

AXIO-SYSTEMIC VALIDITY: POSITIVISM WITH REASON*DOI: <https://doi.org/10.33717/deuhfd.899912>**Dr. Yahya Berkol GÜLGEÇ******Abstract**

Systemic validity is generally in conformity with the understanding of validity adopted by legal officials. On the other hand, it suffers from an inability to account for why an enactment in conformity with the systemic criteria constitutes a norm. Axio-systemic validity aims to compensate this deficiency by introducing a hybrid understanding of validity. While the systemic component continues the descriptive and explanatory advantages, the minimum axiological element guarantees that the enactments possess the character of norms. While axio-systemic validity violates the social fact and sources theses, it is compatible with the separability thesis. Therefore, it can be conceived of as a positivist understanding of validity.

Keywords

Systemic validity, Axiological validity, Legal positivism, Reason for action, Separability thesis

AKSİYO-SİSTEMSEL GEÇERLİLİK: MAKUL POZİTİVİZM**Öz**

Sistemsel geçerlilik genel olarak hukuk uygulayıcıları tarafından benimsenen geçerlilik anlayışıyla uyumludur. Bununla birlikte, bu anlayış sistemsel

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kriterlere uygun olarak çıkarılan bir işlemin niçin norm niteliği taşıdığını açıklayamamaktadır. Aksiyo-sistemsel geçerlilik bu eksikliği melez bir geçerlilik anlayışı sunarak telafi etmeyi amaçlar. Sistemsel bileşen geçerlilik anlayışının açıklayıcı ve tasvirî avantajlarını sürdürürken, minimum aksiyolojik unsur işlemlerin norm niteliği taşımamasını garanti etmektedir. Aksiyo-sistemsel geçerlilik toplumsal olgu ve kaynak tezlerini ihlal etse de ayrılabilirlik teziyle uyumludur. Bu nedenle de pozitivist bir geçerlilik anlayışı olarak kavranabilir.

Anahtar Kelimeler

Sistemsel geçerlilik, Aksiyolojik geçerlilik, Hukuki pozitivizm, Eylem sebebi, Ayrılabilirlik tezi

INTRODUCTION

The generic legal positivist understanding of validity fails to explain normativity. By generic understanding, I mean the systemic validity. While it can perfectly explain what a legal enactment is, it fails to account for why the addressees ought to follow that enactment. Legal positivists were not short of responding to this fundamental flaw. The response relied on why and how it could be rational to follow an authority's or basically someone else's instructions, orders or enactments. Joseph Raz's account based on authority and Scott Shapiro's planning theory of law can be named as two magnificent efforts to demonstrate that legal positivism does not need to resort to the controversial concept of the presuppositional basic norm in order to explain legal normativity.

Raz's understanding concerns, so to speak, the special normativity of law. It sets the conditions an authority needs to fulfill or tests it has to pass in order for its enactments to have exclusionary normative force. I full heartedly agree that it is possible for law to possess such normative power. Yet, in a way, Raz's theory demonstrates more than what is necessary. The question is how can law be normative in cases where the authority fails to pass the test of normal justification? The axio-systemic validity offers an answer.

Shapiro's brilliant analogies between legal normativity and the normativity of plans is susceptible to an important objection. Accordingly, Shapiro's view of normativity is purely instrumental¹. Some prominent philosophers reject the category of instrumental rationality by claiming that only proper ends justify and require the means. Adhering to this idea, Joseph Raz dismisses the distinct category of instrumental rationality as a myth², while Christine Korsgaard indicates that one has reason to adopt the means to an end, only if the end is valuable and morally justifiable³. Accordingly, Kant's famous declaration of "who wills an end wills the means" should be

¹ See for example **Sherwyn**, Emily: "Legality and Rationality: A Comment on Scott Shapiro's *Legality*", *Legal Theory*, No. 19, 2013, p. 410.

² **Raz**, Joseph: "The Myth of Instrumental Rationality", *Journal of Ethics & Social Philosophy*, Vol. 1, No. 1, April 2005, pp. 1-28; **Raz**, Joseph: *From Normativity to Responsibility*, Oxford 2011, pp. 141-172.

³ **Korsgaard**, Christine M.: "Normativity of Instrumental Reason, *in* *Ethics and Practical Reason*, eds. Garrett Cullity and Berys Gaut, Oxford 2003, pp. 250-251. For similar views see **Raz**, *From Normativity to Responsibility*, pp. 144-145; **Bratman**, Michael E.: "Reflections on Law, Normativity and Plans", *in* *New Essays on the Normativity of Law*, eds. Stefano Bertea and George Pavlakos, Oxford 2011, pp. 77-78.

interpreted in a way to only include proper ends. Without delving into the details of the issue, I will explain in the conclusion how axio-systemic validity manages to introduce a truly normative understanding of positivist validity while also avoiding the problems associated with instrumental rationality.

The purpose of the article is to introduce a hybrid understandings of legal validity, called axio-systemic validity. It includes a minimum axiological element while also incorporating the systemic validity. It is the central claim that this understanding is capable of accounting for normativity in cases falling outside the scope of exclusionary normative force. The additional and equally important assertion here is that axio-systemic validity is also consistent with legal positivism or, at the very least, with a version thereof.

Axio-systemic validity accounts for the validity of legal norms other than the hierarchically supreme norm of a legal system. The validity of the supreme norm cannot be determined by axio-systemic validity. However, this is not due to the shortcoming of the axiological element, but rather the systemic element. Systemic validity presupposes an existing system and the existence of the system depends on the existence (validity) of a *first norm* validity of which cannot be systemic.

I. THE ELEMENTS OF AXIO-SYSTEMIC VALIDITY

This section introduces the two elements of axio-systemic validity. Systemic validity is straightforward enough. The sub-section dealing with systemic validity will contend with discussing Jerzy Wróblewski's formula. It will be argued that while the formula is generally sound, it can be simplified and purified by the omission of certain conditions.

The second sub-section deals with the axiological element and is more intriguing. The axiological element is what supplements and enables the systemic validity to account for the normative character of legal enactments. In this section the main aim is to clarify the meaning and the scope of the axiological component. The discussions as to whether the hybrid formed of these two components is compatible with legal positivism will be carried out in the following section.

A. Systemic Validity

This section will examine the first element of systemic validity which is at the core of axio-systemic validity. First, I will make some general remarks

introducing systemic validity and then evaluate and refine Wróblewski's formulation thereof.

Norms validity of which can be traced back to the same ultimate source form a normative system⁴. In this system consisting of hierarchically ordered norms bound by chains of validity, the superior norm determines the criteria of validity for the inferior norm. Validity of the norms within the system depends on their pedigree⁵ and not moral merit or demerit. The ultimate norm constituting the unity of the system is a positive norm validity of which is subject to different approaches in different theories. Kelsen develops the concept of the presuppositional or fictional basic norm⁶ conferring validity on the hierarchically supreme and generally efficacious positive norm. Hart, on the other hand believes that the supreme positive norm that is called the "Rule of Recognition" cannot be valid or invalid, but it may merely exist or not⁷ depending on the internal points of view held by legal officials.

The core of systemic validity asserts that legal norms are only valid if they have been posited in accordance with the criteria provided by yet another legal norm valid within the same system. Jerzy Wróblewski's formulation of systemic validity is instructive and illuminating both due to its ingenuity and deficiency. I would like to briefly examine Wróblewski's formulation of systemic validity and point out its strengths and weaknesses.

According to Wróblewski, systemic validity is not the only prevalent understanding regarding the validity of legal norms within a system.

⁴ See **Raz**, Joseph: "Kelsen's Theory of the Basic Norm", *American Journal of Jurisprudence*, Vol. 19, No. 1, 1975, pp. 94-95; **Aral**, Vecdi: "Kelsen'in Hukuk Anlayışı", *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası*, Vol. 31, No. 1-4, p. 537.

⁵ Pedigree test for the validity of a norm concerns the manner in which legal norms have been issued, adopted or developed. See **Dworkin**, Ronald M.: "The Model of Rules", *The University of Chicago Law Review*, Vol. 35, No. 1, Autumn 1967, p. 17.

⁶ It is argued that in the earlier years of his career Kelsen designed the basic norm as a norm to be presupposed while he had a change of heart during his latter days as a scholar when he claimed that the concept of basic norm is fictional (see for instance **Delacroix**, Sylvie: *Legal Norms and Normativity: An Essay in Genealogy*, Portland 2006, pp. 57-59; **Duxbury**, Neil: "Kelsen's Endgame", *The Cambridge Law Review*, Vol. 67, No. 1, March 2008, pp. 53-58). Regarding the important implications of this change please see **Stewart**, Iain: "Closure and the Legal Norm: An Essay in Critique of Law", *The Modern Law Review*, Vol. 50, No. 7, 1987, p. 914; **Antonov**, Mikhail: "Systemicity of Law: A Phantasm", *Russian Journal of Law*, Vol. 3., No. 3, 2015, pp. 121-122; **Rüthers**, Bernd: *Rechtstheorie: Begriff, Geltung und Anwendung des Rechts*, Munich, 1999, p. 276.

⁷ **Hart**, H.L.A.: *The Concept of Law*, 3rd Edition, Oxford 2012, p. 110.

Axiological or sociological conceptions of validity also play a role, although the dominant conception among these three is systemic validity⁸. The author indicates that although such conclusion is not free of controversy, the consequence of the validity of a legal norm could be said to be the existence of an obligation on the addressees' part in order to comply with the legal norm⁹.

Let me briefly comment on one important point. As I will be explaining in more detail below, I do not share Wróblewski's conviction. Simply put, "obligation" is far too strong as the consequence of legal validity. Moral requirements are thought of being required despite contrary prudential reasons, and in this regard they constitute obligations rather than mere requirements or mere "oughts"¹⁰. In this respect, obligations are requirements which categorically defeat "oughts" of some other kind. Validity, on the other hand, is the existence of the norm¹¹. Since validity is the mere existence of the norm, it cannot entail the norm's special binding force to defeat considerations of a certain kind. Acknowledging that legal validity entails obligation to comply with the legal norm on the addressees' part would render systemic validity susceptible to the criticism that for legal positivism a valid legal norm ought to be complied with regardless of its moral merit or demerit. This would definitely be step back from Hart, who rightfully asserted that a valid legal norm could be too unjust to obey¹². It is possible that Wróblewski's understanding of obligation does not have a strong connotation as explained here. It might be the case that by obligation

⁸ **Wróblewski**, Jerzy: *The Judicial Application of Law*, eds. Zenon Bankowski and Neil MacCormick, Berlin 1992, p. 76. Also see **Raitio**, Juha: "What is Meant by Legal Certainty and Uncertainty", *Rechtstheorie*, Vol. 37, No. 4, 2006, pp. 399-400.

⁹ **Wróblewski**, Jerzy: "Problems of Objective Validity of Norms", *Rechtstheorie*, Vol. 14, No. 1, 1983, p. 19.

¹⁰ See **Himma**, Kenneth Einar: "The Ties That Bind: An Analysis of the Concept of Obligation", *Ratio Juris*, Vol. 26, No. 1, 2013, pp. 26-28; **Himma**, Kenneth Einar: "Coercive Enforcement and a Positivist Theory of Legal Obligation", *Annals of the Faculty of Law in Belgrade International Edition*, Year: LX, No. 2, 2012, p. 223; **Himma**, Kenneth Einar: "Towards a Comprehensive Positivist Theory of Legal Obligation", *Ankara Law Review*, Vol. 9, No. 2, 2012, p. 117.

¹¹ See **Ross**, Alf: "Validity and the Conflict between Legal Positivism and Natural Law", in *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, eds. Stanley L. Paulson and Bonnie Litschewski Paulson, Oxford 1998, p. 158; **Kelsen**, Hans: *Pure Theory of Law*, 5th Edition, trns. Max Knight, New Jersey 2008, p. 10.

¹² **Hart**, H.L.A.: "Positivism and the Separation of Law and Morals", *Harvard Law Review*, Vol. 71, No. 4, February 1958, p. 620; **Haldemann**, Frank: "Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law", *Ratio Juris*, Vol. 18, No. 2, 2005, p. 171.

the author merely means “requirement” or “ought”. In such case, the problem would be eliminated. As I will examine in more detail below, the existence of a norm depends on whether the addressees have at least some reason to conform to the norm, not an undefeated or a categorically superior reason to do so.

According to Wróblewski’s conception, systemic validity can be expressed as follows: 1-a) the rule must have been created and have entered into force in accordance with other rules valid in the system or 1-b) the rule must be an acknowledged consequence of the rules valid within the system; 2) the rule must not have been abrogated; 3-a) the rule must not conflict with other rules in the system or 3-b) if it does, it must either be the case that i) the rule must not be invalid according to the rules of conflict between the legal rules or ii) it must be interpreted in a way to avoid the contradiction¹³.

