

# Network validity

## 1. Problem

### *The concept of a monolithic theory*

The validity of law depends on a theory. Schematically speaking, the theory of validity on which law depends is developed in political philosophy during the 17<sup>th</sup> and 18<sup>th</sup> century (Hobbes, Rousseau, Kant, Locke, Hegel). The basic modus of this type of validity is formal validity. It is consecrated by the end of the 19<sup>th</sup> century in Weber's theory of legitimation, according to which formally valid law is at the same time legitimate law.

The contraction of formal validity and legitimacy results in a monolithic theory of legal validity. The epistemological status of monolithic theories of legal validity is problematic, in that it results in a legal system providing itself with its ultimate criteria of validity.

Natural law theories of validity, when properly analysed, deny the monolithic character of legal validity. Natural law provides an independent touchstone for legal rules' validity. Legal validity is conditioned by a rule's corresponding to (or: not violating of) rules of natural law. This approach holds for classical, theological, as well as rational natural law theories.

### *Historical changes*

Theories that articulate "nature", "reason", "the will of God", "the will of the state" as unique sources of law, aim at providing a rational basis to legal validity. The philosophical background of these theories of legal validity is that truth validates law. Since truth is unique, the validity of law must rely on a unique theory.

After the decline of natural law theories, the theory of law that contracts legal validity and legitimacy found a number of competitors in the historical school (Savigny) and Marxism, e.g. These theories criticize the uniqueness of the source of law that was held to be the state. Apart from the soundness of these criticisms, the idea of a plurality of possible sources of law arises. The emergence of this idea can be explained as a shift in the concept of rationality.

On the disconnection of truth and validity (Hume) the concept of rationality gets a different shape. Rationality is considered a model of explaining reality, not as a concept belonging to reality. This distinction between theories of reality and theories *about* reality, definitely influence the monolithic status of theories of legal validity. Instead of focusing on the connection between truth and validity, legal theory starts focussing on the *rationality of legal ruling*.

### *Current developments*

In the middle of the 20<sup>th</sup> century, the idea of formal validity of law was seriously challenged. The main theory of legal validity as Kelsen had articulated in the first part of the century, was criticised from several and different perspectives. On Kelsen's normativistic theory, the validity of law is to be reduced to its formal validity connected to the will of the state, excluding any other type of criterion or source. Validity in a modern legal system means formal validity. In the strongest version the legal system is considered an autopoietic set of proposition that creates both valid rules and valid criteria for validity (Luhmann and Teubner) - validity is determined from inside, looks as non-monolithic, but it is "the system" that determines the criteria, system as ultimate basis.

Over against Kelsen's theory, others theories of legal validity were developed. These theories can be classified in a general way as jusnaturalistic and realistic. According to the former, law in order to be valid should not violate the standards of natural law or morality. According to the latter, valid law is law as courts create it. This type of theories of legal validity has two variants, characterized as American and Scandinavian realism respectively.

In opposition to normativism, jusnaturalistic and realistic theories criticise the exclusive nature of formal validity, and oppose another criterion to that. At the same time, however, the criterion of validity developed in these theories is on its turn held to be unique.

## **2. Identification of the problem and focus of the project**

### *Identification of the problem*

The specific problem that occurs in theories of legal validity, whether it be normativism, jusnaturalism, or realism is that they are of a monolithic nature. They favour one criterion, and in doing so they suggest to provide some essence of legal validity. The presuppositions of this approach are, among others, the belief in cognizability of values (e.g., justice in natural law theories), the separation of science and politics (e.g., in normativism), the dominant impact of social sciences (e.g., in realism, both American and Scandinavian).

It is these presuppositions, among others, that turn theories of legal validity into monolithic theories. On closer inspection, however, monolithic theories do not hold. As a matter of fact, all of them do favour one criterion at the expense of others, but at the same time, they cannot avoid taking at least one supplementary criterion into account. So, Kelsen's normativism, apart from formal validity, relies on effectivity, realistic theories apart from a factual criterion cannot obliterate some formal aspects of validity (like rules

organising the operation of courts, *e.g.*); jusnaturalistic theories are in need of formal rules (like realistic theories) while at the same time, in none of these theories a rule violating a transcendent norm loses its status of a legal rule.

It follows that theories of legal validity, despite their monolithic appearance, use a *bipolar* modus of validity.

Current research in legal theory shows a growing interest in bipolar, and even multipolar theories of legal validity (Ost, Habermas, Wroblewski, Summers)

Current legal theory criticizes the concept of monolithic validity in a legal system as a unique criterion. The validity of a rule, an executive order or a judicial decision depends on criteria that belong to the legal system itself. Insofar as a rule, executive order, or a judicial decision satisfies these criteria, it is valid. This type of theory is known as legal positivism as it is formulated in the work of Kelsen. Validity determines the ontology (Perelman) and the identity (Raz) of a legal system, what is inside and what is outside.

However, a legal system is connected to a practice that determines itself from within, and so can change from within (but not without taking its “environment” into consideration). The determination of the “outside” and the “inside” of a legal system involves a “demarcation problem” (Popper) that challenges the monolithic character of theories of legal validity, and calls for a connection between different modes of legal validity.

#### *Focus of the project*

The critique of existing theories of legal validity raises the problem of the identification and elaboration of a model of legal validity that avoids the weaknesses of monolithic theories. Its most important weakness is that they want to operate on one mode of legal validity while, while a critical diagnosis shows that they actually run at least two criteria of validity.

