the lower court's ascription. And, again, to defeat is to act, an action which a court performs by using the term valid as a verb rather than an adjective. This is as far as Hart approximated the performative dimension of validity statements. Unfortunately, it was not taken up in his later, more definitive account of legal validity, which we surveyed in the paragraphs above.

[22] HLA Hart, 'The Ascription of Responsibility and Rights' (1948) 49 Proceedings of the Aristotelian Society 171 171-72.

[23] ibid 182-83, 186.

4.2. Identification of Juridical Acts

The second task discharged by the technique of legal validity is to serve as a sign for that which is produced by a successful exercise of a legal power—the plan for action put forth by a power-holder. This feature of legal validity is crucial to the action-guiding function of law and has been given a philosophical articulation by Köpcke.[24] Here I exposit her thesis and further develop some of its aspects.

The primary means by which legal orderings organize social interaction is the motivation of conduct. To move persons to act is indeed the central function of a legal norm. To achieve this end the tools of a legal system must be directed to the reasoning powers of its people. Legal techniques must therefore be fashioned to contribute to the general enterprise by which legal systems direct action. This involves what Köpcke calls an epistemic and a volitional dimension. The epistemic dimension concerns the identification of what counts as the legally required course of action. The volitional dimension concerns the motives that compel the agent's will to act upon the identified proposal for action. The techniques of sanctions and rewards tackle the volitional aspect, and the technique of legal validity the epistemic aspect. Here we are interested in the latter technique.

Chapter IV showed that configurations of legal positions can present themselves under the aspect of 'source of law' and 'proposition of law'. I called source of law the discrete entity brought about by exercises of legal powers whose propositional content is identified, systemically, through an act of interpretation. The interpretive act yields

[24] Köpcke, *Legal Validity: The Fabric of Justice* Chapter 4.

what I referred to as propositions of law. The final product in the process of norm-generation, ie that which actually impacts the normative situation of persons, is the proposition of law. Now, in order to perform their guiding function, propositions of law need to be easily identifiable. This, as I observed, is part of the epistemic challenge of setting up schemes of legal coordination.

The identification of propositions of law presupposes the identification of their source; and it is in the identification of the source where the technique of legal validity plays a central role. Observe now that there are more than one means to promote the identification of sources of law. Promulgation of acts of authority, as well as the formalities and procedures required to form a private agreement, are a prominent means. Now juridical acts, as I observed in Chapter IV.3, following Köpcke, endure in time, detach themselves from the event that created them, and circulate as relatively free-standing entities. One area in which the techniques of promulgation and publicity conditions of validity, fall short is that the mere activity of making known that a legal configuration has been created will not suffice to facilitate its enduring identification. The juridical act can get lost in the legal traffic it is meant to traverse.

In order to trace lasting entities in permanent movement it is useful to mark them. To illustrate, notice that this method is employed in many domains other than the legal. Consider the organization of livestock, vehicles, library books, and currency. These entities are marked by those who are in charge of their management, well-being, and administration, because of the moral desirability of keeping track of them, among other reasons. They are typically marked through a visible sign—a tag, a brand, an imprint, a serial number—and the very word 'mark' evokes the idea of a visible impression produced through sight.

Visible signs work for visible things. Juridical acts, by contrast, may of course be physically represented in documentary support, but strictly speaking are not visible things. They exist, rather, as artefacts, in the minds of a people. The marking mechanism needed in the legal domain is therefore not visual. As I observed above, legal orderings achieve their aims by moving persons to act. Its tools are, and must be, related to the reasoning process of its people. Legal reasoning is characteristically discursive, moving from premises to conclusions by identifying factual and normative propositions, all of which are expressed in a language. Language is central to legal reasoning. Names, therefore, have a central place in the enterprise of legal guidance.

Now we can draw the connection with the technique of legal validity as explained by Köpcke. The technique operates in this respect as the name for juridical acts: that which signals the entity produced by the successful exercise of a legal power. As such it works as a marking technique—a stamp. The idea can be expressed in the vocabulary of game theory. Solutions to coordination problems need to acquire a high degree of salience in order to actually solve the relevant problem. The giving of a name, the christening of the solution as the legally valid solution, singles out the selected plan for action, enabling it to stand out among other potentially reasonable alternatives.

To conclude, observe that this illuminating account of legal validity as a sign (name, mark, stamp) is recent but traces of it can be found in previous reflexion on the matter. One such reflection is Hart's idea that rules of recognition emerge as a response to a social need: namely, uncertainty in knowing what counts as law; or, in other words, of identifying which rules are members of the system. The problem raised by such uncertainty is epistemic and at least partly solved, Hart argued, by stamping the rules of the system with an 'identifying or common mark'.[25] In this context he maintained

[25] Hart, *The Concept of Law* 92.

that the term legal validity can operate as a 'certification' of that which is a constitutive member of a legal system.[26] Hart is here hinting at the technical nature of the notion of legal validity, as a means to generate convergence within a community on specified legal courses of action. Likely following Hart's lead, Finnis held that legal validity can be explained as a technique. Its point is to operate as a 'stable point of reference' by which the legal community can 'attribut[e]' present 'authoritativeness' to past exercises of powers.[27]

5. Ancillary Functions of Legal Validity

The aim of this section is to examine two further tasks discharged by the technique of legal validity. These tasks are ancillary in that they provide support for the continued expression of legal recognition and the identification of juridical acts.

5.1. Coordination of Discourse

The word 'valid' is not the exclusive word used to channel the act of legal recognition, nor to refer to juridical acts. Typically practitioners express themselves through alternative terms, conveyed in expressions such as 'this statute is constitutional', 'this law should be obeyed', 'this contract is obligatory' ('in force', 'effective', 'good in law'), 'this administrative decision is lawful' (or 'legal'), and so on. Conversely, lawyers

[26] ibid 210.
[27] Finnis, *Natural Law and Natural Rights* 269.

commonly replace the term 'invalid' with expressions such as 'void', 'null', 'inexistent', 'ineffective', 'of no force or effect', 'ineffectual', 'inoperative', 'unconstitutional', 'ultra vires', 'unlawful', 'unauthorized', among others.

It is plain to any observer that the family of terms related to the notion of legal validity is varied.[28] But it is not a chaotic set, as it seemed to have been in its origins.[29] As I remarked above, the trajectory of the concept displays a gradual but steady stabilization, by which legal validity has become a term of art. I agree with those who, in providing common guidelines for the contract law of member states of the European Union (the 'Principles of European Contract Law'), have suggested moving towards a more uniform terminology.[30] This path was pioneered by canon lawyers, largely on the basis of the intellectual assets inherited from the Roman legal system, and then further perfected by the posterior highly systematic thinking of German Pandectists in the age of European codifications, who have largely influenced the contemporary doctrinal scholarship on this matter.

Why is it desirable for jurists to possess and employ a rather standardized discourse to refer to juridical acts and so express their act of legal recognition? Part of the moral value in setting up a legal system is to settle what ought to be done and provide a framework of practical reasoning that to a large extent replaces the framework of moral and political reasoning that would otherwise inform the deliberation of the

[28] And frequently reported by Encyclopedia entries: see, for example, William M. McKinney and David S. Garland, 'Void and Voidable' in William M. McKinney and David S. Garland (eds), *The American and English Encyclopædia of Law and Practice*, vol 5 (Edward Thompson 1910); Hellwege, 'Invalidity'.

[29] Zimmermann reports that 'about 30 different terms survive' in sources available from Roman law today, including 'nullum, nullius momenti, non esse, invalidum, nihil agere, inutile, inane, irritum, imperfectum, and vitiosum'. He adds that 'to bring them into any kind of systematic order would be an absolutely hopeless task': Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* 679 (citation omitted).

[30] See Hellwege, 'Invalidity' 990.

community.[31] As we have seen, part of the coordinative task of a legal system is discharged through the use of language. The employment of a unified set of terms simplifies the reasoning process of the community. Categories in the legal domain, like juridical acts themselves, perform a coordinative function. Juridical acts supply a plan for action, thereby providing order to the practical deliberation of a people, enabling them to speak as it were in a single voice. The term legal validity further enables the community to speak, at a second-order level, in a single voice about the juridical acts themselves.

This second-order type of coordination is a matter of practical desirability.[32] Yet to propose this path is not say that we should fix the use of a term by way of definitional fiat. We need not police the use of words either. The point, rather, is to be mindful of the benefits engendered by speaking flexibly but not equivocally about the status of juridical acts.[33] By using related terms to capture the same concept the speaker and addressee are enabled to reduce and analyse the varied categories into an explicit and single form—that of legal validity.[34]

It may be asked why *legal validity* and not another word. The question is sound because it could indeed have been another word or combination of words. A clue to the answer can be found in the etymology of the word validity as well as in its use in domains of non-legal argumentation.

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[31] This thesis crosses the work of theorists of significantly different traditions: see Gerald J. Postema, 'Law's Autonomy and Public Practical Reason' in Robert P. George (ed), *The Autonomy of Law: Essays on Legal Positivism* (Oxford University Press 1999) 80ff.

[32] My argument here finds a parallel with Raz's proposed criteria for a doctrine of the individuation of norms (at Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 The Yale law Journal 823 832). He suggests that a sound doctrine should 'keep laws to a manageable size, avoids repetition, minimizes the need to refer to a great variety of statutes and cases as the sources of a single law, and does not deviate unnecessarily from the (admittedly hazy) common sense notion of a law'.

[33] For a convergent line of thought, see Aulis Aarnio, *Essays on the Doctrinal Study of Law* (Springer 2011) 128.

[34] On reduction of terms to canonical forms, see Austin, *How to Do Things with Words* 61-62.

The word validity was initially applied to poetry, prose, and the human body. It meant 'strong', 'stout', 'able', 'powerful', 'robust', 'vigorous', 'well in body', 'in good health', 'sound', 'healthy', 'mighty', 'powerful', 'effective'.[35] In time it has been extended to domains of practical and formal reasoning. A moral proposition, the conclusion of a syllogism, an inference, are all characterized as valid if they carry argumentative force, the force of reason. Juridical acts operate by bearing as a consideration of special force in the practical reasoning of a people. A legal norm, as we saw in Chapter IV, can be characterized as an institutionally embodied reason for action. Therefore the word validity, in so far as it conveys the idea of strength, seems especially apt to capture the mode of operation of juridical acts. I think this is part of the reason why Raz held that 'the best route' to grasp the notion of legal validity is to begin by 'attending to the fact that it is used interchangeably with 'legally binding'".[36] We may retain Kelsen's insight that legal norms 'exist as' legally valid while detaching it from its Kantian framework. Legal validity is not itself the existence of the norm: validity and existence are not strictly speaking interdefinable. Validity, rather, is the *name* for the mode in which a norm exists; that is, as a special type of reason for action.

5.2. Binary Statements

Ascriptions of legal validity are characteristically binary. A well-established principle of legal thought holds that legal validity is an all-or-nothing matter: a juridical act is normally understood to be either valid or invalid. This technical feature of legal validity

[35] Charlton T. Lewis, William Freund and Charles Short, *A Latin Dictionary: Founded on Andrews' Edition of Freund's Latin Dictionary* (Clarendon Press 1998).

[36] Raz, *The Authority of Law* 149.

is also coordinative and it is an important supplement to the naming function examined above. The task can be understood by identifying, first, the practical need to which it responds.

There are at least two aspects of juridical acts that admit of gradation. One, as we saw in Chapter IV, is that juridical acts may have a higher or lesser degree of stability. The second aspect is that the obligatory character of one juridical act may be weightier than another. I shall examine each aspect in turn.

Juridical acts exist on the condition of being conferred recognition, but recognition is a human judgement, and human judgements inevitably fluctuate. The existence of juridical acts can be more or less stable. The instability of a legal norm is caused by the uncertainty as to whether they are and should be presently recognized, or the degree to which they will be recognized, if at all, in the future. I argued in Chapter IV.6 that the span of time during which a voidable juridical act is liable to nullification is a clear case of an unstable norm, a norm which may be described, by analogy, as fragile.[37] The parties to a defectively created contract, or the subjects of an ultra vires administrative decision, may have reason to believe that there are sufficient grounds for a court to invalidate the act, and therefore to not rely on it to organize their affairs. They cannot however be entirely certain until a judicial pronouncement is given. Until then they will act to a large extent at their own risk. In the characteristically eloquent articulation of a British judge, Lord Hailsham stressed the point in relation to an administrative decision in a way worth quoting in full:[38]

> At one end of this spectrum there may be cases in which a fundamental obligation [a validity condition] may have been so outrageously and

[37] The existence of vague validity criteria further contributes to that instability: see Maris Köpcke, 'Finnis on Legal and Moral Obligation' in John; George Keown, Robert P (ed), *Reason, Morality, and Law: The Philosophy of John Finnis* (Oxford University Press 2013) 386-87; Köpcke, *Legal Validity: The Fabric of Justice* 111-12.

[38] *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] HL, (1980) 1 WLR 182 189-90

> flagrantly ignored or defied [by a public body] that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights.