Rules and principles are the sub-categories of norms¹⁴. It might be surprising to witness that Wróblewski’s formulation mentions only rules. I assume that the expression “rules” here encompasses the “principles” and is the equivalent of a norm. This is important because systemic validity, which is adopted in general by positivist theories, aspires to account for the validity of all positive norms, rules or principles alike.

1. Concerning the Condition “1-a)”

The condition “1-a” envisages the coming into force of a norm as a prerequisite of systemic validity. Is this true? Is it not possible to speak of a valid legal norm which has not yet entered into force? Since the validity of a norm is its existence, it does not seem appropriate to associate a norm’s validity with its being in force. This is because being in force is a condition for the applicability of a norm and not its existence. Therefore, as long as applicability and existence are separable, being in force does not need to be stated as a precondition of validity. For instance, with respect to statutes it is accepted in the jurisprudence of the Turkish Constitutional Court that entering into force is not a precondition of validity¹⁵. Kemal Gözler also

¹³ Wróblewski, *The Judicial Application of Law*, p. 77. In fact, the author speaks of five conditions. However, not all of these are cumulative. Therefore, I have opted to express these conditions cumulatively.

¹⁴ **Dworkin**, p. 25; **Alexy**, Robert: "On the Structure of Legal Principles", *Ratio Juris*, Vol. 13, No. 3, 2000, p. 295.

¹⁵ See The Constitutional Court’s Decision No. E. 2014/46, K. 2014/38 dated 21 February 2014, available at <http://kararlaryeni.anayasa.gov.tr/Karar/Content/4b6f8a47-13e3-47d4->

indicates that a statute may become valid prior to its coming into force¹⁶. Let me now provide a theoretical explanation why norms which are yet to enter into force can be valid.

If a norm is valid, i.e. if it exists, the addressees of the norm needs to have at least some reason to conform to the norm. Let us for now concede that this is true. If a norm which is yet to enter into force can be valid, the addressees must have reason to conform to it prior to its coming into force. Let us consider the following articles of a statute:

- 1- Placing of solar panels on the roofs of apartments, mansions, houses or other residences is forbidden. All solar panels on the roofs of such places shall be removed until the effective date of this statute.
- 2- Any violation of the first article shall be subject to an administrative fee of 20,000 USD.
- 3- This statute shall enter into force on the 45th day following its publication.

With respect to this statute, the addressees will have reason to conform to it prior to its entering into force. Although the statute is not applicable yet, all its addressees ought to remove the installed solar panels prior to the effective date. Since addressees still possessing solar panels on the roofs of their residences will violate the statute without exception, such statute can only be complied with prior to its coming into force. If the binding force of a norm can manifest prior to its effective date, applicability or coming into force should not be established as the precondition of legal validity.

However, there may be cases where the addressees do not have a reason to conform to a norm which is yet to enter into force. The issue will be examined in detail in the next section. For now let me just state the following. Assume that a provision of the newly introduced penal code renders “φ”ing a crime and envisages incarceration as the penalty. Further assume that “φ”ing is not morally wrong and the only reason for a citizen to comply with the newly introduced penal provision stems from the prudential reason originating from the threat of incarceration. It is obvious that no citizen would have reason to refrain from “φ”ing until the provision enters into force. One might argue that according to the reasoning above, such a provision would not be valid until it comes into force as it is when the

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¹⁶ **Gözler**, Kemal: Türk Anayasa Hukuku, 2nd Edition, Bursa 2018, pp. 655-656.

addressees will have a reason to comply with it. In the next section, I will introduce a distinction between the apparent and the real sets of addressees and argue that it is the apparent set of addressees which matter while determining whether at least some addressees have reason to conform to the norm. Therefore, whether some addressees have reason to conform to the norm at a certain time is irrelevant. Nevertheless, the fact that some members of the real set of addressees might have reason to conform to a norm which is yet to enter into force, demonstrates that applicability or the entering into force of the norm should not be determined as a precondition of systemic validity.

Let me touch upon another discussion regarding the condition “1-a”. Inclusion of the definiendum in the definiens is called as the fallacy of *idem per idem*¹⁷. It is controversial if a legal system has a validity apart from the validity of the norms within the system. Joseph Raz indicates that the validity of a legal system is nothing but the validity of all the norms within the system¹⁸. Therefore, according to Raz, there is no conception of validity specifically reserved for the legal system. The contrary view expresses that a separate conception of validity, called “external validity” applies to the entirety of the legal system¹⁹. According to Grabowski, the fact that systemic validity requires the systemic validity of the norm, according to which the systemic validity of another norm will be evaluated, constitutes the fallacy of *idem per idem*²⁰. Thus becomes the definition of systemic validity circular.

A possible way to avoid the fallacy of *idem per idem* in Wróblewski’s formulation is to acknowledge that what is provided by the relevant conditions is not a definition but a description of or a formula for systemic validity. Notice that the fallacy concerns the definition of systemic validity and that no fallacy is committed by the legal officials who attempt to verify if the norm providing the criteria of validity for another norm is itself valid within the system. The fallacy occurs when the conditions above are offered

¹⁷ **Ziembiński**, Zygmunt: *Practical Logic*, trns. Leon Ter-Oganian, Dordrecht 1976, p. 62.

¹⁸ **Raz**, Joseph: *The Authority of Law: Essays on Law and Morality*, Oxford 1979, p. 148; **Raz**, Joseph: “Legal Validity”, *Archiv für Rechts- und Sozialphilosophie*, Vol. 63, No. 3, 1977, p. 341; **Raz**, *Practical Reason and Norms*, p. 127.

¹⁹ **Peczenik**, Alexander: “The Structure of a Legal System”, *Rechtstheorie*, Vol. 6, No. 1-2, 1975, p. 4; **Aarnio**, Aulis: *The Rational As Reasonable: A Treatise on Legal Justification*, Dordrecht 1987, p. 34.

²⁰ **Grabowski**, Andrzej: *Juristic Concept of the Validity of Statutory Law: A Critique of Contemporary Legal Nonpositivism*, trns. Małgorzata Kiełtyka, Berlin 2013, p. 285.

as a definition. In other words, it could be claimed that what Wróblewski provides is not a definition, but a test for systemic validity.

Grabowski suggests to take a different path. Accordingly, the definition of systemic validity should mention criteria determined by a valid legal system and not a norm valid in the system²¹. However, I am not sure if this solves the problem at all. Accordingly, the following arguments can be put forward: 1) “Legal system” cannot determine criteria of validity independently from the norms it contains. Legal system is entirely composed of particular norms and functions through the determinations of these norms. 2) If the first argument holds, replacing “the criteria determined by a norm valid in the legal system” with “the criteria determined by the legal system” would only serve to hide the fallacy. This is because if, after all, criteria for validity will be determined by norms within the legal system, avoiding the fallacy is only possible if it can be demonstrated that the validity of the said norms is irrelevant. In other words, it needs to be demonstrated that invalid norms can also manage to determine the criteria for the validity of another norm. Nevertheless, this is impossible. First off, the existence of a norm requires its validity. An “invalid norm” is non-existent and the expression is a contradiction in terms²². In conclusion, I believe that the proposed replacement is not capable of avoiding the fallacy.

Luckily, it is not always a fallacy to include the analyzed term in the analysis as Ralph Wedgwood stresses²³. This is permitted as long as the analysis cannot be reduced to a logical truth²⁴. Wróblewski’s analysis of systemic validity provides new information regarding systemic validity and is not a simple logical truth. Moreover, one should take note of the following two points. First, what is being analyzed by Wróblewski is the systemic validity of a norm (N_1) while the validity included in the analysis is the validity of another norm (N_2). One could argue that what is analyzed and what takes part in the analysis are not the same thing. Therefore, the analysis cannot be deemed as circular. Second, what is analyzed is the systemic validity of N_1 whereas what is in the analysis is the *validity* of N_2 . Systemic validity and validity are not equivalents. I am not merely playing with words here. For this difference is crucial for systemic validity: there is at least one norm within a legal system validity of which cannot be explained or

²¹ *Ibid.*

²² **Kelsen**, p. 271.

²³ **Wedgwood**, Ralph: *The Nature of Normativity*, Oxford 2007, p. 67.

²⁴ *Ibid.*

accounted for by systemic validity. For instance, in Turkish legal system one can determine the systemic conditions for the validity of administrative regulations by reference to the criteria laid down by statutes. In turn, the validity of the said statutes can be verified by reference to the criteria laid down by the Constitution. However, the validity of the Constitution cannot be established by any criterion laid by another norm which is also *systemically valid* in the legal system. This is why Hans Kelsen had to refer to the presuppositional (or fictional) basic norm²⁵.

This last observation also expresses a problem with systemic validity. It cannot establish the validity of the highest-ranking norm of a legal system without which a legal system does not exist. This is a deficiency which is inevitably inherited by axio-systemic validity as the axiological element of this understanding cannot account for the validity of the highest ranking positive norm of a legal system. I have argued elsewhere that this problem can be solved by another understanding of validity called “axio-factual validity”²⁶. However, the discussion pertaining to this other sort of validity falls outside the scope of this article.

2. Repeal and Systemic Validity

The second condition for systemic validity indicates that in order for a norm to be systemically valid, it should not be repealed. I first would like to point out the important difference between not having entered into force yet, and being repealed. I have demonstrated above that addressees might have reason to conform to a norm which is yet to enter into force. On the other hand, a repeal is not a mere stay of execution. A repealed norm is no longer valid, therefore it is a norm no more. In case of a stay of execution the relevant act is not applicable, though it retains its validity. No one may have a reason to conform to or comply with a repealed norm. Therefore, unlike the situation of a norm which is yet to enter into force, a repealed norm cannot be systemically valid.

Another suspicion with regards to the issue of repeal might be the following: there are instances within the operation of legal system where courts base their decisions on currently non-existent rules and norms. For instance, when a court considers the constitutionality of a statute, the reference is made to the constitutional norms in place at the time the statute has been enacted. Even if these norms are not valid when the

²⁵ **Gülgeç**, pp. 425-426.

²⁶ *See ibid.*, pp. 515-541.

constitutionality review is being conducted, the court may annul the statute by reference to the now non-existent constitutional norm. We may, therefore, conclude that a repealed constitutional norm may serve as a reason for action for the judges and constitute the *ratio decidendi*. If this is the case, how can one conclusively claim that a repealed norm cannot constitute a reason for action or that the addressees cannot have a reason to comply with a repealed norm?

Here a distinction must be made between rules which are reasons for action and facts which are reasons for action although they are not norms²⁷. “The fact that a statute valid or invalid according to the constitutional provisions in force at the time of its enactment” is a reason for action for the judges, although it does not express any legal norm. Reasons are facts and as such they do not have normative importance on their own. This importance is attributed to facts by norms²⁸. Therefore, there must be a norm conferring normative force on the said fact. This norm could be expressed as “The validity or invalidity of statutes need to be assessed in accordance with the constitutional provisions in force at the time of statute’s enactment”. It is this norm that the judges follow and not the constitutional provisions referred to by the norm. Consequently, it cannot be claimed that judges have reason to comply with a repealed norm. Moreover, notice that the norm determining the validity criteria of a statute at the time of its enactment does not have the judges, but the members of the parliament as its addressee. The judges consider whether the enactment is consistent with the criteria laid down by the norm. This does not mean, however, that the judges are conforming to the norm by doing so. The norm does not even address the judges.

3. Collision and Validity

The third and the last condition is as follows: the valid norm should not conflict with other norms valid within the system; if it does, conflict rules should not invalidate the conflicting norm or it should be possible to interpret the norm in a way to avoid the conflict. Kelsen thought that there

²⁷ Raz appropriately points out that norms are never reasons for action (**Raz**, *Practical Reason and Norms*, p. 51, footnote). It is not the norm or the rule itself that constitutes the reason for action, but the fact that such norm exists. Therefore, as a figure of speech, I continue to speak of rules or norms as reasons for action, whereas what I mean is the existence of a rule or norm constituting a reason for action.

²⁸ **Finnis**, John: “On Hart’s Ways: Law as Reason and as Fact”, *American Journal of Jurisprudence*, Vol. 53, No. 1, 2007, pp. 44-45.

cannot be irresolvable conflicts between the norms of a legal system²⁹. In case of a conflict one of the conflicting norms needs to be invalidated or one of the norms will need to be interpreted in a way to avoid the conflict. The fact that the norm the validity of which is concerned is the hierarchical superior of the other norm exemplifies the cases where the conflicting rule is not deemed as invalid. Although a conflict exists in such a case, only the hierarchically inferior norm could be claimed to be invalid. On the other hand, there are cases where the conflict is avoided by interpreting one of the conflicting norms in conformity with the other. For instance, in British legal system domestic acts conflicting with the norms of the European Union are, where possible, interpreted in a way to provide conformity between the two norms³⁰.