The project aims at showing that monolithic theories are epistemologically deficient, since they all operate on a bipolar mode of validity. More specifically, the focus of the project is on the *relation* between these criteria of validity. If a theory needs at least two criteria of legal validity in order to be epistemologically sound, there must be a relation between criteria that can be theoretically articulated. Apart from this theoretical articulation, the project investigates the possibility or the necessity of a relation between more than two criteria. The connection between two criteria can be described as a bipolar relation, while the connection between three criteria will be articulated as multipolar relation or a *network* of criteria of validity.

### 3. Research questions

The critique of monolithic theories of legal validity serves as the starting point of the elaboration of a new type of theory of legal validity.

The first research question consists of grouping theories of legal validity and identifying the criteria on which they rely. The proposed frame of grouping these theories are: formal, axiological, and factual criteria. The working hypothesis of this part of the project is that criteria of legal validity come in pairs. ~~xxxxxxxx~~ **efficiency**

The second research question concerns the *identification of the properties and the operationalisation of a network theory of legal validity*. The following sub-questions are the guiding lines for the elaboration of the research: 1. what are the different possible criteria of legal validity; 2. how do these criteria belong together (static relation); 3. how do these criteria influence each other (dynamic relation); 4. how are judgments on legal validity made within a network theory of legal validity.

The third research question concerns *the stability or instability of a network theory of legal validity*. If one of the advantages of a monolithic theory of legal validity may be some stability concerning the criteria of validity, a network of criteria may turn out to be rather unstable. Different parameters of validity, on their mutual influence, may challenge the aspects of legal certainty and predictability of legal decisions, so that the outcome may be difficult to predict. As a working hypothesis guiding the third research question the project focuses on coherence as a “*criterionless criterion*” (Alexy/Peczenik). A coherentist approach to criteria of legal validity operating in a network has the potential to stabilize the effects of a multipolar theory of legal validity.

### 4. Methodology

**operationalisation** of network validity in **jurisdiction** : **Thesaurus** of judicial decisions (description and assessment: what kind of **arguments** are used; how do they relate)

monolithic theories tend to include a **fixed** (what exists already has higher value than what does not yet exist) → **hierarchy**, idealtypical (cf Weber); one criterion determines all of it; yet these theories don't work; validity comes in pairs (x and y), that are not used in binary way; to be weighed and balanced; therefore monolithic theories focus on **consistency** (to fit and so to be deductible from other elements of the system); consistency with two criteria is difficult to realise: hence: **coherence** or “*compatibility*” (Perelman); coherence as “*criterionless*” (Alexy); as a net/set of justified propositions (Peczenik); as “*whole*” (MacCormick); integrity (Dworkin); multilevel (Wintgens)

legality includes legitimacy : weber's attempt to make coincide **two** criteria in one; critique (Habermas); binary model (valid/not valid) jeopardizes interpretation, so that via actual models of **interpretation** new modes of validity can be traced (again: operationalisation via judicial decisions)

the above is legal theory (what is there and how can it be described); from description to critique, on philosophical basis, and so to another approach: limitations → meaning is theory bound; so is the meaning of validity;

**methodology** : theory of network validity: 1. identification of criteria (*principles*: philosophy; criteria: *theory*, see Taylor; how do they work (practice) - **theory construction** starts with observation of practice (thesaurus of decisions, theory of a practice, if not you start with a priori theory that is applied to practice, cf Bourdieu) 2. how do they operate (separately); how often do they show up, where and when; types of cases - typology of decision making: what do judges say, and how does it make sense; 3. how do they relate to each other in abstracto (model) (is there a rationality or a theory behind their use in practice; 4. how do they actually or *de facto* influence each other. 5. what rational model is to be developed for their identification and their operationalisation (model of weighing and balancing, argumentation)

**possible critique** of network theory of validity: **1. legal certainty**: certainty is a relative value; refers to stability of systems, hence to what can be expected; in as far as it is a moral value it tends to become absolute, so that your system depends on one value (legalism à la Weber); order out of chaos (in the beginning there was chaos → stingers and prigogine); certainty is an argument, not an absolute value; certainty refers to an ideology, yet unreflected reflection of reality; certainty is idealtypical, though not fixed, if it has a moral weight, it is not absolute; **2. objection from CLS** (mainly Unger) goes in the other direction: there is no background theory for legal validity, there are "principles" and "counter principles" that determine the validity of the outcome, yet no "system" **3. critique of legal dogmatics**

**theoretical background**: network validity is in between: the "whole" of the legal system includes the social environment that can be theoretically articulated; therefore, a multi-layered concept of validity is needed; at the level of legitimation this is necessary: if law is to become **relational** (between power holders and subjects) (cf relationeel bestuursrecht, de staercke; relationeel fiscal recht - Gribnau, Foqué, Montesquieu), subjects are not only related by law, but also among themselves (society versus state); legal relation is not only determined by law but is based on social interaction; yet a "reflective" theory of legal validity should reflect social structures: **structural validity** (<-> structuralistic validity) - not only system internal (tribe) but also connected to social structure - integrative approach, yet interdisciplinarity → network validity

**truth conditions:** on what conditions is the proposition “X is a valid norm” true according to the network theory of validity ?; in as far as it “fits” the validity conditions of the theory; compatible with the set of theories that the theory includes; meta-epistemological/philosophical conditions: on what conditions is the network theory of validity itself true:

Research question: relation between normativism (critique of ...) and other theories