Lord Hailsham aptly observes that an unstable juridical act injects an element of uncertainty into the legal system. That uncertainty, as a result, may undermine its capacity to effectively coordinate action. Such is the hazard of an unstable juridical act. Let us now turn to the second aspect of juridical acts that admits of gradation, the weight of their obligatory character. This aspect can undermine the system's coordinative efforts in a similar way.

Obligations can be more or less weighty depending on how central they are to the well-being of persons and the community. The legal obligation to abstain from deliberately injuring one's neighbour, for example, is morally more significant than the legal obligation of pedestrians to cross the street upon the indication of a green light. Moral absolutes aside, the heavier the weight of the content of the obligation, the stronger its normative force. Now disagreements may easily emerge within the community on the weight of specific legal obligations, as well as on how to resolve potential conflicts of reasons. Such disagreements also introduce a potentially damaging element into the system, undermining its capacity to authoritatively settle what ought to be done.

To avoid these hazards political communities employ what we may call mitigating devices. I shall consider each aspect in turn. First, it should be acknowledged

that problems of uncertainty on the status of a juridical act can never be fully overcome. However, the promulgation of clear and precise rules on voidability can reinforce their status of valid-until-avoided, thereby contributing to stabilize them. These rules include the establishment of a judicial procedure to challenge the validity of an act; standing; time limitations; a clear determination of the type of defect that can justify a judicial nullification; and the specification of the kind of remedy that the court ought to apply, to the extent to which it is prudent, for discretion might be needed (see, further, Chapter VII.4-6).

Second, legal reasoning typically operates under the assumption that the exigency of a legal obligation does not stem primarily from its content, but from the fact of having been created by means of a correct exercise of a legal power. The coordinative aims of legal systems are best served if norms bear on the practical reasoning of its people, qua reasons for action of a special kind, simply because they have been created in the manner established by the law. It is therefore desirable that persons treat legal norms as exhibiting a rather opaque semblance, as it were, one which insulates considerations that ought best not to bear on their practical deliberation, including the inherent merit of the norm and the reasons that led to its creation. It is beneficial, in other words, that the normativity of legal norms be to a large extent 'content-independent'.[39]

[39] On content-independence, see Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* 254-55; Raz, *The Morality of Freedom* 35-37. For instructive discussion, see Leslie Green, 'Law and Obligations' in Jules L. Coleman, Kenneth Einar Himma and Scott J. Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2004) 516-17. Content-independence is logically distinct from the question of how conflicts of reasons are to be resolved. The two main views on this latter issue are: (i) that the relative weight of countervailing reasons needs to be balanced on a scale of reasons; (ii) that countervailing reasons are to be excluded from the balance of reasons. I shall remain agnostic on this difficult question as it has no direct bearing on our inquiry. The technique of content-independence, essential to (ii), also operates in (i). See Noam Gur, 'Legal Directives in the Realm of Practical Reason: A Challenge to the Pre-emption Thesis' (2007) 52 American Journal of Jurisprudence 171 in relation to 161-62.

The point of having a binary, non-gradating technique in assertions of legal validity is to mitigate the uncertainty that emerges from those aspects of juridical acts that can be predicated in terms of degree. First, rules on voidability, which mitigate the uncertainty caused by voidable juridical acts, direct the community by establishing guidelines for action in the face of a defective juridical act. They settle what persons can do, and ought not to do: can I challenge the act? On what grounds? For how long can I exercise that option? To which court should I bring the action? What procedure should I follow? What remedy could the court grant? And so on. Second, treating juridical acts as providing content-independent reasons for action renders a kind of equality among legal obligations—they are all equally *legal*—despite their inequality in content. All legal obligations are equally relevant in the eyes of the law, and thus by extension all equally valid.

For reasons of justice, as I adumbrated in section 2, and will explain at greater length in Chapter VII, a voidable juridical act must be treated as binding until a court declares it is not. If we place this consideration in conjunction with the thesis that a uniform mode of discourse has coordinative benefits, we arrive at the conclusion that it is desirable that the community refer to such acts by the same name: as legally valid (until invalidated).[40]

This technical function of legal validity explains that assertions of validity do not primarily *reflect* the fact that a juridical act is more or less stable, or more or less obligatory, but rather *buttress* their stability and exigency. Assertions of validity, from this perspective, are not descriptions of states of affairs but a mechanism to stabilize

[40] Thus I agree with the proposal (in O'Sullivan, Elliott and Zakrzewski, *The Law of Rescission* 1.39, 1.41-42) that it is more convenient to refer to contracts which do not give rise to obligations until ratified by the election of one of the parties as 'ineffective' rather than 'void', or even 'voidable'. The term 'unenforceable' could also work (see the discussion in Chapter V.5; and Chapter VII). For further discussion on terminology, in the spirit of impressing uniformity on discourse, see 1.31.-34.

states of affairs. Failure to recognize this point is remarkably exhibited in the work of legal realists (or a variant thereof) who, in the words of Alf Ross, held that the validity statements only describe the degree of compliance with a norm. In effect Ross maintained that 'a rule can be scientifically valid law to a greater or lesser degree, depending on the degree of probability with which it can be predicted that the rule will be applied'.[41] What this view misses, in what is relevant for our purposes, is that, more than a description of a state of affairs, assertions of validity operate as constructed truths, designed to support the operation of a legal system.

The technique of binary application can therefore be understood to operate as a 'postulate' of legal thinking.[42] Deploying this rationale the logical principle of bivalence, according to which propositions are either true or false, can be extended to the legal domain so as to preclude, to the largest possible extent, the emergence of grey areas in legal thought. In this respect binary assertions of validity operate as a means to realize the moral need of what may be called 'juridical bivalence'.[43]

6. An Exegetical Comment

In the foregoing discussion I have emphasized the continuities between the account I am developing and current views on legal validity, especially those of Hart and Raz. Several aspects of the answer to the invalidity question which I propose build on their insights. Now some scholars have questioned whether those theories allow for the existence of defective but binding juridical acts. They have raised the point that their

[41] Alf Ross, *On Law and Justice* (Oxford University Press 2019) 57.
[42] See Finnis, *Natural Law and Natural Rights* 279-80 in relation to 312-13.
[43] See Timothy Endicott, *Vagueness in Law* (Oxford University Press 2000) 72-73.

theories might be entirely blind to this question. To conclude this chapter I shall attempt to clarify the point and suggest that the theories have no such blind spot. The pertinence of engaging in this exegetical issue is twofold. First, it lends strengths to the foundations of my proposal to the extent that they build on those theories, and, second, since those theories have laid down the structure of thought on legal validity today, it is important to be clear on this matter.

I begin with Hart. Grant Lamond has suggested that some of Hart's ideas on validity are 'problematic' because they might not be able to accommodate the existence of defective rules within a legal system.[44] The reasons, it is claimed, are that Hart excessively focuses on validity as 'membership' to a system, and that he holds the view that a necessary condition for a norm to become a member is to have been created by meeting all the relevant validity criteria. In a passage that strongly supports this claim Hart asserts: 'the statement that particular rule is valid means that it satisfies all the criteria provided by the rule of recognition'.[45]

I think that the suggestion rightly shows a tension in Hart's writings, which stems from too large of a reliance on the notion of membership as an entirely adequate explanatory tool. Lamond, if I understand him correctly, is careful to not go as far as to claim that Hart's view entirely fails to account for the phenomenon of defective but existing rules within a system. He suggests, rather, that a complication might arise. As a contribution to the elucidation of this question I offer three reasons why it would be wrong to endorse the claim that Hart's account does fail.

[44] Lamond, 'The Rule of Recognition and the Foundations of a Legal System' 201 and fn 85 of that page, in connection with 202-03.

[45] Hart, *The Concept of Law* 103.

First, Hart explicitly suggested, albeit briefly and rather opaquely, that a theory of law must make provision for some defective rules to count as legally valid.[46] Second, the context in which Hart developed views on validity, as the endnotes to the relevant chapters of *The Concept of Law* reveal,[47] and the historical moment in which it was written indicates, is largely a conversation with Kelsen, attempting to incorporate his main claims while eluding his Kantian framework. Kelsen took, as we have seen at length, creation in authorized form to be an axiomatic condition for a norm to count as valid (Chapter II.2). It is understandable, then, that in such a context the notion of membership would take a central, structuring place. Third, there are good reasons to believe that Hart was not attempting to develop any systematic theory of law.[48] An important interpretive key to understand his views, I think, is to read them as more exploratory than exhaustive, or entirely conclusive. (The contrast with Kelsen in this regard, at least in intention, is sharp.) I suggest that, when considered as a whole, there is space to accommodate the tensions in Hart's thoughts on this matter. Hart did not attempt to do so, however, partly but importantly because the invalidity question he simply did not engage with.[49]

Wil Waluchow has gone further and maintained that Raz does commit that very contradiction.[50] The claim is based on the proposition that Raz identifies legal validity with membership to a system. In a passage that strongly supports Waluchow's claim

[46] ibid 144, and for a brief discussion on voidable (ie valid until avoided) rules, see 30. For a further statement on voidability, see Hart, 'The Ascription of Responsibility and Rights' 174-75.

[47] Especially at 296-97.

[48] For illuminating discussion, see Thomas Adams, 'Practice and Theory in The Concept of Law' in John Gardner, Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law Volume 4* (Oxford University Press 2021) 26-31.

[49] A similar point has been made on Hart's views on the related issue of the identity of legal systems: Raz, *The Authority of Law* 98.

[50] Waluchow, 'Four Concepts of Validity: Reflections on Inclusive and Exclusive Positivism' 138-41. See also Sandro, 'Unlocking Legal Validity: Some Remarks on the Artificial Ontology of Law' 109-10.

Raz asserts that 'a norm is legally valid if and only if it belongs to some legal system'.[51] Echoing Kelsen, Raz elsewhere stated that an invalid rule 'is not a rule at all': it does not 'exist'.[52] Waluchow concludes: it follows that according to Raz a defective juridical act does not legally exist.

This interpretation is mistaken for the following reason. Raz thinks that the key to legal validity, as noted above, is the notion of binding force. Raz elucidates the nature of norms by attending to their function, which is to direct action. When he says that legal validity means legal existence his point, it seems to me, is that norms exist in the form of binding entities. Legal existence is normative existence and normative existence is ought*ness.* However, the proposition that a defective act is legally inexistent does not follow. This would only be the case if Raz understood legal validity by defining it in terms of non-defective creation, and that he did not do. In his legal writings Raz explicitly gave space for the existence of 'valid until avoided' rules (ie 'voidable')[53] and in his political writings he claimed that some ultra vires directives issued by authorities have 'binding force' (in legal terminology: legally valid).[54] It is true that Raz should have been clearer; again, like Hart, the invalidity question is one that he did not explore.[55]

7. Conclusion

Chapter IV argued that juridical acts come into existence by an action—the giving of an utterance—and a reaction, which confers on it legal recognition. By virtue of this

[51] Raz, *Practical Reason and Norms* 127.
[52] Raz, *The Authority of Law* 146, 148.
[53] ibid 146 n1; see also Raz, *The Concept of a Legal System* 109.
[54] Raz, *The Morality of Freedom* 62.
[55] Except, perhaps, for the unauthorized creation of constitutions: see Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* 332; Raz, *The Concept of a Legal System* 138.

recognition an utterance, a brute fact, becomes a configurator of legal positions, an institutional fact. In Chapter V I argued that the technique of legal powers secures a reasonable action in the law. Validity criteria can help advance just action in the law. They can do so by allocating the powers to the right persons, and by establishing 'procedural' and 'substantive' conditions for their exercise. These allow power-holders to exercise their powers in a reasonable way, and produce juridical acts with a generally reasonable content.

The aim of this chapter has been to explain how the community reacts in a just way. I have maintained that the community is normally under a moral duty to confer recognition on correct exercises of legal powers. The community may also be under a duty to confer recognition, provisionally or definitively, on incorrect exercises of powers. The reason is that justice in the enterprise of the creation of legal norms is an important but not exclusive aspect of the common good. There are other values, constitutive of the common good, that also bear on a reasonable action in the law. These include legal certainty, protecting reliance, action in good faith, the efficacy of the system, among many others. An incorrect exercise of powers is an injustice, but, all things considered, the just reaction may be to allow for the existence of juridical acts. This explains and justifies the status of valid but defective juridical acts.

In developing this idea I explained that the technique of legal validity performs, in this context, a crucial role. I identified and expounded upon four. First, it allows the community to express their act of legal recognition in a unified way. The benefit of this task that validity discharges is coordinative, as it facilitates the external manifestation of complex internal normative attitudes. The technique of validity serves as a canonical, standard form of expressing acts of legal recognition. Second, I explained that the technique of validity also facilitates identifying the produced juridical act. This benefit

is essential to the coordinative aims of a legal system, for a solution to a coordination problem needs to be salient among other reasonable alternatives. By referring to a juridical act as the legally valid plan for action the community stamps it as the settled coordinative solution.

Two additional tasks that the technique of validity discharges were also identified. These were characterized as ancillary to the first two. The first one is that the term validity can coordinate legal discourse. Law guides by engaging with the reasoning powers of its people, and crucially through language. Therefore a coordinated legal discourse can contribute to the action-guiding function of juridical acts. The grammar of legal validity contributes to that form of coordination as well. Finally, and for similar reasons, it is desirable that ascriptions of validity be binary. An important aspect of this function is that a voidable juridical act may be unstable in its existence, but unless and until it is invalidated it is morally desirable to not refer to it as valid to a certain degree.