What is more controversial is the situation of a norm which has not been invalidated despite conflicting another norm although it should have. Could such a norm be deemed as valid according to Wróblewski's formulation? Let us assume that a statute expressly conflicting a constitutional provision has not been invalidated by the constitutional court based on political concerns. Can we assert that this statute is systemically valid? What if the conflict arises out of procedural issues? A statute which has not been invalidated by the constitutional court although it has been enacted in a way contrary to the constitutionally determined procedures? How can we claim that the said statute has been "enacted in accordance with the criteria determined by the system"?

I believe it is Wróblewski's conviction that a norm claimed to be contrary to a constitution or any other hierarchically superior norm is valid until annulled by the authorized court. When the reason for the contrariness is the conflict between the contents of the norms, this may be seen as unproblematic for the understanding of systemic validity. However, if the contrariness is procedural, in other words if the inferior norm is created in a way contrary to the criteria envisaged by the superior norm, accepting a norm which is yet to be annulled by the authorized court as valid would contradict the condition "1a" of systemic validity³¹. This is because

²⁹ See **Kelsen**, Hans: *General Theory of Law and State*, 3rd Edition, trns. Anders Wedberg, Cambridge 1949, p. 408.

³⁰ **Barnett**, Hilaire: *Constitutional and Administrative Law*, London 2002, p. 217.

³¹ In fact, I believe that many of the constitutionally envisaged criteria with regards to statutes cannot be perceived as "criteria of validity" (for more details please see **Gülgeç**, pp. 392-400). This is because legal systems generally bestow an *ex nunc* effect on the annulment decisions of constitutional courts. Accordingly, even if a statute is enacted in

regardless of the decisions of the authorized court, the said norm has not been enacted in conformity with the criteria envisaged by the system. A contrary example can also be imagined. A norm enacted in conformity with the systemically envisaged criteria may be annulled by the authorized court. In light of these examples, I believe that it would be appropriate to introduce some changes to the conditions of systemic validity.

I believe that the third condition is superfluous. A norm conflicting with another may not lose its validity while a norm which is not contrary to the superior norms of the system may be annulled. As long as the conditions state that the norm should not be repealed, any condition pertaining to the “conflicting norms” becomes unnecessary. The condition regarding the conflicting norms would prevent the general account of systemic validity from describing the functioning of the legal system as accurately as possible. After all, Kelsen has labeled the constitutional courts as negative legislator because these courts can repeal statutes³². The legal consequences of repeal and annulment on the validity of the relevant norm are not different. Therefore, I contend that the inclusion of the condition regarding the repeal of the norm would be sufficient for an accurate description of the understanding of systemic validity.

B. The Axiological Element

Systemic validity, as refined by the discussions regarding Wróblewski’s understanding, is sufficient to offer an accurate description of legal practice regarding the concept of validity. It is able to explain how a legal norm comes to existence. However, it has a fundamental deficiency: it does not in any way explain why enactments in accordance with the systemic criteria lead to norms. It does not offer an account of why the addressees of these enactments ought to comply with or conform to them. The axiological element rests on the following axiom: there is no norm which the addressees

a way contrary to some of the constitutionally envisaged criteria, it can enter into force and be valid until the time of annulment. If this is the case, the criteria envisaged by the constitution, at least a great portion thereof, should not be viewed as the criteria for systemic validity as they do not affect the valid enactment of a statute. This of course may change from legal system to legal system. Here, the point is merely that one should be careful in categorizing all constitutional requirements as criteria for legal validity. The issue certainly deserves a more detailed discussion; however, I believe that it has little to contribute to an article aiming to offer a general presentation of axio-systemic validity.

³² See **Kelsen**, *General Theory of Law and State*, pp. 268-269.

do not at least have some reason to conform to or comply with. Considering the fact that there is no general obligation to obey the law³³ in conjunction with the fundamental axiom implies that any genuine model of legal normativity must be able to account for the normative character of legal enactments.

The issue might also be explained based on the relationship of validity and binding force. The famous positivist Hans Kelsen thought that a close relationship existed between the validity and binding force of a legal norm as if these two were synonyms. Consider the following quote: “*By ‘validity’ we mean the specific existence of norms. To say that a norm is valid, is to say that we assume its existence or... we assume that it has ‘binding force’ ...*”³⁴. It may seem meaningless to think of a valid norm with no binding force. However, this depends on how the binding force of a norm is considered. The expression “binding force” seems to be quantifiable, i.e. it seems to allow for different levels of binding force. This makes it necessary to determine what level of binding force is required for the validity of a legal norm and this question is the first issue I am going to examine.

There is a parallel between the binding force of norms and the weight of reasons an addressee has to conform to or comply with two different norms. Stronger set of reasons an addressee has to follow a norm, more binding force the norm has. This raises the question of which reasons are eligible for constituting the binding force of a legal norm. In order to properly understand how legal norms come to possess binding force, it is necessary to determine which reasons for action are relevant. This is going to be the second issue to examine. I will argue that moral and prudential reasons are the only eligible kinds and establish the ways in which the axiological condition may be satisfied by legal enactments.

Thirdly, I will assert that the set of addressees who must have reason to conform to the legal enactment is a set consisting of minimum number of elements. Another issue to be examined in this sub-section is whether the term “addressees” refer to real and existing addressees or possible/imaginary ones. I will argue that it is not necessary that real addressees have reason to conform to legal enactment at any certain point of its existence and that it is

³³ **Raz**, *The Authority of Law: Essays on Law and Morality*, p. 233; **Edmundson**, William A.: *Three Anarchical Fallacies: An Essay on Political Authority*, Cambridge 1988, pp. 7-32; **Smith**, M.B.E.: “Is There a Prima Facie Obligation to Obey the Law?”, *The Yale Law Journal*, Vol. 82, No. 5, 1973, pp. 950-976.

³⁴ **Kelsen**, *General Theory of Law and State*, p. 30.

sufficient if it is *possible* for a real addressee to have some reason to conform to the enactment at a certain point of its existence.

The last sub-section argues, after the clarification of the meaning of the axiological element, that axio-systemic validity has some advantages over mere systemic validity in explaining certain cases where an enactment is generally thought to be invalid. Moreover, these cases are usually accepted as instances of invalidity by positivist authors. These cases are regarded as the basic qualities of and standards regarding norms, such as the principles of *impossibilium nulla obligation est* or *necessitatem nulla obligatio est*.

1. Two Meanings of Binding Force

“Binding force” and the statement that a norm is binding might have two different meanings. One is the binding force in the strong sense. It means that *all things considered* one ought to do as the norm prescribes. Naturally, whether a norm is binding in the strong sense or not requires the consideration of various reasons agents may have in favor of or against taking the action prescribed. Consequently, it must first be noticed that the same norm might have different statuses of binding force for different agents. This is because the reasons different agents have to conform to the norm might differ and the reasons for conforming to the norm might be defeated in one case when it is undefeated in another. Secondly, even if the agent is the same, the reasons the agent has to conform to or to refrain from conforming to the norm might change over time. In this sense, the binding force in the strong sense is a) agent-relative and b) time-relative.

On the other hand, the meaning of binding force does not need to be so absolute. It might also have a weaker meaning. This, I call binding force in the weak sense. Accordingly, whenever agents have at least some reason to conform to the norm, it is binding in the weak sense regardless of whether they ought to conform to it all things considered. It is not necessary to consider the reasons they might have to refrain from conforming to the norm or whether any particular side of the scale of reasons is weightier. Whether binding force in the weak sense is also agent-relative or time-relative depends on whether the agent here refers to a real individual or simply a possible agent. If the addressee here meant a real individual, it could be argued that whether a norm is binding in the weak sense could differ from agent to agent. If the agents were real individuals and not possible ones, the binding force in the weak sense would also be time-relative as a real agent could have reason to conform to a norm at a certain point in time, while she might not at another. I will argue in the third sub-section that the set of

agents here refers to a set of possible/imaginary/apparent agents rather than real ones. Therefore, we can conclude that binding force in the weak sense is a black and white concept: once the axiological condition is fulfilled, (provided that the criteria of systemic validity are met) the norm will be valid once and for all, until it is repealed or abrogated.

a. Association of validity with binding force in the strong sense

It needs to be decided which understanding of binding force is to be associated with validity. I believe that binding force implied by the axiological element of axio-systemic validity is binding force in the weak sense. In order to demonstrate this, first I would like to touch upon some drawbacks of associating validity with binding force in the strong sense. Accordingly, one may mention two categories of drawbacks: technical and critical. The technical drawback relates to the relationship between legal norms. The critical drawback stresses that moral or non-legal critique of law should be possible. Let me proceed with the technical drawback.

Legal norms collide. Collision can be expressed as the prescription of two or more irreconcilable requirements regarding the same matter or action³⁵. As indicated by Alchourrón and Bulygin, the difference in the required actions lead to problems only if these two norms belong to the same system. In other words, the necessity of resolving collisions or conflicts arises from the unity of the legal system³⁶. The collision by norms of different normative systems does not need to be resolved. What interests me here is the collision within the same system.

Logical propositions are either true or false. In case there is a contradiction between two logical propositions, and if one of them is true, the other must be false. On the other hand, norms are not true or false, but valid or invalid³⁷. Logical contradictions are concerned with the truth value, while normative collisions are related with the criterion of fulfillment. In other words, normative collisions lead to problems because it is not possible to conform to the colliding norms at the same time³⁸. It might be the case

³⁵ **Gülgeç**, Yahya Berkol: *Lex Superior* İlkesi: Hukuki Geçerliliği ve Uygulaması, İstanbul 2018, p. 34.

³⁶ **Alchourrón**, Carlos E./**Bulygin**, Eugenio: "The Expressive Conception of Norms", in *New Studies in Deontic Logic: Norms, Actions and the Foundations of Ethics*, ed. Risto Hilpinen, Dordrecht 1981, p. 107.

³⁷ **Kelsen**, *General Theory of Norms*, pp. 212-213.

³⁸ **Alchourrón/Bulygin**, p. 107.

that the legal system envisages the annulment or *ab initio* invalidity of one of the colliding norms. Where this is not the case, the normative collisions can be resolved by the application of positive or meta-positive conflict rules. Conflict rules do not necessarily signify the existence of a normative hierarchy between the colliding norms. They signify primacy of application (*Anwendungsvorrang*) rather than normative hierarchy (*Geltungsvorrang*)³⁹. By applying a conflict rule, one of the colliding norms is *disregarded* but it retains its validity⁴⁰.

In case validity is associated with binding force in the strong sense, in other words, if only norms binding in the strong sense are considered to be valid, one cannot explain how disregarded norms retain their validity. The disregarded norm is not the norm the agent ought to conform to when all relevant norms are taken into consideration. Therefore, it should be invalid. As expressed however, since falsity and invalidity are not logically identical, the disregarded norm does not automatically become invalid due to a collision with another norm. Moreover, in cases where the conflict between the two norms is partial, there may still be cases where the disregarded norm could become binding in the strong sense. I should also add that even in cases where the conflict is not partial, the disregarded norm preserves the potential to become binding in the strong sense with regards to the cases of application in future. That is, in case the other norm is invalidated by way of repeal or annulment in future, the once disregarded norm becomes the only norm applicable to the agents. In short I can conclude as follows: an understanding of validity associated with validity in the strong sense renders applicability a pre-condition for validity with regards to conflicting norms. Nevertheless, just as one concludes that defeated reasons are still valid reasons for action⁴¹, there are cases where a disapplied or disregarded norm remains valid.

The second drawback of associating validity with binding force in the strong sense can be called as “critical drawback”. The critique concerned here can emerge in different contexts. The first one asserts that in case validity is associated with binding force in the strong sense, the moral critique of law becomes impossible. The other claims that following the association the irrationality of an agent who does not consider the norm

³⁹ **Gülgeç**, *Lex Superior İlkesi: Hukukî Geçerliliği ve Uygulaması*, pp. 15-16, 34-38.

⁴⁰ *Ibid.*, p. 36.