I closed the discussion by showing that while Hart and Raz did not address the invalidity question in any detail, there is space in their theories to account for it.

In general, this chapter has shown that ascriptions of validity are poorly conceptualized as logical or conceptual entailments. We saw in Part One of this thesis that this latter idea is held by the void ab initio doctrine, and, interestingly, is also held by theories that can be understood to support the voidable doctrine. Bulygin explicitly understands validity in these terms, and we saw that Kelsen seem to do so as well. This is a crucial point for a sound understanding of the invalidity question. It is misleading to think of validity and invalidity as a matter of automatic operation. They are institutional choices informed by factual considerations and moral values.

VII. REMEDIES

1. Introduction

Chapters V and VI have argued that the incorrect exercise of a power is normally an injustice. If a power is correctly exercised the community is normally under a duty to confer recognition, but the converse does not always hold. Not all defective juridical acts ought to be withheld recognition. Moral considerations can emerge to count in favour of conferring recognition upon them. Full compliance with validity criteria is not, in other words, a necessary condition for power-holders to succeed in creating legal norms. Defective juridical acts may, indeed on occasions must, be recognized as legally valid. This chapter continues the account of reaction in the law developed in Chapter VI. I now turn to examine the question of how legal systems ought to remedy the injustice caused by the defective making of a juridical act, ie the breach of the duty imposed by the principle of responsibility.

Upon the advent of an exercise of powers two different questions must be asked. First: has it met all the required conditions of procedure and content? If the answer is no, the second question is: how ought a political community remedy the injustice?[1] I argue that the community may react in three main ways, one of which is the general rule, and two are more exceptional. The rule is that the act will be regarded as defeasibly

[1] The distinction is helpfully developed in Feldman, 'Error of Law and Flawed Administrative Acts' 282. What Feldman says of administrative decisions applies to any juridical act.

valid. An act is defeasibly valid when it is liable to change its status to invalid. Such acts are void*able*. The more exceptional forms of reaction are to regard the act as indefeasibly invalid from its inception (void ab initio), on the one hand, or as indefeasibly valid, on the other.

A central claim this chapter substantiates is that there is no one way to remedy the injustice caused by a violation of the principle of responsibility. Invalidation (other functionally synonymous terms for this remedy are: annul, avoid, rescind, set aside, quash, strike down), retroactive or prospective, is one among other justified forms of response. Other justified remedies are the mere disapplication of a statute in a concrete case, the delay or suspension of the invalidation of an administrative act or statute, the rectification of the terms of a contract, and the imposition of fines on contracting parties, among others.

The design and application of remedies are the result of an institutional choice, a choice informed by the specific facts of the case and the different requirements of justice at play. Now the application of a remedy may be worse than the disease. So on occasions justice demands that no remedy be granted. Sections 3 to 7 will show how these remedies operate in the practice of prominent jurisdictions, with illustrations taken from contract, administrative and constitutional law. Before proceeding to that exposition I identify, in section 2, some central features that define, as a group, these otherwise diverse types of remedial reactions. Section 8 concludes.

Since my focus is general in scope, covering private and public law, abstracted to some extent from the particulars of specific jurisdiction, I attempt to maintain a careful balance between detail and synthesis. To gather data on how legal systems typically confront the practical challenges involved in the invalidity question I mostly

rely on the authority of treatises and doctrinal analysis, especially comparative. Reasons of pertinence, space, and time preclude inquiring into the details of the case law.

2. Features of Remedies

The various types of remedies legal systems exhibit across private and public law have been the subject of extended doctrinal analysis but, rather surprisingly, the concept itself remains a neglected topic.[2] This general diagnosis of the notion of a remedy is certainly true for the specific kinds of remedies which are of our concern: namely, remedies against the defective making of juridical acts. In 1958, Tony Honoré developed a typology of several forms of response towards the creation of defective contracts. Showing the sophistication and flexibility with which they can operate in practice, he concluded with a provocative claim:[3]

> So we would have at least nine different techniques by which the law expresses degrees of disapproval of contracts or intended contracts and exercises control over them. Most of these can be applied to transactions other than contracts such as the nullity of marriages or to statutes. How much more varied, complex and subtle are the actual instruments of social control than anyone would suppose from reading text-books of jurisprudence!

By and large, jurisprudence has not followed Honoré's lead. In this section I attempt to do so by outlining a sketch of central features that define the techniques legal systems employ to correct the injustice brought about by the defective making of a legal

[2] As diagnosed by Stephen A. Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (Oxford University Press 2019) viii-x; Sandy Steel, 'Remedies, Analysed' (2020) 41 Oxford Journal of Legal Studies 539; Kent Roach, *Remedies for Human Rights Violations* (Cambridge University Press 2021) 4.

[3] A. M. Honoré, 'Degrees of Invalidity' (1958) 75 South African Law Journal 32 38. For a similar line of thought, see Robert S. Summers, 'Toward a Better General Theory of Legal Validity' (1985) 16 Rechtstheorie 65.

norm. The aim is to exposit four main features of such remedies. This does not, of course, amount to a general account of the concept of a remedy, but can contribute to its elucidation.[4]

2.1. Remedies are a Means of Correction

The first and cardinal feature is the purpose of these remedies—the reason why they exist. Chapters V and VI have argued that they are all reactions against one single malady: namely, a violation of the duty imposed by the principle of responsibility. Recall that the principle holds that an incorrect exercise of powers normally constitutes a commutative or distributive injustice, or both. Remedies are employed to correct that injustice They are used, in other words, to re-establish the equilibrium of just relations which the defective exercises of legal powers fracture.

In Chapter V.3-4 I observed that justice in norm-generation is but one aspect of the common good. We have touched on several other aspects of the common good relevant to a sound legal ordering. Here is a summarized list of some important ones. Protect certainty in legal relations, reasonable reliance, expectations legitimately generated, respect for authority, and the separation of powers. Prevent legal gaps, financial breakdowns of the State, administrative chaos, inexpert judgements on contingent matters of policy, and arbitrary discriminations. Secure speed and finality in authoritative decisions; dissuade action taken in bad faith; allow for the efficient operation of markets, including a healthy pace in decision-making and reasonable risk-

[4] I think that these features are to a larger or lesser degree exhibited in remedies employed to correct other injustices, such as imprisonment for crimes and damages for torts, but I shall not pursue that large question here, as it falls beyond the scope of the present inquiry.

taking; and, finally, maintain an efficient use of resources, avoiding excessive costs of litigation for parties and the public apparatus.

These values are specifications of the goods that communities seek to realize by setting up schemes of legal powers. In Chapter V I distinguished between powers to bind others (powers of authority) and powers to bind oneself (promissory powers). Prominent among the general goods that these powers can advance are the benefits of social coordination and the self-direction of private citizens in organizing their affairs. Powers of authority and promissory powers differ, among other respects, in the range of persons and states of affairs that their exercises can reach and affect. Statutes and contracts, for example, share the feature of being configurators of legal positions, but the scope of the kind of relations that a statute can configure, and the reach of the number of persons that its propositional content may affect, is entirely different from that of a contract.

An adequate design and application of the appropriate remedy—a remedial economy, let us say—results from a moral or political judgement sensitive to the purpose of the relevant power and the values which sustain a sound legal ordering, informed in turn by an adequate understanding of the empirical data and the technicalities relevant to the particular subject-matter regulated by the juridical act.

The question of what to do to correct the injustice caused by a violation of the principle of responsibility may bring these values into tension, or indeed conflict, such that, all things considered, the common good may be best served by applying remedies other than invalidation, or not applying any remedy at all, either at the discretion of a court, or by the decision of the legislature (eg through ouster clauses), or the stipulation

of a parties to a contract (eg to exclude remedies for mistake),[5] or the choice of the constitutional framers of a jurisdiction (eg by disabling courts to review legislation). In short, the remedy must not defeat the values a community seeks to advance by empowering persons to produce juridical acts in the first place.[6]

Now, when a community decides that the just response is to provide for the application of a specific remedy a further set of moral values enters the stage. These values do not govern the fashioning of the remedy itself; they bear on the conditions that ought to obtain for the application of the designed remedy to be just. Two important such values are to dissuade persons from abusing the system in claiming a remedy and the protection of legal certainty. Two important ancillary techniques, therefore, are the allocation of standing and the imposition of time limitations. For it is morally valuable that remedies be claimed by persons who have been, in some way or another, actually affected by the incorrect exercise of a power, and that they make the claim within a certain span of time.

The common good, in effect, requires that defective (or ostensibly defective) juridical acts be impugned by those whose rights have been affected, or expectations frustrated, or more generally have a 'sufficient interest' in the outcome of the case. In the law of contracts, for example, standing is allocated to the innocent party in order to disable guilty parties from profiting from their own ineptitude (eg if a party knew of, or

[5] Ole Lando and H. G. Beale, *Principles of European Contract Law. Parts I and II* (Combined and revised. edn, Kluwer Law International 2000) 285.

[6] This point tracks Timothy Endicott's 'principle of relativity' in administrative action, which holds that 'there is no single way in which the law should control administrative decisions': Endicott, *Administrative Law* 10-12, as well as his related thesis that an injustice is not itself a sufficient reason for the law to provide for a remedy (Timothy Endicott, 'The Rule of Justice' (2022) 20 International Journal of Constitutional Law 1851 1852). The thesis that the pertinence of a remedy must result from an all-things-considered judgement has been similarly suggested, albeit briefly and in relation to the rescission of contracts in particular, by Nicholas J. McBride, 'Rescission' in Graham Virgo and Sarah Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge University Press 2017) 160-61.

should have reasonably been able to identify, a vitiating mistake),[7] or wrong (eg in fraudulent misrepresentations).[8] The securance of this value must in turn be balanced with other potentially countervailing considerations that might emerge upon the advent of certain facts. For example, in order to protect the reliance of a guilty party (who does not have standing rights), it is reasonable for rescission to be barred when the innocent party has communicated, by words or deeds, that he or she intends to comply with the contract.

In public law the scope of persons that count as having an interest is a matter of more contention, and opinions differ among jurisdictions and within areas of law. In Germany, for example, standing to challenge the validity of a statute is explicitly allocated to persons whose 'rights' have been infringed.[9] In English administrative law, by contrast, standing clauses seem to be more flexible, covering states of affairs other than the infringement of a right.[10] There are limitations, of course, such as when the applicant is ill-willed, uses the remedy for a purpose deemed improper, or has no realistic prospect that the claim will succeed.[11] These variations in approach show a different, even if slight, ranking of the competing values placed on the balance of reasons in designing a remedy.

In constitutional adjudication standing powers are sensitive to the distinctive characteristics of the relevant remedy. For example, in some European jurisdictions (eg France, Germany, and Austria) courts are empowered to review statutes prior to their enactment, or prior to their application once enacted ('abstract review'). In these

[7] Kèotz, Mertens and Weir, *European Contract Law* 158.

[8] John Cartwright, *Misrepresentation* (Sweet and Maxwell 2002) 4-65ff.

[9] Basic Law 19(4); Code of Administrative Court Procedure 42 (2). For discussion, see Singh, *German Administrative Law in Common Law Perspective* 217.

[10] Donnelly and others, *De Smith's Judicial Review* 15-033.

[11] Lewis, *Judicial Remedies in Public Law* 11-013.

instances, standing is typically allocated to political representatives from the political opposition,[12] not to private citizens, and these persons are empowered without having, strictly speaking, been aggrieved.[13] One way to explain this institutional design is to understand the 'abstract review' remedy as an extension of the political contestation carried out during the antecedent legislative debate. By contrast, the United States, a representative example of an alternative approach, allocates no power to politicians to challenge a statute in such terms due to the constitutional requirement that courts must only adjudicate on actual disputes between litigants, as established in the 'cases or controversies' clause in Article III of its Constitution.[14]

Consider now limitations of time to challenge a juridical act. Here, as well, views and rules vary from jurisdiction to jurisdiction. In the rescission of contracts on the grounds of fraud and mistake, for example, time-limitations can range from weeks or months in English law, to five years in French law, or ten years in Belgium.[15] To organize these techniques in a systematic fashion, French doctrinal scholars have developed a distinction between 'absolute' and 'relative' nullity. The category absolute nullity encompasses those cases of juridical acts vitiated by factors judged to be more morally grave. The moral gravity justifies allocating a wider range of persons with standing powers and allowing for longer limitations of time. Relative nullity

[12] To members of the executive power (eg President, Prime Minister) or the legislature (eg the president of the chamber or a fraction of its members). See Georg Vanberg, 'Abstract Judicial Review, Legislative Bargaining, and Policy Compromise' (1998) 10 Journal of Theoretical Politics 299 302; Wolfgang Zeidler, 'The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms' (1987) 62 Notre Dame Law Review 501 505.

[13] See Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Third edition, revised and expanded. edn, Duke University Press 2012) 15.

[14] Section, 2, Clause 1. For comparative treatment, see generally Alec Stone Sweet, 'Constitutional Courts' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2013).

[15] See Lando and Beale, *Principles of European Contract Law. Parts I and II* 276.

encompasses the opposite.[16] To avoid confusions, observe that the meaning intended with the use of these categories must not be confused with the meaning intended for the same categories as employed by some English public lawyers, where absolute means what I have here referred to as void ab initio, and relative means voidable.[17]

2.2. Remedies are Artefacts

The second feature that characterizes these remedies flows from the first. Remedies are artefacts. They are things designed and crafted for a specific purpose. An important guiding principle of a sound remedial economy is that the remedy must be fitting: it should be apt to correct the injustice by being proportionate to the disvalue that triggers the need to react.

Several considerations factor into the decision of whether to empower a court to grant a remedy, and, if so, how they ought to be designed. Among them are the following. The moral weight of the violated validity criterion (eg administrative action outside its jurisdiction is more grave than the omission of a minor formality); the strategic importance of the defect in relation to the purpose for which the juridical act was created (eg a contract entered into under duress is central to the voluntariness of the exercise of the power, whereas a mistake that is not essential to the purpose of the contract is not); the salience of the defect (the act of a legal official under 'colour of law' or 'appearance of legality' justifies protecting reliance and expectations); the nature of

[16] Barry Nicholas, *The French Law of Contract* (Second edn, Clarendon 1992) 77. The distinction has gained track in several civilian jurisdictions: see the many places it is deployed in the comparative analysis in Zweigert and Drobnig, *International Encyclopedia of Comparative Law* Chapter 11.

[17] Eg H.W.R. Wade, ' 'Unlawful Administrative Action: Void or Voidable? (Part I)' ' (1967) 83 Law Quarterly Review 501.

the power-holder (eg the remedy of interpretation, by which courts may 'read in' terms into a statute, thereby extending its meaning to cover aspects which the legislature did not intend, may conflict with the value of the separation of powers); the expertise and institutional capacity of courts to deal with complex technical information (eg allocation of resources pursuant to the satisfaction of social rights); and, finally, the number of persons, legal norms, and states of affairs that were affected by, or came into existence under, the government of the impugned juridical act (eg the retroactive invalidation of a tax law gives rise to systemic disadvantages which a defective contract of sale between private citizens does not). These considerations explain and justify the differences in the remedial economies exhibited in private and public law.

2.3. Remedies are Ordered by Courts

Remedies are also set up through, and structured by, legal norms. Remedies are institutionalized, that is, and normally, as a rule we may say, judicially-related. By judicially-related I mean that, prior to a judicial pronouncement, there is normally no reason to disregard the juridical act as if it were invalid.[18] There are two main exceptions to this rule, which I shall here state, and develop more extensively below. One is the communication of one party to another of their desire to annul (rescind) a contract. This communication can, in some jurisdictions, such as England and Germany, be constitutive of the annulment of the contract.[19] It is typically referred to as a 'self-help' remedy, but the aid ('help') of this mechanism to annul a juridical act is

[18] This truth holds independently from the fact that a juridical act may become unstable during the time in which it is liable to be avoided: see Chapter IV.6; and section 4, below.

[19] O'Sullivan, Elliott and Zakrzewski, *The Law of Rescission* 11-53ff; Häcker, *Consequences of Impaired Consent Transfers: a Structural Comparison of English and German Law* 21.

of course limited. For in order to enforce the obligations that stem from mutual restitutions the parties may need to recur to a court.[20] Another exception is the case where the law directs the community to disregard the juridical act—to recognize it as invalid—from its very inception. In such a case the act does not gives rise to obligations, courts are under a duty to declare its invalidity, and it cannot be affirmed by the parties. I have reserved the terms void ab initio to refer to these acts.

In noting that remedies are an institutionalized and judicially-related means of correction we procure ourselves a criterion to demarcate them from other techniques that have effects similar to the invalidation of a juridical act. Compare invalidation to the termination of contracts, derogation of statutes, and overruling of precedent. They all involve removing a norm from existence, and they may also require the application of retroactive effects.[21] But these latter techniques differ from the annulment of a juridical act in a crucial respect: they do not, at least primarily, correct the injustice caused by a defective exercise of a legal power. The purposes for which they exist are different.

The outlined criterion also enables us to distinguish remedial reactions from instruments of another kind which however do share the same purpose. These range from immaterial means such as the maintenance of a culture of good habits in relating to one's community (prudence, responsibility, honesty, temperance, justice, empathy)

[20] Observe, however, that if a court finds that the party's choice to rescind lacked grounds, the court will regard the contract to have been valid ab initio, such that the rescinding party may be found liable for breach of duties under the contract (the self-help rescission could thus be described as a 'voidable', because not final, juridical act). This position has been criticized as unfair and it seems that the case law is not entirely settled: see H. G. Beale and Joseph Chitty, *Chitty on Contracts* (Thirty-fifth edition. edn, Sweet & Maxwell 2023) 10-121; Cartwright, *Misrepresentation* 4-70.

[21] While derogation and termination of contracts normally have prospective effects, an overruling poses questions on retroactivity similar to those of a ruling that invalidates a statute. Clear thinking requires that the two techniques be kept conceptually separate. It may happen that a court overrules a judicial decision that had in turn annulled a statute. In jurisdictions which work under the rule of stare decisis, both techniques in effect operate in tandem, in ways which will be explained in section 4, below.

to concrete mechanisms such as social and political pressure in public discourse, often institutionalized through techniques such as elections, the establishment of ombudsmen, the veto power of the executive, and the checking powers of legislatures through committees, hearings, and impeachments. These alternative means of control become crucial to the enforcement of the principle of responsibility on those subject-matters which a community may judge 'non justiciable', such as powers related to the defence of the State, the conduct of foreign affairs, and resource allocation.

2.4. Remedies May be Discretionary

The granting of a remedy may be subject to the discretion of the court. The foregoing discussion shows that an adequate understanding of judicial discretion must proceed by locating its place in the wider context of which it is a part. That wider context is the truth that remedies are techniques designed to satisfy distinct requirements of justice. Their design, to repeat, is a moral or political judgement, resulting from striking a balance between the competing values listed above, in light of the contingent facts of specific cases. The question, therefore, is not *whether* a decision must be made about which, if any, remedy must be granted, but *who* makes the decision. It is for the political community, then, to answer the prior question of who ought to make that judgement.

The community may be justified in taking at least two courses of action. One is to decide, through intentionally posited rules (constitutional, statutory, administrative), that provided that certain facts obtain a remedy must necessarily be awarded. Here the court will be under a duty to grant the remedy. The community may, alternatively,

confer on courts the power to choose. This discretion may include the choice to apply a remedy among a set of previously selected remedies, or even to design it *ab ovo*.

A notable instance of a remedy crafted by courts is the Canadian delayed or suspended declaration of invalidity of unconstitutional statutes, born out of the landmark case *Reference re Manitoba Language Rights*.[22] By contrast, the power to grant this exact remedy was conferred on South African courts through its Constitution (Article 172). In 2022, by means of the Judicial Review and Courts Act 2022, which amended the Senior Courts Act 1981 (Article 29A), the same remedy was introduced for the review of English administrative decisions. The explicit introduction of this rule was motivated by a lack of clarity within the participants of the English system on the pertinence of suspended declarations of invalidity.[23] There is much wisdom in codifying these matters, but I shall not go into a fuller examination of that question here.

Now judicial discretion is commonly exercised in administrative and constitutional adjudication. It is indeed a topic of lively debate. In the law of contracts the issue is rarely thematized. This leads us to an important set of questions. I shall frame them as follows: is discretion only a function of public law remedies? And, if discretion is exercised, is there a loss in rights if the court decides to withhold a remedy from the applicant?

It is appealing to think that there is a stark contrast between private and public law with regards to discretion. This much seems to be suggested by theorists who maintain that discretion, while limited, is the rule in public law, whereas contract law is a domain where, upon the determination that a right has been infringed, the court must

[22] [1985] 1 SCR 721.
[23] As reported in Faulks QC and others, *The Independent Review of Administrative Law* 3.47-69.

grant the remedy *ex debito justitiae.*[24] There is a core of good sense here, but the truth is overstated, and in overstating it we acquire a distorted picture of reality.

Observe, first, that the reasons that justify judicial discretion can equally emerge in both fields. Rules on the voidability of contracts cannot foresee every future factual circumstance, emergence of which may affect the requirements of justice at play. The rules on voidability may be vague in some respects, or conflict with others, such that a prudential judgement becomes inevitable at the stage of applying those rules.[25]

Consider the following examples of a contract entered into under mistake. If the law established that the appropriate remedy is not nullification but the rectification of a contract, courts may be conferred discretion if the claimant delays bringing his or her claim to court, on the grounds that the order to rectify would then become unjust. Courts may also withhold the remedy of rectification when its application would prejudice innocent third parties.[26] In some jurisdictions courts are empowered to modify, at their discretion, the terms of the contract, to bring it line with reality, if the mistake was common to both parties (eg Germany), or of no major significance (eg Austria).[27] In cases of innocent misrepresentation, within English law, courts have discretion to uphold the contract and award damages in lieu of rescission. The reason is that the facts may be such that to hold the mistaken party bound to the contract would not cause them any significant hardship, while, conversely, it would considerably aggravate the other party.[28]

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[24] See, for example, C. F. Forsyth, William Wade and Julian Ghosh, *Wade & Forsyth's Administrative Law* (Twelfth edn, Oxford University Press 2023) 250-51.

[25] On the reasons that justify judicial discretion I draw on HLA Hart, 'Discretion' (2013) 127 Harvard Law Review 652 661-63.

[26] Kèotz, Mertens and Weir, *European Contract Law* 165.

[27] Zweigert and Drobnig, *International Encyclopedia of Comparative Law* 99, in relation to 92-98; 107-09.

[28] Misrepresentation Act 1967 s.2(2). See further Cartwright, *Misrepresentation* 4-65ff.

It is of course true, to put it bluntly, that the exercise of discretion is more common in public law adjudication. It is also a plain fact that retroactive invalidation is disproportionately more common in the law of contracts than in the review of statutes. As we will see below, in the latter case courts frequently modulate, at their discretion, the temporal effects of their judgement. Yet it remains true that justice may demand conferring on courts discretion when reviewing the formation of a contract. The principles that ought to inform the discretional judgement of the review of administrative action laid down in the Senior Courts Act 1981 Article 29A, the substance of which I have mentioned in expositing the first and second feature of remedies, has clear parallels with the principles on discretion proposed in a document for the enactment of a European civil code, the 'Draft Common Frame of Reference' (Article II–7:303, s3). These facts seem to me to prove that the difference between private and public law in this respect is not in kind but degree. Review of public juridical acts demands a wider scope of discretion because of the nature of the regulated subject-matter and the range of affected persons. It is just, in other words, to confer less discretion on courts upon the finding of a defect in the contracting process.

Now to the question concerning the relation between remedies and rights. Can a court's exercise of discretion infringe the right of an applicant to a remedy? I raise the question in these terms because it is not infrequent to find the issue framed as a tension between the rights of individuals and the values that sustain a political community. The tension is thus articulated as follows. The choice to refuse to grant a remedy (legislative or judicial, depending on the case) leaves a claimant's right to relief unprotected, but this decision is ultimately justified, and this because of an overriding need to secure other weighty values, such as the protection of legitimate expectations, the avoidance of administrative chaos, financial breakdowns, and so on.

The tension has been sharply articulated by Lord Bingham. He observes that it forces 'a choice between the high ground of purist principle and [a] more pragmatic, utilitarian approach'. He maintains, however, that 'a straight clash between the rights of the individual and the wider interests of society', which the tension can give rise to, may be avoided if discretion is sufficiently 'limited'.[29] It is beyond the aim of this chapter to evaluate the scope of judicial discretion. Instead I propose to dwell a bit on the very terms in which the tension is framed. Does discretion truly lead to a loss in rights?

The answer depends on whether claims of rights can be coherently detached from considerations about justice and the common good. Lord Bingham's view, which is highly evocative of Ronald Dworkin's thesis that it is of the nature of rights to conflict with the general welfare of a community,[30] seems to be that there is no incoherence. I believe that Finnis has provided a convincing argument against that line of thought. His argument, in rough outline, runs as follows.

Rights-talk is a method to express a relationship of justice from the vantage of the person benefiting from that relation. The benefit lies in holding a claim, liberty, or immunity, against a duty-bearer's rational necessity to ϕ, or a power correlative to another person's liability to have his or her legal position changed.[31] Rights, properly conceived, do not conflict with justice: rights are claims *of* justice.

This thesis is coupled with the proposition that claims of rights acquire the directive force in legal argument typically associated to them when the terms of what they direct towards are concretized. That is, when the various equally reasonable

[29] Tom Bingham, 'Should Public Law Remedies be Discretionary?' (1991) Public Law 64 74.

[30] See, for example, Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) Part One.