⁴¹ See for instance **Gregory**, Alex: “Normative Reasons as Good Bases”, *Philosophical Studies*, Vol. 173, No. 9, 2016, pp. 2302-2303.

which should not be conformed to, all things considered cannot be explained. I will refer to the second as the impossibility of the critique of the irrational addressee. Lastly, I will propound that the association leads to the relativization of the concept of validity and that this is unacceptable.

i. The impossibility of the moral critique of law

Let us imagine a sanctioned legal norm which the addressees have no moral reason to conform to. The concept of sanction implies the promise of reward for compliance with a legal norm or the threat of imposing evil in cases of violation⁴². On the other hand, it is generally those appearing as threat of evil that are called “sanctions”⁴³. The agents have a prudential reason to conform to a sanctioned legal norm. It is not necessary that the promise of reward or the threat of evil is realized or will definitely be realized. It is sufficient that they are possible⁴⁴. Of course, greater is the possibility, stronger the prudential reason one has to conform to the norm will be. Consequently, it can be concluded that the effective imposition of sanctions increases the binding force (in the weak sense) of the relevant legal norms.

Let us assume that the addressee has a moral reason to refrain from conforming to the sanctioned legal norm. There are wide ranges of positions with regards to the relationship of morality and prudence, hence moral reasons and prudential reasons. A widespread position contends that moral reasons categorically defeat prudential reasons⁴⁵. Accordingly, it is a fundamental feature of moral requirements that they ought to be fulfilled regardless of one’s concerns over her own well-being or interests⁴⁶. Let us assume that this position is right. Accordingly, in cases where an agent has

⁴² **Kelsen**, *Pure Theory of Law*, pp. 24-25. On the other hand, Austin believed that this understanding including rewards in the definition of sanctions was mistaken. See **Austin**, *John: The Province of Jurisprudence Determined*, 2nd Edition, ed. Wilfrid E. Rumble, Cambridge 2001, pp. 23-24.

⁴³ **Kelsen**, *Pure Theory of Law*, pp. 24-25.

⁴⁴ **Austin**, p. 23.

⁴⁵ See generally **Crisp**, Roger: “Prudential and Moral Reasons”, in *The Oxford Handbook of Reasons and Normativity*, ed. Daniel Star, Oxford 2018, p. 805 for an overview of the position.

⁴⁶ **Himma**, “The Ties That Bind: An Analysis of the Concept of Obligation”, pp. 26-28; **Himma**, “Coercive Enforcement and a Positivist Theory of Legal Obligation”, p. 223; **Himma**, “Towards a Comprehensive Positivist Theory of Legal Obligation”, p. 117. I have some concerns over this position. However, I will not adopt a contrary view in this paper.

prudential reason to conform to a legal norm and a moral reason to refrain from doing so, she ought to refrain from obeying the legal norm. Moreover, if only a norm binding in the strong sense is valid, a norm which an agent has merely a prudential reason in favor of and a moral reason against conforming to it should be considered as invalid. The same applies to the cases where an agent has a moral reason both in favor and against conforming to the legal norm but where the reason against is stronger than the reason in favor.

A distinction needs to be made here between the invalid norm and the norm from which the prudential reason originates. According to Kelsen, each norm has to have a sanction⁴⁷. In the past, I have criticized this view⁴⁸ and stressed that the legal norm and the sanctioning norm need to be considered as different norms⁴⁹. Therefore, in the example above, the prudential reason originates from a norm other than the one which the agent considers whether to obey or not. The reason for the invalidity of the norm under consideration is not the fact that the agent does not have a prudential reason to conform to it, but rather the fact that such prudential reason is defeated by a moral reason. Since defeated reasons for action remain as valid reasons and valid reasons can only be provided by valid norms, the norm envisaging the sanction remains valid. Moreover, it should be kept in mind that the sanctioning norm does not have the agent as its addressee, but the legal organ which is tasked with applying the sanction. Therefore, whether the agent ought to conform to the sanctioned norm or not does not play a part in determining whether the sanctioning norm is binding.

In case validity is associated with binding force in the strong sense, there can be no norm which agents have merely prudential reason to obey, but a moral reason to disobey. As previously expressed, the same applies to norms which, all things considered, an agent ought to disobey due to a stronger moral reason in favor of disobeying. If this is the case, the moral

⁴⁷ See **Kelsen**, Pure Theory of Law, pp. 52-52.

⁴⁸ See **Gülgeç**, Yahya Berkol: "Interrelationship Between Validity, Efficacy and Coerciveness", Ankara Üniversitesi Hukuk Fakültesi Dergisi, Vol. 66, No. 4, 2017, pp. 711-721; **Gülgeç**, Yahya Berkol: Normlar Hiyerarşisi: Türk, Alman ve İngiliz Hukuk Sistemlerinde Kural İşlemlerin ve Mahkeme Kararlarının Hiyerarşik Gücü, 2nd Edition, İstanbul 2018, pp. 10-11; **Gülgeç**, Lex Superior İlkesi: Hukukî Geçerliliği ve Uygulaması, pp. 13-15.

⁴⁹ See **Gülgeç**, Normlar Hiyerarşisi: Türk, Alman ve İngiliz Hukuk Sistemlerinde Kural İşlemlerin ve Mahkeme Kararlarının Hiyerarşik Gücü, p. 11. Also see **Hauser**, Raimund: Norm, Recht und Staat, Vienna 1968, p. 9.

critique of legal norms becomes impossible as a morally flawed legal norm cannot exist, i.e. be valid. In order for the critique to be possible, the object of the critique needs to exist first⁵⁰. Accordingly, the moral critique of law and the possibility of rendering law morally acceptable through reforms and changes are only thinkable for theories allowing for the existence of morally flawed legal norms. Naturally, agents should not comply with a legal norm in case the moral reasons against doing so defeat the reasons in favor. However, this is a determination regarding the binding force of the norm. In order to be able to make such a determination, there needs to be a norm which the agent has a moral reason to disobey. This was the point made by Hart in his famous critique of the Radbruch formula: there can be legal norms so unfair that one ought not to comply⁵¹.

Non-positivist legal theorists are aware of the dangers posed by the association of validity with binding force in the strong sense. This is why non-positivists such as Gustav Radbruch and Robert Alexy attempt to strike a balance between legal certainty and justice or fairness⁵². This balance tilts towards legal certainty, meaning legal norms are considered to be valid unless they exceed a certain threshold of immorality. Consequently, these theories allow for the moral critique of legal norms in cases where immorality remains under the threshold.

The impossibility of the moral critique of law is not a definitive objection to the association of legal validity with binding force in the strong sense. All that argument demonstrates is that such association deprives us from a valuable opportunity. However, not all perceived as valuable have to exist. Therefore, if I want to demonstrate why this association is not possible and not merely why it is unreasonable, I need a stronger argument.

ii. The impossibility of the critique of the irrational agent

Reasons we have may conflict. In this conflict we ought to perform the action supported by the stronger set of reasons. Therefore, we can conclude

⁵⁰ **Pino**, Giorgio: "Positivism, Legal Validity, and the Separation of Law and Morals", *Ratio Juris*, No. 190, 2014, pp. 193-194.

⁵¹ **Hart**, "Positivism and the Separation of Law and Morals", p. 620.

⁵² See **Radbruch**, Gustav: "Gesetzliches Unrecht und übergesetzliches Recht", *Süddeutsche Juristen-Zeitung*, Vol. 1, No. 5, August 1946, p. 108; **Kühl**, Kristian: "Radbruch Formülü", trns. Mehmet Cemil Ozansü, *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası*, Vol. LXX, No. 1, p. 373; **Alexy**, Robert: *The Argument From Injustice: A Reply to Legal Positivism*, trns. Bonnie Litschewski Paulson and Stanley L. Paulson, Oxford 2004, pp. 52-53.

that we have a second order reason in the Razian sense⁵³ to act in accordance with the stronger set of reasons. Similarly, we can say that we have an exclusionary reason to refrain from acting based on the defeated set of reasons⁵⁴. These reasons could be understood as expressing the two different meanings of the principle of autonomy dictating that agents ought to act based on the balance of reasons⁵⁵.

Although it is not possible to examine the issue in detail here, I believe that the practical difference thesis is a thesis regarding the legal system in general and does not apply to individual legal norms⁵⁶. In other words, individual legal norms do not have to provide new and previously non-existent reasons for actions. After all, the normative force of the reason one has to comply with a norm might originate from another norm as demonstrated by the case of sanctioned legal norm.

On the other hand, there are cases where legal norms provide their addressees a new reason for action. For instance, Raz's authoritative directives constitute both a reason to refrain from acting on certain reasons while also being a reason in favor of a certain action. Raz calls this sort of reasons the "protected reasons"⁵⁷. On the other hand, exclusionary reasons

⁵³ Regarding second order reasons see **Raz**, *Practical Reason and Norms*, p. 39.

⁵⁴ For the concept of exclusionary reasons in general see **Raz**, *Practical Reason and Norms*, p. 39. Raz's focus is on how authoritative directives constitute exclusionary reasons. There is a difference between the exclusionary reason I mention here and the exclusionary reasons constituted by authoritative directives regarding the reasons they exclude. Accordingly, authoritative directives might also exclude reasons from the normally stronger set of reasons. This way, law can lead to a practical difference and fulfill the conditions of the practical difference thesis. For more on the practical difference thesis see **Coleman**, Jules L.: "Incorporationism, Conventionality, and the Practical Difference Thesis", *Legal Theory*, No. 4, 1998, *passim*; **Waluchow**, Wil: "Authority and the Practical Difference Thesis: A Defense of Inclusive Legal Positivism", *Legal Theory*, No. 6, 2000, *passim*; **Himma**, Kenneth Einar: "H.L.A. Hart and the Practical Difference Thesis", *Legal Theory*, Vol. 6, No. 1, 2000, *passim*; **Moreso**, José Juan: "In Defense of Inclusive Legal Positivism", *Dritto & Questioni*, No. 1, 2001, pp. 115-117. The exclusionary reason I mention here does not originate from any authority. It can be considered as a reason provided by a basic principle of practical rationality dictating agents to decide on the balance of reasons.

⁵⁵ I have previously claimed that the principle of autonomy can be understood as a second order reason. See **Gülgeç**, *Normativite ve Pozitivizm*, p. 207.

⁵⁶ For a detailed examination see *ibid.*, pp. 530-541.

⁵⁷ **Raz**, *The Authority of Law: Essays on Law and Morality*, p. 18.

may not exclude all of the first order reasons an agent has⁵⁸. In such cases the agent may have to refrain from taking the action supported by a protected reason even if she refrains from acting based on the excluded reasons. The authoritative directive that is the protected reason here is not valid if validity is associated with binding force in the strong sense. Nevertheless, since the protected reason may only originate from a valid norm which is the authoritative directive, this would mean that the agent never had a first order reason originating from the authoritative directive. This seems to be an absurd analysis. Therefore, the authoritative directive needs to be a valid norm for one to be able to speak of the existence of a protected reason validity of which has been assumed in the example above.

In case of association of validity with binding force in the strong sense, some of the norms conferring normative force the reasons in the lighter side of the scale will need to be invalid. Let me first explain why it is some and not all of such norms that are invalid. As explained before, the reasons an agent have in order to comply with a norm may or may not originate from the norm itself. Often it is another norm providing these reasons. For instance, in case a norm is sanctioned, the agent's prudential reason to comply with the norm originates from the sanctioning norm. However, even if this prudential reason is defeated, the sanctioning norm cannot be invalid. This is because the agent here is not an addressee of the sanctioning norm. The addressees of the sanctioning norms are the legal organs or persons charged with applying the sanction in cases of violation. Therefore, the sanctioning norm is not "a norm which is not binding all things considered". On the other hand, in some other examples even if the reason to comply with the norm (N_1) originates from another norm (N_2), when one violates N_1 one, she also violates N_2 . For example, one of the reasons we have in favor of complying with the legal norm prohibiting thievery originates from the moral norm with the same content as the legal norm. If, all things considered, one ought to steal, we will need to conclude that the moral norm is invalid because the agent ought not to comply with it all things considered. The following explanations are made with these sorts of cases in mind.

The logical contradiction here can be stated as follows. The agent needs to be involved with balancing in order to determine which set of reasons is heavier and to take into consideration all relevant reasons. As a result of this

⁵⁸ **Raz**, *Practical Reason and Norms*, p. 46; **Raz**, Joseph: "Reasons for Action, Decisions and Norms", in *Practical Reasoning*, ed. Joseph Raz, Oxford 1978, p. 132.

balancing the agent will have to conclude that the lighter set of reasons are actually not reasons. This is because she would have to reach the conclusion that norms conferring normative force on these reasons are invalid. However, if this is true, the agent is mistaken at the start of her deliberation as she takes invalid reasons and norms into account. Norms logically precede the reasons they provide. The fact that the reason it provides is not binding in the strong sense, should not be the cause of the norm's invalidity.