[31] Finnis, *Natural Law and Natural Rights* 205, 199-203, and chapter 8 generally. For a direct engagement with Dworkin's thesis, see John Finnis, 'Human Rights and their Enforcement', *Collected Essays* vol III (1 edn, Oxford University Press 2011).

alternatives of realization of the relevant requirements of justice are clearly specified. Aspects that call for specification are the identity of the persons involved in the relationship of justice; the content of the subject-matter which ties them; and the conditions under which the exercise of a right may be precluded, or waived; among others.[32] Prior to such a specification a claim to an action or forbearance can only peripherally, or in a watered-down sense, be referred to as a claim of right. Why? Because it can be easily overridden, which deprives the concept of the force typically associated to it.[33]

Let us suppose that after careful and sound consideration of all the relevant moral reasons, the person (or body) allocated with the responsibility (power) to design or apply a remedy chooses that no remedy should be granted. The power-holder has soundly concluded that a claim to relief is unjustified. On the theory of rights-as-aspects-of-justice I have sketched the litigant in truth has no moral right to obtain relief. What Lord Bingham categorizes as 'pragmatic' and 'utilitarian' considerations are in truth requirements of justice, and not different in kind from the requirement of justice to grant a remedy, or produce a lawful administrative decision. If the scheme of specification is morally sound, in sum, then there is no loss in rights in an exercise of judicial discretion.

The justification of this claim of course requires more work. There are multiple and rival theories of conceptions of rights, and the one I have outlined, which I believe to be sound, is far from being widely accepted. I shall not, however, engage in that enterprise here, and so I propose to leave the point more as a suggestion than a conclusive argument. The concept of rights is very unstable, perhaps somewhat

[32] Finnis, *Natural Law and Natural Rights* 218-19.

[33] Grégoire C. N. Webber and others, *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge University Press 2018) 45-48.

intractable, and for this reason I have purposely avoided framing the violation of the principle of responsibility in terms of a duty *that infringes right*s (of a person or a group). I have chosen, rather, to express the answer to the invalidity question in terms of (in)justice, as sketched in Chapter V. This particular view of justice, while of course not free from controversy, seems to me to have the capacity to work as a basis for a broader overlap between rival traditions, and thus appeal to a larger audience. Observe, finally, that I am not saying that my thesis cannot be expressed in terms of rights.[34] The point is only that, as a matter of convenience, for present purposes, we may simply confine ourselves to assert that a claim to relief will be, all things considered, unjustified.

3. Forms of Reaction: Prelude

To continue the inquiry lest us first recapitulate. I have argued that power-holders are normally under a duty to exercise their powers correctly. A defective exercise of a power normally constitutes an injustice. The application of a remedy, if adequately sensitive to the relevant requirements of justice and empirical data, attempts to correct the injustice to the largest possible extent. There are moral reasons that justify a diverse and flexible remedial economy. These considerations may also warrant the political judgement that a remedy may be worse than the disease. Such considerations, I have observed, are matters of justice, and constitutive of the common good. Just action *and*

[34] One such attempt to explain the duties of public officers in terms of a correlative right of individuals, convergent in relevant respects with part of my argument, can be found in Smith, *The Law of Loyalty* 336ff.

reaction in the law are, in short, aspects of the common good. The techniques of legal powers and remedies structure and guide the community in order to make action and reaction just.

There is more than one way to arrange systematically the many forms in which a community reacts towards the defective making of a juridical act, as exhibited in the current rules and conventional practices in place in prominent legal systems. My proposal of classification is informed by two criteria: the moment in time at which the act is deemed to be valid or invalid, and the defeasibility of that status. The combination of these criteria yields three main forms of reaction. One is the general rule, the other two are the exceptions.

The general rule is for the community to react by recognizing defective acts as (i) valid from their inception. In this category of cases the status of such acts is defeasible, such that it may be eventually nullified (in which case it becomes indefeasibly invalid) or not (in which case, and provided that other conditions are also met, the already valid act acquires an indefeasible status). The exceptional reactions are for the community to recognize the acts as (ii) indefeasibly invalid, that is void ab initio, or (iii) valid, not upon the occurrence of an event subsequent to their creation, but from their very inception, that is valid ab initio.

As I have adumbrated above, political communities in fact deploy many remedies other than invalidation to react against a (defeasibly or indefeasibly) valid juridical act. I shall now undertake a survey of the remedial economy of some prominent civilian and common law jurisdictions. The aim is to show the richness and ingenuity that communities have employed in intelligent institutional thinking, designing institutions to adequately correct injustices in the creation of norms.

The overview, which will be carried out in sections 4 to 7, is general and descriptive. General in that it attempts to group exercises of promissory powers and powers of authority. Descriptive in the sense that it exposits remedies, and the common reasons that justify them, as they exist today. I will not evaluate in any detail the pertinence of these remedies. The task, rather, is to establish a prior point: that they are a distinct technique, which serve distinct requirements of justice. This prior point is of course is a normative claim.

The duty imposed by the principle of responsibility may be intentionally violated by a power-holder (or purported power-holder) to cause harm or loss to another. Such an act generates an additional loss and may constitute a tort. This wrong is itself an injustice of a distinct type and it may arise in the creation of both voidable and void ab initio juridical acts. A tort provides the victim with a cause of action to claim damages against the tortfeasor. Now the remedy of damages does not apply to correct an incorrect exertion of a power per se. It requires the further circumstance of intention (or foresight) to cause a loss. Since the granting of damages needs this additional factor I will examine this remedy as a distinct category, separated from the three main forms of reaction summarized in the previous paragraphs.

4. Defeasible Validity

Let us then begin with the first form of reaction. Most defective contracts, administrative acts, and statutes are binding unless and until invalidated. The status of these juridical acts can thus be described as valid until avoided; an appropriate word for them is voidable. A voidable act is one which the recognitional community is under a defeasible

duty to confer recognition. This technique, of allowing for the (defeasible) validity of a defective juridical act, realizes moral goods which have been listed in section 2. Central among them are protecting certainty, reliance, speed in decision-making, respect for authority, and that determinations on the authoritative character of norms rest on authoritative decisions.

The main remedy against a voidable juridical act is invalidation. Voidable acts that are invalidated become indefeasibly invalid. The temporal effects of an invalidation may be fully retroactive, partially retroactive, or prospective. Alternative remedies, other than invalidation, include the delayed or suspended declaration of the invalidity of an administrative decision or statute, severance, interpretation, the rectification of contracts, adaption of the terms of contracts, and the discount of the price to be paid by an aggrieved contracting party. This is the most important category of cases and so our examination of it will be more extended than other forms of reaction.

4.1. Invalidation and Other Remedies

The mechanism to render a voidable act invalid is by way of an authoritative decision. Courts are typically conferred the power to settle the matter, for which they may or not have discretion.[35] The exception to this rule, as we have seen above, is that in some jurisdictions a contract can be annulled by the authoritative determination of the aggrieved party. This mode of rescission is executed by communicating to the other

[35] Is a judicial invalidation a 'declarative' or 'constitutive' ruling? This way of framing the issue, by no means uncommon, is somewhat misleading. For the ruling is declarative in one respect and constitutive in another. It declares the previously existent reality that a power has been defectively exercised, and identifies the defect. Yet, since that juridical act really did exist as valid (but voidable), the ruling is constitutive in that it now directs the community to withhold recognition (and, if the ruling is retroactive, it also directs the community to deem the effects of that act as inexistent ab initio).

party the choice to render the contract invalid. The remedy by which courts invalidate an act carries different names. Invalidation, nullification, and avoidance are commonly predicated of all kinds of juridical acts. The invalidation of a contract may also be referred to as rescission or setting it aside; of an administrative decision: quash and vacate; of a statute: strike down.

The law typically specifies a procedure to challenge the validity of an act (eg directly or collaterally; by application of a party or by the referral of an inferior court to a constitutional court; etc.). If the act is challenged under the wrong procedure the party ought not to succeed in his or her claim. The law also specifies the legal situation a person must be in in order to challenge the validity of an act, which I have examined above under the heading of standing.

Contracts

Political communities think that the avoidance of a contract should generally have retroactive effects, as a matter of justice.[36] Retroactive invalidation is the technique by which the parties to the legal relation, and the community at large, are ordered to withhold recognition of the impugned juridical act and deem all the legal positions it configured, or purported to configure, to have never existed. All actions carried out under the invalidated act must therefore be reversed and the parties must carry out the restitution of the goods and moneys transferred under the contract. The executory obligations under the contract are extinguished. Under some circumstances restitution

[36] Long-term legal relations, such as those of employment contracts, are an important instance where invalidation operates with prospective effects only.

can be unjust: it does not operate against third parties acting in good faith, nor when the claimant is incapable of making a sufficient counter-restitution, ie when restitution is impossible. The institutional choice to limit the effects of retroactive nullification is the result of a balance of countervailing goods.[37] These techniques—voidability and its limitations—aim to secure the values of certainty, reliance, speed in the operation of markets, risk-bearing, and fairness in restitution.

Legal systems have developed alternative techniques when the nullification of a contract is deemed too disruptive a remedy, a remedy, that is, unfitting for the purpose. This remedial flexibility is exhibited in the following instances.

There are instances of mistake in the formation of a contract where courts can modify its terms, a remedy known as the 'rectification' of a contract. For example, when an agreement fails to record the terms as the parties intended them, the court can order them to give effect to the version of the agreement as understood by the claimant. A similar solution is adopted in some jurisdictions when the terms of the contract excessively favour one the parties. Courts are conferred the power to 'adapt the contract' so as to remove the disproportion.[38] In case of duress, in the specific domain of commerce, a trader's undue influence on a consumer may constitute an 'aggressive commercial practice', to which the law in England establishes the right to claim for a remedy called 'discount'.[39]

[37] O'Sullivan, Elliott and Zakrzewski, *The Law of Rescission* 18.03.
[38] Lando and Beale, *Principles of European Contract Law. Parts I and II* 266
[39] Cartwright, *Contract Law: An Introduction to the English law of Contract for the Civil Lawyer 165*

Statutes

While retroactive invalidation is the general rule for contracts, the opposite seems to be true of the invalidation of statutes.[40] Why so? The invalidation of legislation is more prone to produce systemic effects that may cause more harm than good. Most of the considerations that inform the fashioning of temporal effects have been listed above. These are the number of persons whose legal situation the impugned act configured, the salience of the defect, the time during which it was relied upon, and the effects that an invalidation may have on criminal convictions, the finances of the State, or the structure and order of its organization, as well as the guiding-function capacity of the system, if the avoided act leaves a considerable gap.

There is no clear and general positive systematization of the invalidation of statutes. Early constitutions are generally silent on the matter; modern constitutions establish some remedies, but they tend to not regulate it any detail.[41] The development of how voidness operates in the specifics has been mostly jurisprudential; the United States, through *Marbury v Madison*, is a paradigm example.

Some constitutional texts, such as those of Austria (Article 140 s7) and Italy (Article 136), explicitly state that rulings on invalidation must operate prospectively.[42] This amounts to a denial of the doctrine that all unconstitutional legislation is

[40] Cappelletti and Cohen, *Comparative Constitutional Law: Cases and Materials* 96, 100-01. For detailed comparative treatment, see Yowell, 'The Negative Legislator: On Kelsen's Idea of a Constitutional Court'; Allan-Randolph Brewer Carías, *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge University Press 2011) 103ff; Popelier and others, *The Effects of Judicial Decisions in Time*.

[41] Roach, *Remedies for Human Rights Violations* 44.

[42] But both jurisdictions establish that retroactive effects may apply for the case in point (Austria: Article 140 s7); on Italy, see the jurisprudential development exposited in Vittoria Barsotti and others, *Italian Constitutional Justice in Global Context* (Oxford University Press 2017) 83. I will return to this combination of temporal effects below.

necessarily void, which I have termed the void ab initio doctrine (Chapter I.2). The jurisprudence of some courts, Germany prominent among them,[43] espouses the void ab initio doctrine as a conceptual matter, but in fact they mean voidability. For statutes are recognized to carry a presumption of constitutionality, they must be enforced and regarded as binding until invalidated, and, if invalidated, the retroactive effects tend to be restricted.

The practice of constitutional adjudication plainly shows how talk of voidness can easily conceal what in fact happens. A particularly interesting instance where rhetoric neither reflects nor shapes practice is the power of the United States Supreme Court to react against unconstitutional statutes. The point is worth mentioning given how influential its culture is in judicial and academic circles around the world.

It is frequent for the participants of the US practice to refer to their Supreme Court's power of review as if it were capable of eliminating a statute by the violent impact of 'striking it down'. It has been argued that this intensely expressive term is a misleading idiom. As a form of criticism the idiom has been characterized in similarly expressive terms—a 'myth'.[44] What in fact occurs is that the court refuses to apply (enforce) a statute in a specific case. This remedy is not an invalidation but what may called, for lack of a better term, disapplication.

The widespread impression that US Supreme Court actually annuls unconstitutional statutes is lent credibility by the fact that, due to the operation of the stare decisis doctrine, its rulings have general effects within the system.[45] Yet the law

[43] Werner Schroeder, 'Temporal Effects of Decisions of the German Federal Constitutional Court' in P. Popelier and others (eds), *The Effects of Judicial Decisions in Time* (Intersentia 2014) 22, 32.

[44] Jonathan F. Mitchell, 'The Writ-of-Erasure Fallacy' (2018) 104 Virginia Law Review 933 939, 945, 976.

[45] The remedy of disapplication also exists in jurisdictions where the rulings of courts do not have general effects. The Chilean constitution is an example (Article 93 s6). The Dutch Constitution

remains on the books, in a state of 'dormancy' as it were, because of the standing prospect that Court may change its mind on the matter and overrule that decision.[46] Unless and until the statute is formally derogated by the legislature, litigants will always be entitled to claim that the Court can apply the unconstitutional law by adopting a different interpretation of the Constitution. This is not an infrequent practice.[47] The law, therefore, does not cease to legally exist in any genuine sense of existence. It remains recognized by the community as a law, albeit one which is presently—but not permanently—unenforceable.

It may be asked: is such a statute *legally valid*, then? The statute exists but its existence is highly unstable. Recall that one of the functions of the technique of legal validity is to mark existent norms. This provides a good reason to refer to these statutes as valid, albeit with the proviso that its obligatory character is asleep, as it were. One may refer to this case as a valid juridical act in a peripheral sense; and in this sense it resembles those contracts tainted by illegality which the law deems valid but unenforceable to one or both parties (see Chapter V.5).

Now when courts do decide to annul retroactively they may steer a middle path and nullify with partially retroactive effects, by selecting a period of time, or a range of persons and states of affairs, which the invalidation will touch. A case which fleshes out the considerations of justice that must be placed on a balance to arrive at this institutional choice is the invalidation of a tax statute. Consider the example of a case judged by many to be crucial to Irish constitutional adjudication.[48] The court found

empowers courts to apply this remedy for legislation that is incompatible with international treatises (Article 94).

[46] Hogan, 'Declarations of Incompatibility, Inapplicability and Invalidity: Rights, Remedies and the Aftermath' 238-40.

[47] Mitchell, 'The Writ-of-Erasure Fallacy' 968ff, 1015-16.

[48] *Murphy v Attorney General* [1982] IR 241.

that certain provisions of a tax law arbitrarily discriminated between married and unmarried couples. The law obligated married couples to pay higher income taxes. The facts of the case were such that the married couple who challenged the validity of the statute had been paying unconstitutional taxes for a period of six fiscal years. During this time the State was unjustly enriched. The Supreme Court held that the relevant provisions of the statute should be invalidated, but that a fully retroactive invalidation, by virtue of which a large number of persons would be enabled to claim restitution of the unconstitutional taxes they paid, would lead to financial chaos.

To invalidate with prospective effects only raises further moral questions about the litigant. If the litigant is not granted the remedy he or she may have done a service to the community but is left with no redress. On the other hand, if the plaintiff does obtain relief, other persons in a similar situation will be unfairly discriminated against. These values must be carefully balanced and there are differing views across and within jurisdictions. The Irish Supreme Court concluded that it would invalidate prospectively, but provided the plaintiffs with some relief, albeit not full redress. The court allowed them to recover the taxes collected for the time elapsed between the challenge of the statute and the issuing of the judicial decision, a period of only two years.[49]

Finally, some jurisdictions enable courts to delay or suspend the invalidation of a statute or administrative decision. English courts, as I mentioned in section 2 above, have been recently empowered by statute to delay their quashing orders at their

[49] On the benefits and drawbacks of retroactive and prospective nullification, see, for example, Ben Juratowitch, *Retroactivity and the Common Law* (Hart Publishing 2008) Chapter 3, 5 and 6; Robert Leckey, 'The Harms of Remedial Discretion' (2016) 14 International Journal of Constitutional Law 584; David Kenny, 'Grounding Constitutional Remedies in Reality: The Case for as-Applied Constitutional Challenges in Ireland' (2014) 53 Dublin University Law Journal ; Samuel Beswick, 'Retroactive Adjudication' (2020) 130 The Yale law Journal 276; Neil Duxbury, 'Ex Post Facto Law' (2013) 58 The American Journal of Jurisprudence 135 157ff.

discretion. The practice is also common in the constitutional review of legislation of Ireland, Canada, South Africa, Germany, France and Italy. The declaration is typically accompanied by imposing a deadline to the reviewed body—the executive or legislative branch—to correct the defect.

Administrative Decisions

I have observed that the general rule for the invalidation of contracts is retroactivity and that this tends to be the exception for legislation. The temporal effects of the nullification of administrative acts (including orders, bylaws, secondary legislation) lies within a spectrum between these two ends. This variability is due to the variability of subject-matters and number of persons that administrative acts regulate and reach. These range from: conferring licenses and permits (eg for a construction, or a business to operate); imposing fines or penalties (eg violations of pollution regulations, or parking rules); assessments and collection of taxes (eg determining the amount of property tax owed by a homeowner); regulating certain states of affairs during times of political or social exception (eg involving matters of internal and external security) as well as times of normality (eg zoning changes in urban development; safety requirements for the food and drug industries); determining public benefits (eg granting or denying social security, unemployment benefits, or public housing applications); appointing authorities; among many, many others.

There may be good reasons to invalidate unlawful administrative decisions with prospective effects only. When a power has been defectively exercised, but the defect is not salient, and many persons have been governed under or relied upon it, and

retroactive invalidation would produce systemic effects disproportionate to the redress of the parties. The moral considerations that bear on this decision are the same as the ones outlined in the previous paragraphs.

Now the particulars of a case may be such that the mere nullification of an administrative act, even if retroactive, would not suffice to correct the injustice. In such cases a court may accompany a quashing order with an additional remedy. English administrative law offers a rich variety of examples.[50] Consider the following possibilities.

An applicant may have been denied a benefit they were entitled to by an unlawful discretionary decision. Suppose that the decision is defective because the applicant was not heard, and the law imposed that duty on the decision-maker. A reviewing court may annul that decision and, in conjunction, issue a 'mandatory order', commanding the public body to hear the applicant. Similarly, when a public body is under a duty to act, and refuses to do so, the court may quash the decision by which the body has refused to act and also issue a 'declaration' setting out its obligations. Finally, there may be cases where an authority threatens to exceed its jurisdiction. An inferior court, for example, may misinterpret the scope of its powers and decide to act on a subject-matter which is in truth beyond its reach. A reviewing court may quash that decision and additionally issue a 'prohibiting order' to restrain the inferior court from acting.

These are the main remedial reactions available for contract, administrative, and constitutional law. There are two additional remedies that are common to these three domains. One is severance. In some cases the defect does not affect the entire

[50] For a helpful overview, see Lewis, *Judicial Remedies in Public Law* 6-010ff.

juridical act. This may justify severing the defective from the non-defective part of the act, leaving the latter to stand as valid. Through this technique the court fine-tunes the scope of a nullification. Another remedial reaction is to interpret the potentially defective propositional content of a juridical act in a way in which it meets the relevant validity criteria. This interpretive remedy may include 'reading in' words into a norm judged to be under-inclusive and thus discriminatory, or, conversely, 'read down' the terms to narrow the scope of their meaning.

The application of the interpretive remedy also involves risks, especially in cases of legislation. There may be a fine line between interpreting words and changing their meaning entirely, or the meaning intended by the legislature. This would undermine the values of democratic law-making. The judgement of the pertinence of this remedy will thus depend on how the designer (or applier) resolves the well-known tension in values that judicial review of legislation gives rise to. One example is the UK Human Rights Act 1998, which confers no power to annul legislation contrary to the European Convention on Human Rights, but imposes, in section 3, a duty on courts to interpret legislation in a way that makes them compatible Conventional rights. The duty of compatible interpretation is qualified by the proviso, 'so far as it possible to do so'. The meaning of this proviso is that the judicial decision cannot change the meaning to such an extent that in effect amounts to rewriting the law.

4.2. Stabilizing Devices

Voidable acts have a relatively unstable existence, as the people governed under them will be uncertain as to whether they will be eventually nullified or not (Chapter V.6). In the interest of legal certainty it is desirable that that state of affairs be eventually settled.

Too extended periods of uncertainty can be, all things considered, a disvalue. Thus legal systems employ techniques to settle the uncertainty, by which the voidable act is rendered indefeasibly valid. The rationale here is the justification of the doctrine of res judicata writ large: namely, that at some point in time, the quest for infallibility must yield to the good of finality.

There are various devices which can be used to render a voidable act indefeasibly valid. Some are specific to exercises of powers of authority, and some are shared with exercises of promissory powers.

Devices common to both types of powers are the following. First, the action by which persons with standing waive their right to challenge the validity of a juridical act. Second, the expiration of the time limitations imposed by the law. After the deadline, the voidable act becomes indefeasibly valid ipso iure—automatically, as it were, by the sole operation of the law. The law may fix an exact number of days/weeks/months/years. It may also leave it to the discretion of a court to determine a deadline, through clauses commonly framed as requiring the litigant to bring a claim 'within a reasonable time'. The right to challenge the validity of a statute, however, does not normally have a time limitation. In addition to securing the good of legal certainty, time limitations also preclude persons from acting in bad faith and taking undue advantages on others. A third device is the unappealable judicial decision that declares a voidable act to be valid, by the operation of the doctrine of res judicata.

There are other devices proper to the domain of administrative law. These are employed at the stage of adjudication, when an application to challenge the validity of the act has been initiated. These may be grouped under the rationale that the remedy

is unfitting. Consider the following instances.[51] A court may refuse to quash an administrative act if the remedy would have no practical effect (eg there is a breach of natural justice which did not prevent the claimant from being heard, or when a public body fails to disclose information that the claimant already knew). A court may also refuse to quash a decision if it judges that it is highly likely that the result would have been substantially the same had the decision not been defective. Similarly, a court may refuse to quash if the defect is not essential to the purposes of the act. Many such non-fundamental errors are formalities. In Spain, a term has been developed to refer to these latter types of errors as 'non-invalidating irregularities'.[52]

The same rationale also justifies devices that are specific to the domain of contract law. Cases of mistake offer various examples.[53] The law typically bars the avoidance of a contract if the litigant knew or should have known of the mistake; or if the thing mistaken was not the main motive for the contract, such that the mistaken party would have contracted regardless. Persons are not protected under the law of mistake if they had erroneous expectations to enter into a contract (eg the purchase of a wedding present cannot be avoided if the wedding is cancelled). Neither are persons protected if the mistake lies in the value of the thing, because prices fluctuate.

5. Indefeasible Invalidity

The previous section examined the various techniques surrounding what I classified as the first form of reaction, the reaction of allowing for the defeasible validity of a juridical

[51] ibid 6-022-36; Donnelly and others, *De Smith's Judicial Review* 18-057.
[52] García de Enterría and Fernandez, *Curso de Derecho Administrativo* 692.
[53] Kèotz, Mertens and Weir, *European Contract Law* 158ff

act. In this section I turn to a second form of reaction, which is more exceptional. It concerns a defectively created juridical act that becomes indefeasibly *in*valid from its inception; or, to be more precise, from its attempted inception. Here the rules of the system impose an indefeasible duty on the community to withhold recognition from the very beginning: to deem the purported norm to not have any legal existence. There may well be certain empirical appearances of legality, but the community is under a duty to not assign to such facts, as Searle would put it, any institutional function (Chapter V.3). The main categories to refer to such acts is void ab initio or void ex tunc.

In its purest form—there are variations across jurisdictions and areas of law—voidness operates from the inception of the juridical act. The voidness is of course a *legal* reality: the event which purported to create the act still occurred. To remove doubts, were there any, the law empowers courts to settle the question. Standing to request for a declaration of invalidity is not restricted to a person having been aggrieved; there are no time limitations to bring a claim to court, and courts are under a duty to declare the invalidity of the act ex officio. If the juridical act is a contract it cannot be affirmed by the parties.

Indefeasible invalidity ab initio is the strongest reaction that a system can employ against the making of a defective juridical act. The kind of defects that merit it, therefore, ought to be proportionately grave. There is no equal treatment among jurisdictions on which defects justify this form of reaction. Void contracts in the common law are typically those vitiated by mistake (eg on the identity of the other party, or the common mistake on the existence of the object of the transaction) and illegality (eg the sale of slaves). Civilian jurisdictions tend to include additional defects, such as

undue influence (eg Germany) and certain unfair terms in consumer contracts (eg France, Germany and Belgium).[54]

Characteristic grounds for voidness in administrative law can be found in s44 of the German Administrative Procedure Act and s47 of the Spanish Law of Common Administrative Procedure. Examples are acts issued by a body whose lack of authority is patent (apparent, evident, manifest, plain); that do not disclose the identity of the authority that has produced it; or propose a plan for action that cannot in fact be performed.[55] The cited German provision helpfully provides two criteria to identify void acts: that the 'error' (defect) should be both 'very grave' and 'apparent'. These criteria secure the important moral values of making the reaction proportionate to the disvalue, as well as the protection of legal certainty, by establishing that if the defect is not salient the citizen cannot disregard the juridical act as invalid, and must obey it until a court has settled the matter.[56]

6. Indefeasible Validity

The third, and final, form of reaction of the community is to confer legal recognition on a defective juridical act from its inception. The duty is indefeasible and thus the juridical act acquires an indefeasible status from its inception. The rules of the system direct the community to recognize the act as a successful configurator of legal positions

[54] On how this institutional reality has been shaped by the different values informing the civilian and common law traditions, see Muriel Fabre-Magnan, 'Defects of Consent in Contract Law' in A. S. Hartkamp and Christian von Bar (eds), *Towards a European Civil Code* (2nd rev ed. edn, Kluwer Law International 1998) 219-20.