The following objection can be made here: the norm is not invalid *ab initio*, but *ex nunc*, following the reason it provides is defeated as a result of balancing. Therefore, the fact that that in order to attribute normative force to the reason, the norm needs to be valid prior to the balancing does not constitute and obstacle for associating validity with binding force in the strong sense. The argument here seems to claim that a norm which is inefficacious or disregarded in a single instance becomes invalid. However, the same norm would be binding in the strong sense for another agent. This is inconceivable as the validity of a norm is its existence and existence is a black or white concept, i.e. something either exists or it does not. The only way for the objection to escape this fundamental contradiction is to claim that validity is a relativized concept and this is a matter for the next subsection.

On the other hand, maybe the objection can be formulated in another way. Binding force in the strong sense relates to concrete cases and may yield different results for different agents. Maybe the objection expresses that a norm which can never be binding in the strong sense is invalid. In other words, it fails to require an action which can reasonably constitute what a possible agent ought to do all things considered. Let us illustrate the point with an example relating to an expressly immoral legal norm, so that the agents may not have any moral reason in favor of complying with the legal norm. On the other hand, let it be the case that all agents have a prudential reason to do so based on a sanction to be applied for violation. Considering the fact that here I assume moral reasons always defeat prudential reasons, such a norm will never be binding in the strong sense for any agent. Nevertheless, any agent who does not consider a valid reason would be irrational regardless of whether she takes the right action. Such an agent who is not aware that the prudential reason she has is defeated by a contrary moral reason takes the right action for the wrong reason. In case validity is associated with binding force in the strong sense, the norm conferring normative force on the prudential reason, i.e. the sanctioning norm would have to be invalid and invalid norms cannot truly confer

normative force. If the reasoning above is sound, then the association of validity with binding force in the strong sense fails to explain why the agent in the example is irrational. At this point I can point out a parallel with Hart's candor (*candour*) argument against Radbruch formula⁵⁹. An agent who takes the right action without knowing what is sacrificed is irrational. In the example, the agent is unaware of the threat of sanction she faces. It is the price to be paid for the morally right action.

In conclusion, even if a norm is not binding in the strong sense, the fact that the reason provided by the said norm is not taken into consideration during the practical deliberations would amount to irrationality. The consideration of the reason provided by a norm which is not binding in the strong sense may not change the action to be taken, all things considered. However, since the determination that a reason (norm) is not binding in the strong sense can only be made after balancing it against reasons in the opposite direction, the agent willing to act for the right reason will need to take the said reason, and the norm providing it, into account. The association of validity with binding force in the strong sense will lead to the inability to criticize the irrational practical deliberation of the agent.

iii. The relativization of the concept of validity

Here I will argue that association of validity with binding force in the strong sense will lead to a relativized understanding of validity based on the addressees of the norm. In other words, the same legal norm could be valid for some of its addressees, while it is invalid for certain others. I contend that the relativization of validity should be avoided in order to circumvent difficult theoretical problems.

Binding force in the strong sense concerns concrete cases where it is determined whether the action demanded by the norm is the action to be taken by the agent, all things considered. Therefore, as the concrete case or the reasons agents have change, the norm's binding force will be altered. This means that, when binding force in the strong sense is considered as a pre-condition of validity, the same norm will be valid for some agents while it will be invalid for others. It will exist for some and be non-existent for others. In other words, the concept of validity is relativized based on the addressees of the norm.

⁵⁹ See Hart, "Positivism and the Separation of Law and Morals", pp. 619-620.

I believe that this conclusion is already strange and absurd. As long as validity implies the existence of the norm, it should not be possible for a norm to be existent and non-existent at the same time. Of course, there is nothing illogical in expressing the following propositions at the same time: “According to addressee A, the norm N is valid” and “According to addressee B, the norm N is invalid”. Obviously, as long as these are understood as real propositions and validity is accepted to be the existence of a norm, one of these propositions would have to be false. Notice that subjectivity is not what is concerned with the relativization at hand. It is not the claim that addressees’ beliefs regarding the validity of norms may differ. It is the claim that the validity of the norm differs. Therefore, anyone subscribing to the association of validity with binding force in the strong sense would have to commit a contradiction by claiming that a norm is both valid and invalid at the same time.

Although it is logically impossible for something to be existent and non-existent at the same time, it is perfectly possible for the existing concept to have different effects under different circumstances. A norm’s effect is its binding force. It is true that the existence of a norm implies at least a minimum level of binding force. However, this does not prevent the altering of the effect above the minimum threshold based on the circumstances. On the other hand, if the norm no longer exists, its effect should cease for all addressees and at the same time.

I believe that this final argument regarding the drawbacks of the association project is conclusive and demonstrates the failure of the project. This is because it moves from a conceptual truth between existence and its effect. Accordingly, I believe that the concepts of validity and binding force in the strong sense should be separated in such a way that validity does not lead to binding force in the strong sense and vice versa.

b. Association of validity with binding force in the weak sense

The easy way to take here would be to claim the following: 1) it is conceptually necessary to associate validity with a certain binding force, 2) binding force in the strong and weak senses are the only available options, 3) since the association with binding force leads to irresolvable theoretical problems, validity should be associated with binding force in the weak sense. Here I will demonstrate that the association of validity with binding force in the weak sense does not lead to similar theoretical problems and that axio-systemic validity has advantages over mere systemic validity.

i. Minimum character of binding force in the weak sense

Binding force in the weak sense is minimum with respect to the following three aspects: 1) the strength of the reason, 2) the source of the reason and 3) addressees. I have stressed before that a norm which no one has a reason to conform to cannot be valid. It is sufficient for addressees of a norm to have some reason to conform to it in order for the norm to be binding in the weak sense. It is not necessary that the norm requires the action which ought to be taken by the addressees, all things considered. This means that a norm can be binding in the weak sense even if the reasons addressees have to conform to it are of minimum strength. This is the first meaning of the minimum character of binding force in the weak sense.

Second, such reason one has to conform to the norm does not even have to originate from the norm itself. In other words, it is not necessary that the addressees have a reason to conform to the norm because it is a legal norm. The reason may be provided by the moral worth of the norm's content (i.e. a norm of morality) or the sanctioning norm (i.e. a norm of prudence). I have stated above that the practical difference thesis should be understood as a requirement for the legal system as a whole and not of particular legal norms. Therefore, binding force in the weak sense is also minimum with respect to the conditions regarding the origin of the reasons addressees have in order to conform to the norm.

The third sense is the most important and complicated. All norms have a certain set of addressees. In certain cases it may not be clear from the wording of the legal norm whom the set of addressees consists of⁶⁰. Even if it might be difficult to determine who exactly form the set of addressees, a norm simply cannot lack one. Here it is important to determine whether binding force in the weak sense requires all members of the set to have some reason to conform to the norm or whether this "set" refers to real agents or simply imaginable ones.

In cases where sanctions are envisaged against the violations of the norm, this question loses its importance. The fact that there is a threat of sanction provides some prudential reason for all members in the set of

⁶⁰ For instance, sometimes legal norms mention "relevant authorities". It may not be clear who these authorities are. In such cases the exact set of addressees is often determined by subsequent regulations. In the worst case scenario, it could be assumed that the norm addresses the administration.

addressees⁶¹. The fact that sanction may be applied to some members, but not others or that some addressees may evade sanctions more easily than the others does not change the fact that the sanctioning norm provides all addressees a reason to conform. For instance, even if the norm has not been applied to a certain sub-section of the set of addressees (for instance wealthy citizens) does not guarantee that the future application of the sanction will follow the same course. The improbability of suffering the consequences of sanction will definitely affect the strength of the reason an addressee has to conform to the norm. Note, however, that this change occurs in the magnitude of the binding force and not on the existence of the reason. In other words, the strength of the reason provided by the improbable sanction is never “zero”. In other words, even if the concerned person is almost sure that the courts or administrative authorities will not apply the sanction to her, she can never be completely sure of it. A similar explanation goes for the cases where it is relatively easier for an addressee to evade the sanction. One can never foresee the future with certainty. When considered along with the minimum character of binding force in the weak sense with regards to normative force of the reason, these explanations are sufficient to demonstrate why a sanctioning norm provides a reason for all addressees to conform to the sanctioned norm.

A similar observation can be made for cases where the reason to conform to the norm stems from the moral value of the legal norm’s content. Moral norms are universal⁶² and therefore, the reason originating from the moral content of a legal norm will be shared by all addressees. Therefore, all addressees without exception would have reason to conform to a morally worthy legal norm.

The question of whether all addressees need to have reason to conform to the norm becomes meaningful in cases where such reason does not originate from the sanction or the morally valuable content of the legal norm. Addressees might have moral or prudential reasons arising from their subjective states. For instance, an official who takes a vow to comply with laws will have a distinctive reason to conform to legal prescriptions when compared with a civilian. Promising affects the reasons one has. Moreover, conforming to a rule might be beneficial for some while being detrimental to

⁶¹ See **Kramer**, Matthew H.: “Requirements, Reasons and Raz: Legal Positivism and Legal Duties”, *Ethics*, Vol. 109, No. 2, January 1999, p. 379.

⁶² **Kant**, Immanuel: *Groundwork of the Metaphysics of Morals*, 11th Edition, trns. Mary Gregor, ed. Mary Gregor, Cambridge 2006, pp. 14-15.

others. If all legal norms must have a set of addressee, and if some of the addressees might have reason to conform to the norm while others do not, what ratio of the addressees should be deemed sufficient for the norm to be valid?

Expectedly, it is not possible to provide a numerical answer to this question. It also seems as a pretty difficult question to answer. I believe that this is because the right question is yet to be asked, or rather because I did not yet relate the question to why one needs to render binding force a condition of validity. I have indicated the following. Systemic validity is capable of accounting for the legal practice regarding the issuance, repeal, validity and invalidity of norms in a legal system with admirably high coherency. No legal theory doubts if a repealed or annulled norm loses its validity. Therefore, it is not necessary to suspect systemic validity's role in explaining these ordinary legal phenomena. The discussion should not concern systemic validity's role in a reasonable understanding of validity, but its sufficiency. Some philosophers cast doubt on systemic validity's capability of explaining the validity of certain norms such as the norms of international law or foreign law applicable in cases of conflict of laws⁶³. On the other hand, Gustav Radbruch's and Robert Alexy's theories in the non-positivist tradition, while accepting that systemic validity is a positive condition for legal validity, imply that systemic validity fails to account for the invalidity of norms which are unacceptably or unbearably immoral. By somewhat approaching the non-positivist tradition I have conceded the fact that systemic validity makes no attempt to explain why issuances conforming to the systemic criteria lead to creation of norms. In other words, systemic validity does not offer an explanation as to why these issuances are norms in the proper sense. In order to guarantee that issuances conforming to the systemic criteria constitute norms, I have suggested to combine systemic validity with an axiological element requiring that in order for a certain declaration of will by the authorities to constitute a norm, at least someone needs to have a reason to do so.

Depending on the explanation above I conclude that following is valid.

1) Someone who is not determined by the legal enactment as its addressee does not need to have reason to conform to the enactment. Even if, due to the

⁶³ For instance see **Grabowski**, pp. 290-291; **Raz**, "Legal Validity", pp. 341-342; **Marmor**, Andrei: "Exclusive Legal Positivism", in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, eds. Jules L. Coleman, Kenneth Einar Himma and Scott J. Shapiro, Oxford 2004, p. 105.

moral worth of the enactment's content someone who has not been determined as an addressee might have reason to do as the enactment prescribes, this fact should not be taken into consideration while determining whether an enactment has binding force. 2) At least a portion of the determined set of addressees must have reason to conform to the enactment if such enactment is to constitute a norm. The reason might originate from norms other than the one binding force of which is under consideration.

The first condition concedes the fact that under certain circumstances a non-addressee might have reason to take the action required by the norm. For instance, consider a statutory provision envisaging that "Everyone with a monthly income over 5000 Dollars, shall spend five percent of its total income with the purpose of aiding the poor". Let us assume that helping the poor, in other words the action required by the norm, is morally worthy. In such a case a person with a monthly income of 4999 Dollars also has a moral reason to help the poor. However, the reason such person has cannot be considered as a reason to conform to the norm as the norm does not require the person to do so.

On the other hand, the following question might be asked: if a certain portion of the determined addressees do not have reason – whether defeated or undefeated - to conform to the norm can it be reasonably claimed that these persons are still the true addressees of the norm? In other words, could there be a schism between the real addressees and apparent addressees?

Let real addressees be those with a reason to conform to the norm. Apparent addressees would consist of people obedience of which is demanded by the norm. It is possible for some apparent addressees not to be real addressees. Therefore, there might be a discrepancy between the sets of real and apparent addressees. The fact that binding force in the weak sense is minimum with regards to the set of addressees implies that the sets of real and apparent addressees do not have to overlap. Therefore, the minimum axiological element to be supplemented to systemic validity does not require all apparent addressees to have reason to conform to the norm.