[55] See, further, García de Enterría and Fernandez, *Curso de Derecho Administrativo* 644ff; Singh, *German Administrative Law in Common Law Perspective* 56; Bocksang, 'Voidness and Voidability of Unilateral Administrative Acts in the Western Tradition' 425-26.

[56] Singh, *German Administrative Law in Common Law Perspective* 84.

without further qualification. According to my account there is no other term to refer to such defective juridical acts than as legally valid ab initio. This is not to say that the act cannot be criticized. It *is* defective—the duty imposed by the principle of responsibility has indeed been breached—and to that extent unlawful, unconstitutional, and so on, but the circumstances justify the judgement that the act should not be rendered void.

In the law of contracts, as we have seen, some defective contracts are void ab initio, and most are voidable. The parties to a contract may limit the availability of rescission by stipulating so. In such cases the contract is born indefeasibly valid. This technique is considered to be morally justified for certain vitiating factors only, typically for certain mistakes. Yet if the cause of the mistake is a malicious act, say deceit, the law does not enable the parties to impose limits in rescission. The law does not protect action in bad faith.[57]

Indefeasible validity ab initio is more common in public law. There are different techniques to achieve this same end. Administrative acts may be shielded from the purview of courts by specific legislative provisions—'ouster clauses'. Legislation, typically, may be equally shielded by the absence of a norm empowering courts to invalidate them, as is the case with the United Kingdom, and was the case for most constitutional orders prior to World War II. In jurisdictions where no power to nullify legislation is available, unconstitutional laws are legally valid.

Some constitutional drafters have preferred to explicitly disable courts from invalidating legislation. Article 120 of the Dutch Constitution establishes a prohibition

[57] For further limitations, see Kèotz, Mertens and Weir, *European Contract Law* 174-75; Lando and Beale, *Principles of European Contract Law. Parts I and II* 255.

to this end in the following terms: 'The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts'.[58]

A more exceptional technique has been devised in Canada, where s33 of the Charter of Rights and Freedoms, known as the 'notwithstanding clause', empowers the legislature (Parliament or the legislature of a province) to disable courts from annulling enactments subsequently found defective (ie 'inconsistent' with the Constitution). However, in Canadian eyes, limitations on the reviewing power of courts must themselves be limited. The contrast with The Netherlands is stark. In effect, the Canadian legislature can make provision to disable courts from nullifying their enactments for a maximum period of five years, and only certain inconsistencies between a statute and the constitution are protected by s33. It does not include democracy rights (the right to vote, and the sitting of the legislatures), mobility rights, and language rights.

The values secured by protecting administrative decisions and statutes from judicial invalidation are efficiency in decision-making, that technical questions be solved by specialized experts, and respect for the democratic will of the people, among others. The debate around the prudential pertinence of empowering courts to nullify or otherwise review legislation is well-known and we need not engage with the details of it here. Suffice it to make an historical observation to place it in perspective.

Up to the codification period (19th Century onwards), the notion of legal validity was generally thought to apply to private transactions. It was in the wake of the cultural transformations catalysed by the work of Enlightenment philosophers, along with the

[58] The prohibition of review is not absolute, however. Article 94 establishes that legislation incompatible with international treatises is reviewable. The cited article states that such statutes 'shall not be applicable'. This provision has been understood to mean that courts can disapply the statute but not invalidate it (cf section 4, above).

increasing bureaucratization of the Modern State, and specific events of significant political and moral impact such as the French and American Revolutions in the late 18th Century, and the Universal Declaration of Rights in the mid 20th Century, to name but a few, that the idea that acts of administration and legislation could be legally scrutinized and subject to judicial control—in much the same was as contracts, wills, and marriages—acquired momentum. The political ideal we call 'Constitutionalism' can, in this sense, be described as the gradual extension of the notion of legally valid action from the private to the public realm. In sum, the idea that exercises of public authorities can be thought of in terms of valid or invalid is a relatively new event in Western history.[59]

Political communities are still making sense of this phenomenon in a way in which questions surrounding the nullification of contracts are not. The fact that the debate on the review of legislation is so lively, and that it has become the subject of such an enormous scholarship in the past decades, indicates that accommodations are still being made about the invalidity question.

I have observed that, all things considered, the balance of reasons may warrant the conclusion that some juridical act should acquire the status of indefeasibly valid from the inception. The conclusion is a trade-off, a sub-optimal solution, for the disvalue caused by an incorrect exercise of powers is still there. There may remain moral space, as it were, to justify an alternative set of remedies to correct the injustice caused by the violation of the duty imposed by the principle of responsibility. In the domain of the exercise of legislative powers certain techniques have been employed to correct the

[59] This brief sketch draws from Köpcke, *A Short History of Legal Validity and Invalidity: Foundations of Private and Public Law especially* Chapter 9.

injustice without annulling the statute. These are subtle but not for that reason less effective.

A first such technique is known as the non-binding declaration of incompatibility. The court declares the unconstitutionality of the statute but does not annul it. Part of the rationale for this device is that courts can collaborate with the legislature by engaging in conversation with them with regards to legislation that may need modification while remaining at a distance from the details of the legislative process itself. The UK Human Rights Act 1998 (s4) empowers courts to issue declarations stating that municipal primary legislation is incompatible with Conventional rights. These declarations leave the validity of the statute intact. The law says that such rulings, called 'declarations of incompatibility', 'do not affect the validity, continuing operation or enforcement of the provision' it finds incompatible, and 'is not binding on the parties to the proceedings in which it is made' (s4(6)).

A similar power is displayed in the activity of the German Federal Constitutional Court. That Court has power to annul statutes, but it can also choose to declare them incompatible with the Basic Law but not void. The resemblance with the powers allocated to UK courts has limits. For in Germany such declarations of incompatibility may carry some binding force, as all pending litigation governed by the incompatible statute may be suspended until the legislature has corrected the defect according to the guidelines laid down by the court.[60] The German Federal Constitutional Court also uses a variation of this declaration, through which it states that a law might, eventually, become defective in its propositional content due to changes in social or political circumstances. An example: a statute that regulated election districts was declared to be

[60] Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 37.

not-yet-unconstitutional because of a shift in population, gradually producing what was judged to be a constitutional imbalance.[61]

While declarations of incompatibility do not affect the validity of the act, they do contribute to its instability, as the community will, upon the declaration, have reason to believe that the legislature will either modify the law or derogate it. The extent to which the guiding-function of the incompatible statute will be undermined will partly depend on the constitutional culture of the country. In countries where, generally, judges are respected, and show a deferential comity to legislatures, it has been reported that these declarations do produce real effects.[62]

It is understandable that in the domain of public law, especially that of legislation, the balance of reasons might warrant the conclusion that an enactment should acquire the status of indefeasibly valid upon inception. The values that countervail the use of the technique of nullification, mentioned above, are heavy. Now these considerations do not emerge in the field of private promissory powers. The conclusion of a contract and its judicial invalidation do not raise questions about democratic legitimacy, the Rule of Law, polycentricity, and expertise in decision-making. That is true, but there are other values that might counsel allowing for the indefeasible validity of a contract from its inception, while concomitantly empowering a court to issue not a declaration of incompatibility, say, but what may well be called a sanction. It is an exceptional situation, but it does exist.

In France, for example, the law mandates that transactions worth more than €1,500 be made in written or notarial form. If the parties do not comply, the law holds

[61] Zeidler, 'The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms' 512, 515.

[62] See, eg, Wiltraut Rupp-v Brunneck, 'Germany: The Federal Constitutional Court' (1972) 20 The American Journal of Comparative Law 387.

that the contract will stand as valid, but attaches the sanction that oral evidence provided by witnesses on the existence of the contract will not be allowed in court.[63] A similar situation takes place when banks do not meet the formality of specifying the interest rate of a consumer credit. In France and Germany the contract stands as valid and the law fills in the gap. In the former country the credit will have no interest, in the latter a maximum of four percent per annum.[64] The sanction, which is against the bank, protects the vulnerable contracting party.

The justification for this type of reaction, in sum, is an institutional choice which judges that, while invalidation is disproportionate, a sanction may be entirely fitting.

7. Damages

A violation of the principle of responsibility causes an injustice. Voidability, voidness ab initio, and validity ab initio, are the three main forms of reaction against the making of a defective juridical act. Within these forms of reaction several types of remedies can be granted to correct the injustice. The foregoing exposition has surveyed how legal systems typically deploy them. A question that remains to be answered is the following. An incorrect exercise of powers may also cause a loss on a person, a loss that is actionable in tort.[65] This wrong is typically made right by an award of damages. The purpose of awarding damages is to compensate that loss. In this section I briefly survey

[63] Kèotz, Mertens and Weir, *European Contract Law* 78 (citing Article 1359(1) of the French Civil Code)

[64] ibid 84.

[65] For contracts, see O'Sullivan, Elliott and Zakrzewski, *The Law of Rescission* 2.07; in some civilian jurisdictions this responsibility emerges through the technique of 'culpa in contrahendo': Nicholas, *The French Law of Contract* 79. For administrative decisions, see Donnelly and others, *De Smith's Judicial Review* 19-025.

how claims for damages can be inserted into the remedial economy against the making of defective juridical acts.

Contract law offers several examples. A misrepresentation may cause the innocent party false expectations on the financial benefit of the obligations imposed by the contract. Risk-bearing is an essential aspect of the contracting process, and such expectations are not normally protected. But if the misrepresentation is fraudulent or negligent, it often gives rise to claims for damages.[66]

The vitiating factor called duress does not by itself amount to a tort, but certain forms of duress can cause a wrong actionable in tort. A common example is an overt act of illegitimate pressure. The vitiating factor called fraud may give rise to compensatory damages as well, if, for example, the party induced to the contract made expenses to prepare for it. Damages may be awarded in addition to, or in replacement of, a rescission.[67] The innocent party, in other words, may have an option to select a remedy. In a similar fashion, there is a rule in The Netherlands to the effect that if, in the unlikely case that rescission operates prospectively, and this unjustly benefits one of the parties, the court may award damages.[68]

Wrongs can also come about in the domain of public exercises of authority. English administrative law establishes that there is a tort ('misfeasance in public office') if a loss is caused by a public body which issues an administrative act maliciously intending to not meet the relevant validity conditions, or knowing that it does not meet them, and that this may cause a loss. A loss may also be caused by the misrepresentation of a legal official. If an official's statement is untrue, and it is negligently uttered, it may

[66] John Cartwright, *Unequal Bargaining: a Study of Vitiating Factors in the Formation of Contracts* (Clarendon Press 1991) 66, 105-06

[67] See Zweigert and Drobnig, *International Encyclopedia of Comparative Law* 472; 37-111, 342ff;

[68] Kèotz, Mertens and Weir, *European Contract Law* 412-15 (the reference is to Article 3:53(2) of the Dutch Civil Code).

count as 'negligent misstatement' and give rise to an action in damages.[69] A delay in making a decision can also be actionable because of 'negligence', or 'breach of a duty'.[70] Finally, a wrongful imprisonment, that is an imprisonment caused by an act subsequently declared unlawful, may give rise to a cause of action.[71]

Damages in all such cases may be claimed in addition to the invalidation of the relevant act. The two remedies address, and correct, different requirements of justice.

8. Conclusion

The main claim that this chapter has attempted to substantiate is that remedies are a distinct technique. They do not automatically follow from a finding that a juridical act has been defectively created. Validity and remedies are different types of artefacts and it is crucial to clear thinking to keep a sharp conceptual distinction between them. Remedies satisfy different requirements of justice. To explain this idea in further detail I identified four main features of remedies against the making of defective juridical acts.

Remedies are a means to correct the injustice caused by a violation of the principle of responsibility, they are artefactual, normally ordered by courts, and in some occasions may be granted at the discretion of a court. Between a finding of defectiveness and the granting of a remedy lies a moral choice. It is for the community to make that choice. The means to regulate the remedial economy—through constitutions, legislation, or the jurisprudence of courts—is itself a moral choice.

[69] Donnelly and others, *De Smith's Judicial Review* 19-032.
[70] ibid 19-032.
[71] Lewis, *Judicial Remedies in Public Law* 5-020.

The types of powers exhibited in legal systems (to contract, marry, enact, adjudicate, etc.), the subject-matters they regulate, and the way they reach and affect members of the community is varied. The moral values at play in such different circumstances thus also differ. It follows that there is no one way to react against the making of a defective juridical act. Hence the need for a flexible and sensitive remedial economy. I examined the main remedies legal systems typically employ to correct the injustice caused by a violation of the principle of responsibility. Other than retroactive invalidation, I identified at least ten other corrective means.

VIII. CONCLUSION

This DPhil thesis has identified a question and provided an answer. In this final chapter I trace the train of reasoning I undertook to arrive at the answer and summarize the main arguments which justify adopting it.

I began by noting a practical predicament any jurisdiction is faced with. The problem concerns what to do upon the advent of an incorrect exercise of legal powers. Ideally legal powers should be correctly exercised, but persons are imperfect, and very frequently juridical acts are defectively created. The problem, in other words, is a function of human freedom; it is inevitable. I characterize the issue as a predicament because there is a sense in which it is a lose-lose situation. The event by which a person disregards validity criteria cannot be undone—time cannot be reversed—but something must be done to correct what went wrong, even if the correction cannot fully redress the wrong.

I observed, in rough outline, that political communities solve the practical aspect of the problem by allowing for the provisional or definitive legal validity of many such acts. Most but not all defective juridical acts, in the normal operation of a legal system, are regarded as valid until avoided. The decision to retroactively avoid (annul, invalidate) a defective juridical act must come from a person or public body empowered to make that decision. Courts are normally allocated such powers; but in the law of contracts these can also be conferred on private citizens; and there are other means to render a juridical act inexistent, such as the derogation of a statute or the termination of a contract. Now retroactive invalidation is not the only remedy courts grant. Legal systems exhibit a vast and flexible set of tools to react towards the making of defective juridical acts. These include partial retroactive invalidation, prospective invalidation,

severance, interpretation, rectifying the terms of a contract to what the parties actually intended, modifying the terms of the contract to what the law permits, delayed declarations of the invalidity of statutes and administrative decisions, non-binding declarations of incompatibility of statutes, and declarations which express that a statute may become unconstitutional in the near future, among others.

This practical problem has a theoretical dimension, which I termed the invalidity question. That is the question that this DPhil has proposed to answer. For ease of exposition I disaggregated the question into two components. One component concerns how to explain and justify that many defective juridical acts legally exist, are binding, and referred to as valid until invalidated. The second component concerns how to explain and justify the existing diversity of remedies, including an explanation of the fact that sometimes no remedy is available, such that the act is indefeasibly valid from its inception. I referred to the first component as the question of status—what is the status of a defective act?—and to the second as the question of remedies.

This practical problem and, by extension, its theoretical dimension, is very old. Indeed, as old as the technique of legal powers has been used within the set of institutions we call a legal system. What is particularly interesting about it is that it continues to challenge legal practitioners and theorists. The justification to undertake this DPhil project lies in the diagnosis that the existing approaches are found wanting in crucial respects.

In modern times, the invalidity question has been mostly treated at the level of adjudication, subsequently systematized by legal doctrine. Since it has been examined in all prominent jurisdictions, and across such a long span of time, it is not easy to identify a definite statement of the current approaches. To articulate them I distilled the existing information, gathered mostly from comparative doctrinal work, and

reduced it to two main views. For the sake of clarity I exposited the two approaches as archetypes, noting that it may in fact occur that they may be combined by practitioners and theorists.

The first view, the void ab initio doctrine, holds that all defective exercises of powers produce an invalid juridical act. The voidable doctrine, by contrast, holds that all defective exercises of powers produce a valid juridical act, which may eventually be invalidated. The void ab initio doctrine fails because it cannot account for how practice in fact operates and indeed should operate. As a universal doctrine, applying to any and every exercise of powers, it is fatally flawed. The voidable doctrine has greater explanatory capacity, but its operative concepts—validity, existence—must be furnished with stronger theoretical foundations. The voidable doctrine is also incomplete in that it does not capture the varieties of remedial reactions legal systems exhibit, including none.

Given this diagnosis, and to provide an adequate answer to the invalidity question, I proposed that we need a clear and coherent conceptual apparatus, one which can explain the notions of existence, validity, and remedies. For this reason the focus of this DPhil thesis is more philosophical than doctrinal. The apparatus I propose to develop is general in scope, intended to apply to any exercise of powers, in any jurisdiction.

Within the contemporary canon of legal philosophy the invalidity question has only concerned Hans Kelsen and Eugenio Bulygin. Their theories attempt to account for the fact that many defective juridical acts exist. They can be understood to furnish the voidable doctrine with stronger conceptual foundations. Kelsen argued that all defective exercises of powers are voidable. Bulygin held that defective exercises of powers are invalid but applicable. Although semantically Bulygin's thesis might seem

closer to the void ab initio doctrine—because it holds that all defective exercises of powers are invalid—it actually tracks the rationale of the voidable doctrine, through the notion of applicability. Bulygin held no detailed views on remedies. Kelsen, by contrast, did, and the substance of his views, I argued, are entirely sound. Chapter VII of this thesis justified that claim.

The received answers, as I called them, have significant flaws, which I identified in Chapter III. First, they do not aptly capture the point of the view the participant of legal practices, and thus fall short in descriptive accuracy. Bulygin fails to capture the fact that defective but binding acts are referred to as valid until avoided, not as invalid but applicable. Kelsen, in turn, justified the voidability of defective acts by positing a tacit alternative clause. According to this clause all power-holders are empowered to disregard the validity criteria set out in the explicit norms of a legal system. I argued that this idea is foreign to legal thought.

A second flaw pertains to the conceptual apparatus they use to explain their views. We saw that Bulygin's notion of 'invalid but applicable' becomes rather incoherent, since invalid but applicable norms do not belong to the legal system, and according to Bulygin membership to a legal system is axiomatic for a norm to exist. Kelsen's view, in turn, cannot explain the fact that modern jurisdictions have rules that direct the community to regard some defective exercises of powers as void ab initio. Kelsen seems to be aware of this fact, but his explanation is weak. His reasoning seems to be that such void ab initio acts may, despite what the rules of the system dictate, be regarded as binding by members of the community. I argued that the features of Kelsen's account of legal validity, which I explained in Chapter II, force him to make room for this fact by stating that, if such a situation occurs, then the defective act must be valid. By adopting this move Kelsen cannot explain the phenomenon of norms that

are regarded as binding by some people but should not be ascribed the status of legally valid. Third, and finally, I observed that both Kelsen and Bulygin lack a developed account of the ontological status of norms. This, I argued, is an important theoretical gap.

I concluded by arguing that Kelsen and Bulygin think that ascriptions of validity are akin to logical or conceptual necessities. They fail to note the truth that ascriptions of validity are the result of the practical, moral choice of a political community. I observed that one reason why they failed to see this lies in the value-free method they deployed to develop their theories, under which moral considerations are excluded from scientific analysis. Now Kelsen did use a value-engaged method to explain one aspect of the invalidity question—the remedies component—albeit apparently without acknowledging that he was shifting the method. The soundness of his views on remedies is a testimony of the fruitfulness of that method. To chart a path forward I proposed to deploy a value-engaged method, much in the same spirit as Kelsen's proposal on remedies. A central proposition of that method is that legal institutions and techniques—and legal validity and remedies are among such techniques—are best understood in light of the moral values and human goods they seek to advance and realize.

These were the main elements of Part One of this thesis. In Part Two I proposed my own, alternative answer to the invalidity question. To begin to develop that answer I articulated, in Chapter IV, the bare bones of a framework on the ontological status of juridical acts.

The main features of that framework are the following. The two existence-conditions of juridical acts are the manifestation of an intent to configure legal relations, through a say-so, and a recognition, on the part of the recognitional community, that

the say-so functions as a configurator of legal positions. This phenomenon I referred to as action and reaction in the law. A crucial feature of my argument is, therefore, that juridical acts exist if the community recognizes them to exist. Existence is success in recognition. According to this account of the ontological status of norms, defective legal acts exist because they are recognized to exist.

The framework idea of action-and-reaction provided the groundwork for the following chapters. The plans for action contained in juridical acts are significant to the well-being of persons. It is important, therefore, that action and reaction in the law be responsibly exercised. Empowerment involves responsibility. Action and reaction must be for the common good.

This background sheds light on the nature of the several techniques legal systems employ to secure a just action and reaction in the law. The technique of legal powers secures a just action; and the techniques of legal validity and remedies a just reaction. I set out to develop these ideas in Chapters V to VII.

In Chapter V I focused on legal action. I argued that validity criteria can help secure that action in the law be reasonably just. Validity criteria can do so by allocating powers to the right persons, establishing conditions for the reasonable exercise of such powers, and, finally, by requiring from power-holders that they produce juridical acts with a sufficiently reasonable content. I articulated this point by arguing that legal powers and validity criteria satisfy requirements of distributive and commutative justice. To that extent they contribute to a just enterprise of norm-generation. I then argued that power-holders are normally under a moral duty to exercise powers by meeting the relevant validity criteria. That duty is typically embedded in legal systems as a legal principle, which I termed the principle of responsibility. From this proposition I derived the conclusion that an incorrect exercise of powers is normally an injustice.

The truth that an incorrect exercise of powers is normally an injustice is at best obscured and at worst missed when the operation of legal systems is understood in logical or quasi-logical terms, in the Kelsenian or Bulyginian fashion, such that defective exercises of powers are conceptualized in terms of 'conflicts' or 'inconsistencies' between norms, and not primarily the result of free choices of human persons, choices the effects of which must be corrected because unjust.

Chapters VI and VII then moved to examine how reaction in the law can be just, and the techniques that serve that purpose. This, I argued, is the appropriate context to elucidate the notions of legal validity and remedies. In Chapter VI I argued that the recognitional community is normally under a moral duty to confer recognition on correct exercises of powers; and that it is also frequently under a duty to confer provisional or definitive recognition on defective exercises of powers. Very exceptionally, there is a duty to withhold recognition altogether, from the very beginning. Such acts are genuinely void ab initio. (Observe that this aspect is what, I argued, Kelsen failed to account for.)

Why is the recognitional community under a duty to confer recognition on some defective juridical acts? The reason is that it is required by the common good. It may be morally valuable, all things considered, to confer provisional or definitive recognition on those acts. Justice in norm-generation—secured through conformity to validity criteria in power exertion—is an important aspect of the common good, but not the only one. I argued that other values constitutive of the common good include certainty in legal relations, trust between persons and in institutions, action in good faith, speed in the operation of markets, administrative efficiency, avoidance of legal gaps and financial chaos, among others. These values must be carefully balanced against each other to arrive at a just institutional choice.

The technique of legal validity serves as a means to express that institutional choice. It equips the community with a stable and uniform channel to express their act of legal recognition. Since juridical acts are solutions to coordination problems, and such solutions need to be salient among reasonable alternatives in order to effectively guide conduct, it is desirable that such acts be marked (signaled, named, stamped) in a way that renders them salient. Ascriptions of validity serve that purpose. Additionally, ascriptions of validity also provide a grammar to coordinate legal discourse, and to fortify the stability of legal norms.

In developing this account, through Chapters IV to VI, I built on theses that have been developed by others. I signaled resemblances in order to show the contours of my answer to the invalidity question, and to show that these theses can be coherently articulated as a unified whole.

In Chapter VII, finally, I argued that remedies enable the community to correct the injustice caused by a violation of the principle of responsibility. This is another, and crucial, means to react in the law. Part of the aim of the chapter was to show, against the void ab initio and voidable doctrines, that invalidation is but one of the means of correction legal systems actually employ. I identified the main features of these reactions, which define them as a unit: a mechanism to correct the injustice of an incorrect exercise of powers.

I then argued that, depending on the moral gravity of the case, a defective juridical act can be (i) conferred recognition as a defeasibly valid juridical act (voidable), (ii) withheld recognition from its (attempted) inception, its status being that of an indefeasibly invalid juridical act (void ab initio); or (iii) conferred recognition from its inception, its status being that of an indefeasibly valid juridical act (valid ab initio). Reaction (ii) is the most severe, and for that reason very exceptional. Reaction (iii) is the

opposite, the least sever. For this reason it is also very exceptional. Reaction (i) is the general rule. Now while it is the general rule, the circumstances may be such that other means, listed above, may be more effective and appropriate to remedy the injustice. I identified at least ten different remedial reactions, and attempted to explain under what circumstances they are appropriate, resulting in a healthy and fitting remedial economy.

I can now state my answer to the invalidity question in summarized form. As to the first component of the question: how can such defective acts exist, and why are they referred to as valid? My answer is that they exist because a people recognize them to exist when there are strong moral reasons to do so; and they are ascribed legal validity to coordinate social interaction and discourse. The second component: why is there such a variety of remedies? Because there are more than one means to correct the injustice caused by a violation of the principle of responsibility. This truth is a function of the fact that legal powers are very varied, that the subject-matters they regulate are also very varied, and that the reach and scope of their effects can affect a vast or minor number of persons. The facts and human values involved will vary, and thus the remedy must vary accordingly.

To conclude, finally, I will return to our starting point. I began by noting failures in current approaches to answer the invalidity question. I have mentioned them in the foregoing paragraphs. Yet they also exhibit much wisdom, and my account can explain where they are sound. The void ab initio doctrine tracks the important truth that some exercises of powers are too defective to be tolerated. The voidable doctrine, realistic as it is, insightfully captures the truth that juridical acts that produce legal effects do have a real existence. Kelsen's theory was well oriented in tracking this point, but erred in taking it to the extreme. On the other hand, he was right about remedies, and indeed he laid down the main foundations for our current thinking about constitutional

invalidation. This is to be welcomed. Bulygin, finally, had a clear view of the problem, but his conceptual apparatus, logical in inspiration and application, does not aptly fit the subject-matter which it seeks to understand—the imperfect action of free human beings. His answer fails not because he did not grasp the issue but because he deployed an apparatus which was based on poor foundations.

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