The first important point here concerns the concept of validity. There might be a schism between the real and apparent addressees as explained above. However, it cannot be stated based on the link between minimum binding force and validity that "a legal norm is only valid in virtue of persons having reason to conform to it". Although minimum binding force is a condition for validity, validity as the existence of the norm is a black and

white concept⁶⁴. Therefore, the fact that some of the apparent addressees of the norm have absolutely no reason to conform to the norm cannot be explained by asserting that the norm is not valid for these addressees, but by realizing that the norm does not constitute an “*ought*” with regards to the actions of these persons. In other words, such people are not the *real* addressees of the norm.

Herein lies another importance of sanctions in legal systems. As previously explained, sanctions provide a standard prudential reason, weight of which may differ from one addressee to the other, for all apparent addressees of the norm. Thus, any possible schism between the sets of real and apparent addressees is bridged.

I have also stressed that the fact that people other than the apparent addressees have reason to perform the action required by the norm cannot be used to establish that the norm is binding in the weak sense. Accordingly, the set of real addressees may be equal to or narrower than the set of apparent addressees, but may never include agents falling outside the scope of the latter. Let me briefly explain why this is the case. Apparent addressees constitute a part of the norm-content. Even if a person who is not the apparent addressee of a norm takes the action required by the norm, which is another part of the norm-content, cannot be deemed to be conforming to this norm. A butcher adopting the standards of hygiene envisaged for bakers does not conform to the “Regulation Regarding the Standards of Hygiene for Bakeries”. In the best case scenario, the butcher conforms to the set of rules he adopts for its own business as inspired by the said regulation. The fact that the apparent addressees constitute a part of the norm-content makes it impossible for the set of real addressees to include persons falling outside the set of apparent addressees.

There is yet another obstacle to be surpassed with regards to the condition of minimum binding force. Sometimes when norms are enacted none of the apparent addressees have a reason to conform to the norm. Moreover, the apparent addressees may not even exist in reality. Let me start with a rather extreme example. Let us assume that a legislature believing that respect for elders is of utmost importance enacts a statute comprising the following provision: “Everyone is obliged to treat their mothers with respect”. Let us assume again that a tragic catastrophe has occurred right before the said statute was enacted and that all mothers on earth have lost

⁶⁴ See **Elias**, Katarzyna/**Zaluski**, Wojciech: “Critical Remarks on Alf Ross’s Probabilistic Concept of Validity”, *PRINCIPIA*, Vol. 61-62, 2015, pp. 249-250.

their lives. Since there is not a single child having a mother by the time the statute was enacted, no one can have a reason to conform to the norm. Let me give another example. Let us assume that the legislature has decided to impose a wealth tax at the rate of one percent on individuals with an income above a certain threshold. However, as of the issuance date, no citizen is above the said threshold of income. Therefore, in reality no one has a reason to conform to the norm. It can be further claimed that the set of real addressees for these norms is an empty set. Should we then conclude that these statutes are invalid because no one really has reason to conform to them as of the date they have been enacted?

Let me first mention a drawback of thinking that the norms in the examples are invalid. If such norms are invalid, states will sometimes fail to fulfill their function of providing social cooperation and coordination by planning. For instance, a statute regarding the precautions to be observed during pandemics will be invalid in the absence of a pandemic and will not regain its validity upon the emergence of one. However, a claim cannot be simply untrue because it has undesirable consequences. Thankfully, we do not have to acknowledge that legal norms are invalid in case the set of real addressees is an empty set. The only evaluation that needs to be performed with regards to the condition of minimum binding force is whether the set of apparent addressees can possibly correspond to a set of real addressees. In a universe where mothers suddenly disappear, the fact that female children who hold the potential of becoming future mothers remain renders the set of apparent addressees of the norm possible. The impossibility of the set of apparent addressees implies that no one can possibly have a reason to conform to a norm and results in the failure to meet the condition of minimum binding force⁶⁵. As a result, the binding force in the weak sense concerns whether the set of apparent addressees is possible and it is not necessary that any real addressee has at least some reason to conform to the norm at any given time.

⁶⁵ Here I would like to give an example concerning individual norms in a legal system. Some of these norms concern an action to be taken by a particular person. In other words, the set of apparent addressees for these norms is a single real (or legal) person. If the relevant person has died before the emergence of the individual act, the act would be invalid. This is because no one will ever have a reason to conform to such individual norms.

Kelsen believes that in order for a certain norm to be valid, it should at least exhibit some level of efficacy⁶⁶. Kelsen's reason for this position is that the constant non-application of and non-compliance to a norm leads to a new norm repealing the now inefficacious norm. This phenomenon is called *desuetude*⁶⁷. Hart adopts the contrary opinion and holds that there is no link between the efficacy of a single norm and its validity⁶⁸. Accordingly, efficacy is only a condition for the validity of the legal system as a whole and not its particular norms⁶⁹. Elsewhere, I have criticized Kelsen's view and sided with Hart⁷⁰. The reason for my rejection of Kelsen's phenomenon of *desuetude* is that as long as it lacks positive source, i.e. a norm envisaging efficacy as a condition for the validity of norms, the link between minimum efficacy and legal validity violates the dualism of is and ought. The condition of minimum binding force, although it does not have a positive source, is exempt from this criticism as it establishes a link between two normative concepts (legal validity and normativity of reason).

Let me sum up the final understanding of validity I have reached before taking on further issues. Accordingly, validity of a legal norm implies that 1) the norm has been enacted in accordance with the criteria determined by another norm valid in the same system (and that it has not been repealed or annulled) and 2) it is possible for at least one person from the set of apparent addressees to have reason to conform to the norm. These conditions are cumulative. Because it is meaningless to speak of an enactment which does not comply with the system-based criteria as "legal", while it is also impossible for something to be a norm without at least some addressees having some sort of reason to conform to it. A legal norm may only exist and be valid as a result of the fulfillment of both these conditions. I will call the understanding of validity thus formulated "axio-systemic validity".

The condition of minimum binding force may also be named as the "axiological element" of legal validity. Therefore, one may be inclined to conceive of axio-systemic validity as something similar to the understanding of validity adopted by non-positivist theories. Let me briefly state here the differences between the two views:

⁶⁶ **Kelsen**, *Pure Theory of Law*, pp. 212-213.

⁶⁷ *Ibid.*

⁶⁸ **Hart**, *The Concept of Law*, p. 103.

⁶⁹ *Ibid.*, p. 116.

⁷⁰ See **Gülgeç**, "Interrelationship of Validity, Efficacy and Coerciveness", pp. 686, 690, 696.

1) Axio-systemic validity perceives prudence as well as morality as the proper constituent of the axiological element. Despite what is purported by non-positivist theories, there is no necessary connection between morality and legal validity. The axiological condition can be fulfilled by the mere existence of prudential reasons.

2) In non-positivist theories the relationship between the external source (morality) and legal validity appears in the form of “contrariness”, in other words the incompatibility between the content of the legal norm and the external criteria. This is not the case with axio-systemic validity. The axiological element in non-positivist theories is negative, while it is positive in axio-systemic validity. In other words, non-positivist theories require the absence of unbearable or extreme immorality or injustice while axio-systemic validity seeks the existence of a minimum moral or prudential reason. Naturally, axio-systemic validity would also dismiss an immoral norm which addressees have no other reason to conform to as invalid. However, the fact that addressees have no reason to conform to the norm does not automatically indicate a contrariness to the external sources. As I will explain below, meaningless expressions of will are contrary to neither morality nor prudence. Yet, no one can have reason to conform to these norms. Therefore, meaningless expressions of will cannot lead to norms. In short, while non-positivist theories require the absence of a “contrariness” above a certain threshold between the legal norm and morality, axio-systemic validity seeks the existence of a reason to conform to the legal norm.

3) It can be concluded that the axiological element of axio-systemic validity is much weaker than that of non-positivist theories. Moreover, non-positivist theories seem to associate validity with binding force in the strong sense, as they fail to distinguish between an “invalid legal norm” and “a legal norm which is too unjust to be obeyed”. On the other hand, axio-systemic validity allows for the validity of a legal norm which, all things considered, ought not to be obeyed. In this context, axio-systemic validity can explain the rationality of phenomena such as civil disobedience or violation of gravely unjust legal norms without having to recourse to the invalidity of the legal norm.

ii. Three advantages of axio-systemic validity

The three important advantages of associating validity with binding force in the weak sense over an association with binding force in the weak sense should be clear by now. Association of validity with binding force in

the weak sense is capable of explaining 1) how the norm which ultimately ought not to be obeyed in normative collisions retains its validity, 2) how it can be justified not to act in accordance with a valid norm and 3) the irrationality of an addressee who does not take into account the prudential reason she has in favor of conforming to a legal norm which, all things considered, ought not to be obeyed due to a moral reason. Here I will examine three advantages of axio-systemic validity over systemic validity.

The first case concerns the principle of *impossibilium nulla obligatio est*. This principle expresses that in order for the existence of a normative requirement, the required action must be possible⁷¹. In other words, “ought implies can”⁷². At the other end of the spectrum there is the principle of *necessitatem nulla obligatio est*. This principle expresses that there can be no obligation regarding an action which will necessarily be taken⁷³. In other words, the first principle requires a possible action while the second demands a non-necessary one. Positivist authors generally do not contest these principles.

The second case expresses that meaningless expressions of will cannot lead to norms⁷⁴. For instance, a statutory provision such as “All ought to abcd” does not constitute a norm despite the fact that it has been enacted in accordance with the system-based criteria. This is because “abcd” cannot be interpreted as a meaningful verb. This is also generally accepted by positivist authors⁷⁵. One, therefore, needs to examine whether invalidity of meaningless expressions can be explained by systemic validity.

⁷¹ For instance see **Zorzetto**, Silvia: “Thinking of Impossibility in Following Legal Norms: Some Brief Comments About Bartosz Brożek’s Rule-Following”, *Revus*, No. 20, 2013, p. 56.

⁷² See **Ferreira**, Nick: “Feasibility Constraints and Human Rights: Does ‘Ought’ Imply ‘Can’”, *South African Journal of Human Rights*, Vol. 28, No. 3, 2012, p. 483; **Feis**, Guglielmo: “Ought Implies Can: Counter-Examples and Intentions”, *European Journal of Legal Studies*, Vol. 9, No. 2, 2017, pp. 37-39. “Ought implies can” rests on Kant’s idea that in order to be normatively required to take some action, it must be possible to take the action. See **Kant**, Immanuel: *The Critique of Pure Reason*, trans. and ed. Paul Guyer, Cambridge 2000, p. 540.

⁷³ Natural necessities cannot constitute normative requirements. A norm needs to be violable. See **Zorzetto**, p. 56.

⁷⁴ **Gözler**, Kemal: *Hukukun Genel Teorisine Giriş: Hukuk Normlarının Geçerliliği ve Yorumu Sorunu*, Ankara 1998, p. 29.

⁷⁵ Kelsen dismisses expressions of will which does not contain a sanction and which cannot be interpreted as relating to the scope of application of a sanction as irrelevant (**Kelsen**, *Pure Theory of Law*, p. 52). These are norms subjective meaning of which

The third case claims that norms cannot imply descriptive statements. They can only imply normative statements. Descriptive and normative statements are either true or false. Norms, on the other hand, cannot be true or false, but valid or invalid⁷⁶. Descriptive statements convey information as to what is. Norms should not describe what is, but constitute an “ought” for human action. Formal sources of law sometimes contain descriptive statements. Some descriptive statements can be interpreted as expressing normative requirements and it can be propounded that such statements are eligible for representing the content of a norm. On the other hand, it should be conceded that descriptive statements which cannot be interpreted as normative statements cannot be norms⁷⁷. Lastly, I will demonstrate that axio-systemic validity is more successful than systemic validity in accounting for why norms cannot be expressed by descriptive statements.

Systemic validity does not impose restrictions on the norm-content unless such restriction has been envisaged by a norm of the legal system. Therefore, it falls short of explaining why actions which are impossible or necessary due to a law of nature cannot constitute the action required by a norm.

In fact, it can be observed that some positivist thinkers do not adopt a pure version of systemic validity. Kelsen, for instance, combines systemic validity with factual validity. Accordingly, particular norms lacking minimum efficacy lose their validity although no systemic norm envisages it⁷⁸. Since I attempt to combine systemic validity with axiological validity, I

cannot be interpreted as their objective meaning (*ibid.*) and therefore are invalid. Kemal Gözler indicates that meaningless expressions of will do not have the character of norms while also adhering to the idea of systemic validity (*see Gözler, Hukukun Genel Teorisine Giriş: Hukuk Normlarının Geçerliliği ve Yorumu Sorunu*, pp. 29, 73).

⁷⁶ On the other hand, this issue is not without dispute. Some thinkers believe that norms can be true or false (**Alchourrón/Bulygin**, p. 95). Here I will not attempt to take sides in this discussion. Regardless of one’s side in this dispute, the thought that descriptive statements cannot be expressed by norms does not rely on the truth-aptness of norms. Therefore, the dispute regarding the truth-aptness of norms will not affect the conclusion here.

⁷⁷ It should not be thought that I believe norms to be statements. When I mention a statement not being a norm, I mean a statement not being suitable for being expressed by a norm.

⁷⁸ **Kelsen**, Hans: *General Theory of Norms*, trns. Michael Hartney, Oxford 1991, p. 163. Kemal Gözler is another author combining systemic validity with factual validity. Accordingly, although the validity of all other norms originate from yet another norm

do not have a generic objection to the attempt to do the same with systemic and factual validity.

One might think that it is possible to explain the principle of *impossibilium nulla obligatio est* based on a combination of systemic and factual validity. This is because a norm which cannot be conformed to will inevitably remain below the minimum efficacy threshold. This being said, the systemic-factual validity implies more than the principle. The doctrine of *desuetude* also applies to norms which could be conformed to but were not. Therefore, what systemic-factual validity explains does not completely correspond to what the principle expresses.

There might also be cases where systemic-factual validity completely fails to explain the invalidity of norms requiring the impossible action. Since an agent cannot conform to or comply with a norm requiring the impossible, such norm cannot be efficacious by way of observance⁷⁹. However, I believe that this is not the only way duty-imposing norms can be efficacious. In the past I have adopted the view that in case a duty-imposing norm is sanctioned, whether the sanction has been applied or not should also be considered while determining the efficacy of a norm⁸⁰. This claim might seem self-contradictory. This is because unlike Kelsen, I think that sanctioning norm is a norm independent from the sanctioned one. When this is the case, one may be inclined to believe that applying the sanction only affects the efficacy of the sanctioning norm and not the sanctioned one. It must be acknowledged, however, that the sanctioned norm still serves a function within the mind of the sanction applying organ. The fact that the sanctioned norm has been violated serves as a reason for the application of the sanction. In other words, the sanctioned norm still continues to create a change in the legal realm. Therefore, it must be conceded that, although it is not the norm complied with by the organ applying the sanction, the process of sanction application increases the efficacy of the sanctioned norm. In other words, although the sanctioned norm is not conformed to by the

within the same legal system, the validity of the constitution cannot stem from another norm, but from the will of the primary constituent power. In other words, a constitution is valid because it has been issued and it factually exists. See **Gözler**, Kemal: *Hukuka Giriş*, 10th Edition, Bursa 2013, pp. 207-208.

⁷⁹ Compliance is apt for measuring the efficacy of duty-imposing norms while it is inapt to determine the efficacy of power-conferring norms. See **Munzer**, Stephen: *Legal Validity*, The Hague 1972, pp. 30, 33.

⁸⁰ See **Gülgeç**, “Interrelationship Between Validity, Efficacy and Coerciveness”, pp. 704-705.

sanction applying organ, it could be argued that the legal system raises the efficacy level of the violated norm by showing the envisaged reaction (application of the sanction).

Let us now assume that the legal system attaches a sanction to a norm requiring the impossible. If the legal officials charged with applying the sanction for the violations of such a norm actually, even if occasionally, apply the sanction envisaged, one can no longer hold the norm requiring the impossible to be inefficacious and thus invalid. What is important from the perspective of the systemic-factual validity is whether such sanctions are applied or not. Therefore, even if it could be argued that the legal officials should refrain from applying the sanction, application of the sanction continues to contribute to the efficacy of the norm requiring the impossible. In conclusion, there might be cases where it is altogether impossible to explain the principle of *impossibilium nulla obligatio est* by reference to systemic-factual validity.

Axio-systemic validity makes no reference to facts while explaining why an impossible action cannot be the action required by a norm. What is important is whether the agent might have reason to take the impossible action. This is not possible because reason does not demand the impossible. This is true for both morality and prudence. Of course, it might be impossible to conform to the demands of reason in a specific case. For instance, there may be cases where one has reasons to take conflicting actions and if taking one of these actions will *ipso facto* mean failing to take the other, it would not be possible to take one of the actions actually supported by reason. However, the principle of *impossibilium nulla obligatio est* concerns actions which are never possible, not actions impossible to be taken under certain circumstances⁸¹. Reason never requires an action that can never be taken by the agents.

Can it be explained by systemic-factual validity why actions that will necessary be taken cannot be required by norms? The first point to make is that the principle of *necessitatem nulla obligatio est* implies that the efficacy of a norm cannot necessarily be a hundred percent. In other words, the norm must be violable. The expression “necessarily” here is important. A norm can be fully effective. A norm which has never been violated and has always been complied with is fully efficacious. However, this must be contingent

⁸¹ Joachim Hruschka stresses that the action mentioned by the principle is physically impossible. See **Hruschka**, Joachim: “Verhaltensregeln und Zurechnungsregeln”, *Rechtstheorie*, Vol. 22, No. 4, 1991, pp. 454.

and not necessary. The principle requires that a norm is violable, not that it is violated.

As previously explained, from the perspective of systemic-factual validity minimum efficacy is a condition for validity. In other words, it does not specify any consequences for the validity of a very efficacious norm. Therefore, systemic-factual understanding, as it is explored here, cannot explain why necessary actions cannot constitute a part of the norm-content. Efficacy is the positive and not a negative condition of validity.

An inviolable norm is not a normative rule or directive but a law of nature. The action in such a law is not to be taken; it will be taken. As such, it is something that will come to pass under the right circumstances rather than being a requirement to be fulfilled. If this is the case, then axio-systemic validity can explain the invalidity of norms requiring a necessary action. Laws of nature are descriptive. These explain natural phenomena. Reason why descriptive statements cannot be implied by norms and how axio-systemic validity accounts for this will be examined below.

I suggest that we consider the relationship between the principle *impossibilium nulla obligatio est* and the claim that meaningless expressions cannot have normative character. In case meaningless expressions could be understood as norms conformance to which is conceptually impossible, we will have a shortcut to understanding how axio-systemic validity can explain why meaningless expressions cannot lead to norms.

First, the situation of meaningless expressions cannot be associated with the principle of *necessitatem nulla obligatio est*. What is common for both is that the norms cannot be violated. On the other hand, the efficacy of the norm requiring the necessary action is a hundred percent. This cannot be the case regarding meaningless expressions. It is not possible to conform to or violate the meaningless expression. Therefore, attempting to establish a link over the inviolable nature of meaningless expressions would be the strategically sounder path to take.

If the content of the so-called norm is meaningless, the addressees of the norm cannot possibly have reason to conform to it. Furthermore, even conforming to the norm for the wrong reasons is impossible. It is important to distinguish meaningless expressions from uncertain, vague or ambiguous expressions. In case of uncertainty, what the legal officials should is to

dissipate the uncertainties by way of “operative interpretation”⁸². Similarly, non-conformance to a legal norm due to uncertainty, can only be justified with reference to an uncertainty violating the requirements of a positive legal principle such as the “rule of law” or *Rechtsstaat*. Therefore, certainty is not by itself a condition for validity. Meaninglessness implies that it is impossible to determine the content of the requirement by way of interpretation. For instance, “All need to crumptyfy” cannot be the norm-content since “to crumptyfy” is not a meaningful verb. No one can conform to such a norm.

Based on what is stated above, I believe that why meaningless expressions cannot constitute the norm-content can be explained in line with the principle of *impossibilium nulla obligatio est*. Therefore, regarding axio-systemic and systemic-factual understandings of validity, the relevant evaluation above will suffice. I will not repeat the conclusion here.

Norms are not descriptive but prescriptive. Accordingly, if a statutory provision comprises the expression that “Houses are white” and if this expression cannot be interpreted as “Houses shall be painted white”, one must conclude that the provision is not a norm, i.e. is invalid. Legal positivists acknowledge that descriptive statements cannot have norm-character⁸³. Despite this acknowledgment, systemic validity which is at the core of legal positivism does not concern such criteria of validity. These are rather additional conditions of validity. Therefore, what ultimately fails to explain why descriptive statements cannot have norm-character is not positivist theories, but the main understanding of validity adopted by these theories. If expressions of will with a certain content cannot lead to norms and if validity is the existence of the norm, the adopted understanding of validity should be capable of explaining this condition.

Systemic validity does not reject the norm character of descriptive statements unless such condition is envisaged by a positive rule of the legal system. If a statutory expression such as “Turks do not commit crimes”

⁸² **Wróblewski**, *The Judicial Application of Law*, p. 87.

⁸³ For instance see **Gözler**, *Hukukun Genel Teorisine Giriş: Hukuk Normlarının Geçerliliği ve Yorumu Sorunu*, p. 16 (descriptive premises cannot be followed by normative conclusions); **Kelsen**, *General Theory of Norms*, p. 150.

cannot be interpreted as “Turks shall not commit crimes”⁸⁴, it will be acknowledged as valid as long as the statute is systemically valid. Axio-systemic validity, on the other hand, is capable of explaining why such descriptive statements which cannot be interpreted as prescriptive ones do not have norm-character. As will be remembered, the axiological element requires the addressees of a norm to have reason to conform to the norm. Since descriptive statements do not express requirements regarding an action, it is impossible for the addressees to have reason to conform to norms contents of which are descriptive.

II. AXIO-SYSTEMIC VALIDITY AND LEGAL POSITIVISM

The discussion above establishes the fundamental characteristics of axio-systemic validity. What I aim to do in this section is to put an argument forward in favor of the idea that axio-systemic validity is compatible with legal positivism. Naturally, such an argument requires a clarification regarding the meaning of legal positivism. What is the essence of legal positivism? What are its tenets shared by all positivists?

Labeling theories is often done without much hesitation. The answers to the questions above, however, cannot be given so easily. The vast variety of legal positivist theories renders it difficult to determine the core positivist tenets. It do not claim here to have determined the correct legal positivism. However, it can be demonstrated that axio-systemic validity is compatible with at least a specific sort of legal positivism.

The core of legal positivism can be explained by reference to three fundamental theses: the separability thesis, the social fact thesis and the sources thesis. The first part of this section will argue that axio-systemic validity is incompatible with social fact and the sources theses. The second part will first attempt to dissipate the vagueness in the meaning of the separability thesis and then demonstrate that axio-systemic validity is compatible with the separability thesis.

Above, I have touched upon some differences between the understanding of validity defended by the non-positivist theories and axio-systemic validity. The fact that by allowing prudence to become an independent source for legal normativity should be sufficient to convince the readers that axio-systemic validity is definitely not non-positivist. It rejects

⁸⁴ Kelsen correctly indicates that grammatically descriptive statements can be used to express norms as long as they can be interpreted as prescriptive statements. See **Kelsen**, *General Theory of Law and State*, pp. 149-150.

the idea of a necessary connection between law and morality which could be considered as the fundamental thesis of natural law and non-positivist theories. This is why I have argued elsewhere⁸⁵ that even if one may question the compatibility of axio-systemic validity with separability thesis or may reject the idea that the separability thesis may correctly characterize legal positivism, it is undeniable that the axio-systemic validity does not represent the understanding of validity belonging to a natural law theory. Therefore, if legal theories could be represented by a spectrum, the theory embracing axio-systemic validity would take its place away from natural law theories and close to legal positivism. Its relative proximity to legal positivism stems from the facts that 1) it directly rejects the fundamental claim of natural law and non-positivist theories and that 2) it limits the extent of the axiological element to a minimum as previously explicated.

A. Axio-Systemic Validity's Incompatibility with The Social Fact and Sources Theses

In reply to Dworkin's famous criticism of the validity based on pedigree, Hart has acknowledged that moral standards can constitute standards of validity for legal norms in case the Rule of Recognition of the legal system includes these standards or norms as criteria of validity⁸⁶. Following Hart's answer legal positivists were separated into two different camps. One group followed Hart and formed inclusive or soft positivism. Others were uncomfortable with the compromise and opposed Hart's idea, thereby forming the camp of exclusive or hard positivism.

The social fact thesis can be described as the basic tenet of inclusive (soft) legal positivism⁸⁷. According to the social fact thesis moral standards can never *necessarily* be a criterion of validity for legal norms⁸⁸. As Hart conceded, there might be cases where moral standards constitute criteria for legal validity. However, this is contingent on whether the relevant Rule of Recognition of the legal system deems it so⁸⁹. In other words, moral standards and evaluative considerations may only constitute criteria of validity in case "the law says so".

⁸⁵ See **Gülgeç**, Normativite ve Pozitivizm, pp. 680-683.

⁸⁶ See **Hart**, The Concept of Law, pp. 247-248.

⁸⁷ See **Coleman**, Jules L.: "Rules and Social Facts", Harvard Journal of Law & Public Policy, Vol. 14, No. 3, Summer 1991, p. 722.

⁸⁸ **Gardner**, John: "Legal Positivism 5 ½ Myths", American Journal of Jurisprudence, No. 46, 2001, p. 223.

⁸⁹ **Hart**, The Concept of Law, p. 247.

The sources thesis is very similar to the social fact thesis but diverges from it with respect to a very important detail. Accordingly, moral standards and evaluative considerations can *never*, even contingently, become criteria of legal validity⁹⁰. It is true that the Rule of Recognition may make references to morality or moral principles. However, this is never the ideal morality, but positive morality⁹¹. Imagine a statutory provision declaring immoral contracts null and void. Exclusive positivism would argue that such a contract would not be invalid by virtue of ideal morality, but based on morality agreed upon by the majority of the judges. Thus what constitutes a true criterion of validity is not ideal morality but a social fact, i.e. the judges' agreement.

Notice that if axio-systemic validity violates the social fact thesis, it will automatically violate the sources thesis as it is the more demanding of the two. Now, it is pretty much straightforward why axio-systemic validity violates the social fact thesis. The violation stems from the axiological element. This element makes it necessary that in order for legal norms to be valid, there needs to be some sort of connection between the enactment (which can be determined on the basis of pure social facts, i.e. based on the criteria of systemic validity) and reason in the form of morality or prudence. Both these normative sources, namely morality and prudence, are considered in their ideal dimensions. Moreover, this moral or prudential criterion does not need to be envisaged by the Rule of Recognition of the legal system. It is imposed as a criterion independent from any legal source. Thus, axiological element is not a contingent but necessary condition for validity. Therefore, one would have to conclude that axiological element of axio-systemic validity violates the social fact thesis and thus, the sources thesis.

There may be cases where one actually does not need to perform an evaluative consideration in order to conclude that a legal enactment is axio-systemically valid. I have mentioned above that the existence of a sanction for the violation of a norm provides a valid prudential reason to conform to the norm. Since systemic validity of a legal norm does not require evaluative consideration, and because it is possible to determine the existence of a sanction purely on the basis of social facts, one may be inclined to think that axio-systemic validity does not always violate the social fact and the sources

⁹⁰ **Raz**, *The Authority of Law: Essays on Law and Morality*, pp. 39-40.

⁹¹ See **Finnis**, John: "Natural Law: The Classical Tradition", in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, eds. Jules L. Coleman, Kenneth Einar Himma and Scott J. Shapiro, Oxford 2004, p. 15.

theses. I believe that the looks are deceiving in the case of sanctions. Let this be a shorthand formula for axio-systemic validity in cases where a norm is sanctioned: if a norm is enacted in accordance with system-based criteria, it has not been repealed or otherwise invalidated while it is also sanctioned, it is axio-systemically valid. It is true that one testing whether a norm satisfies the formula above does not need to engage in evaluative reasoning. It must be remembered, however, that the formula is just a shorthand restatement of an evaluative reasoning and it conceals the evaluative reasoning justifying the formula. Therefore, it would be apt to conclude that axio-systemic validity always violates the said theses and it is not possible for the adherents of the social fact or the sources theses to adopt axio-systemic validity.

B. Axio-Systemic Validity's Compatibility with The Separability Thesis

The separability thesis is usually expressed as the claim that legal validity does not necessarily depend on the legal norm's conformity with a moral standard⁹² or that there are no necessary connections between law and morality⁹³. The second expression refers to issues other than legal validity and makes it possible for the separability thesis to have different meanings. Pino has determined that the separability thesis can have multiple meanings related to issues ranging from the determination of the legal norm to psychological relations between law and morality⁹⁴.

In the past I have proposed that the separability thesis can have three different meanings which could reasonably be said to be defended by legal positivists. The first concerns the separability of moral value and legal validity. The second argues that the reason the addressees have to conform to legal norms is not necessarily a moral reason. The last one claims that it is not necessary to appeal to moral considerations while determining the

⁹² **Moreso**, p. 100.

⁹³ **Coleman**, Jules L.: "Negative and Positive Positivism", *The Journal of Legal Studies*, Vol. 11, No. 1, 1982, pp. 140-141; **Himma**, Kenneth Einar: "Inclusive Legal Positivism", in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, eds. Jules L. Coleman, Kenneth Einar Himma and Scott J. Shapiro, Oxford 2004, pp. 135-136.

⁹⁴ **Pino**, pp. 199-203. I will not explore all of these meanings here, but rather rely on the conclusion of a previous effort to determine which of these fields can constitute the correct content of the separability thesis when it is construed as the core of a legal positivist theory.

content of legal norms⁹⁵. Here I will simply explain why axio-systemic validity is compatible with the separability thesis.

An immoral legal norm is a norm which addressees have a moral reason to refrain from conforming to. Could it be possible for the addressees to have moral reason to conform to an immoral norm? This obviously depends on the case. A legal norm may be in conformity with a moral standard while violating another. In this case, the addressees would have conflicting reasons for action. Regardless of whether they eventually ought to violate the legal norm, it would retain its validity as long as they have a moral reason in favor of conformance. Moreover, it is perfectly possible for the addressees to have prudential reason to conform to an immoral norm. The norm would retain its validity also in such a case. Therefore, axio-systemic validity is compatible with the first meaning of the separability thesis in that it does not require immoral legal norms to be invalid.

Similarly, the axiological element of axio-systemic validity is composed of both morality and prudence. There is no legal norm considering which it is necessary that the addressees have moral reasons to conform to. Even if it is conceded that moral reasons always defeat prudential reasons, there is nothing in axio-systemic validity that would require the addressees to have moral reasons to obey certain legal norms. Therefore, axio-systemic validity is also compatible with the second meaning of the separability thesis.

Sometimes legal norms incorporate moral standards. A statutory provision declaring the nullity of immoral contracts, or a constitutional provision requiring the restriction of fundamental rights and freedoms to be consistent with the demands of justice exemplify such legal rules. In order to determine whether a contract is immoral or not, in other words determining the exact meaning of the legal norm for the case at hand, may require appealing to moral considerations. Notice first, however, that such consideration is only necessary when legal norms incorporate moral standards. Moreover, axio-systemic validity does not concern the determination of the content of legal norms. Any evaluation regarding the axiological element would be an evaluation regarding the binding force, and not the content, of the legal norm. It is true that sometimes the reason addressees have to conform to a legal norm stems from the morally valuable content of the legal norm. However, axio-systemic validity does not impose

⁹⁵ For more detailed discussions on the issue please see **Gülgeç**, *Normativite ve Pozitivizm*, pp. 651-657.

this as a necessary condition. It is a contingent matter. Therefore, there is nothing in axio-systemic validity that violates the third and the last meaning of the separability thesis.

CONCLUSION

Axio-systemic validity obviates an important deficiency of systemic validity. Unlike systemic validity, enactments valid in accordance with axio-systemic validity are guaranteed the norm-character. Thereby, it bridges the gap between a positivist understanding of validity and reason. I would like to briefly touch upon what differentiates it from the efforts made by prominent scholars such as Raz and Shapiro.

I have indicated above that Raz's theory based on the concept of authority is paramount to understanding how law can have a special normative power. The whole project based on the authority of law is dedicated to explaining the conditions for law's having this special normative power. Raz's theory focuses on a conceptual claim regarding the legal directives⁹⁶ (claim to authority) and aspires to discover the conditions and consequences of law's authority. As such, it is not truly a theory on legal validity, but the binding force of legal norms. Axio-systemic validity, on the other hand, is purely a theory on legal validity. As a theory of legal validity pertaining to particular norms and since it rejects the idea that legal norms ought to make practical differences (the practical difference thesis), it does not limit itself to the special normative force of legal directives. It ventures to explain the conditions for the existence of legal directives as norms. In this respect, axio-systemic validity also relates to cases where specific legal directives lack legitimate authority⁹⁷.

Scott Shapiro perceives the most fundamental rules of a legal system as plans⁹⁸. More specifically, fundamental legal rules are shared plans which

⁹⁶ All legal directives necessarily lay a claim to authority (Raz, Joseph: *Between Authority and Interpretation: On the Theory of Law and Practical Reason*, Oxford 2009, pp. 111-112). Like all claims, claim to authority may be true or false, justified or unjustified.

⁹⁷ This is to imply that axio-systemic validity can be reconciled with the idea that directives with legitimate authority have a special normative force due to fact that it is an exclusionary reason. Nothing in the understanding of axio-systemic validity prevents a legal norm having exclusionary normative force. It is possible for a reason an addressee has to conform to a norm to be an exclusionary reason. The axio-systemic validity introduces a minimum standard regarding the reason to conform to a norm and does not exclude the possibility of such reason being an exclusionary one.

⁹⁸ See Shapiro, Scott J: *Legality*, Cambridge 2011, p. 119.

involve planning for a group⁹⁹. Accordingly, the existence of a shared plan is determined purely on social facts. A plan is shared and exists if a) it has been laid down by at least some members of the group with the group in mind, b) it has been accepted by the members of the group and c) it is publicly accessible¹⁰⁰. According to Scott Shapiro, in order to achieve complex goals and ends, plans are necessary¹⁰¹ and rationality dictates that once adopted, they should be complied with¹⁰². Since fundamental legal rules are shared plans, legal normativity can be explained by reference to the normativity of plans.

Just like systemic validity, planning theory of law attempts to explain the existence of legal norms purely on social facts. The effort is made to demonstrate that once the social fact in the form of shared plan exists, it is inevitably binding, i.e. law's normative force follows directly from the existence of certain social facts¹⁰³. As previously indicated, whether instrumental rationality is a distinct category of rationality is disputed. Moreover, Shapiro has been criticized for solely focusing on instrumental rationality and not allowing for divergence from an accepted plan¹⁰⁴.

Axio-systemic validity holds that the social facts underlying the emergence of law do not necessarily imbue it with normative force¹⁰⁵. This lies in the foundation of its criticism to systemic validity and it is what

⁹⁹ *Ibid.*, pp. 179-181.

¹⁰⁰ *Ibid.*, p. 136.

¹⁰¹ *Ibid.*, p. 119. Also see **Shapiro**, Scott J.: "Planning Agency and the Law", in *New Essays on the Normativity of Law*, eds. Stefano Bertea and George Pavlakos, Oxford 2011, p. 18.

¹⁰² **Shapiro**, *Legality*, pp. 126-127.

¹⁰³ There are many important issues to be discussed when it comes to instrumental rationality and the possibility of explaining legal normativity by reference thereto. However, this would have to be left to another time and another work due to its irrelevance and the attention to detail it requires. Therefore, I will limit my explanations to how axio-systemic validity avoids some problems associated with instrumental rationality and the effort to use it in order to explain legal normativity.

¹⁰⁴ See **Sherwyn**, p. 410.

¹⁰⁵ This claim seems similar to what is held by some philosophers that there is no general obligation to obey law. However, in case obligation is understood to relate to the action which, all things considered, ought to be taken, it might be possible to separate the claims here by indicating that although the agents might not have to follow legal directives all things considered, they will have a reason, even if it is a defeated reason, to do so by virtue of the directive's being a legal directive. If this is the case, axio-systemic validity claims that enactments in conformity with the system-based criteria does not guarantee that the addressees will have a reason to conform to the enactment.

necessitates the incorporation of an axiological element. Moreover, the binding force of law, according to systemic validity, does not have to be instrumental. Addressees might have reason to conform to a legal directive because the directive will promote a certain end the addressee has. However, this is not the only sort of reason an addressee might have. Therefore, I can conclude that axio-systemic validity evades the problems associated with instrumental rationality.

Despite its advantages over and differences from the examined theories, axio-systemic validity suffers from a fundamental flaw stemming from its systemic component. Since systemic validity requires an enactment to be in conformity with system-based criteria, it fails to account for the validity of the hierarchically supreme norm of a legal system. Let us assume that this norm is a legal document called “constitution”. The validity of the constitution is a prerequisite for the existence of a “system”. It establishes the primary criteria of legal validity and its own validity cannot be determined by reference to another norm valid within the system. This dooms axio-systemic validity as an understanding merely relating to the validity of particular norms within the system other than the hierarchically supreme norm.

One has to adopt a different understanding regarding the validity of the constitution or the hierarchically supreme norm of a system. In this different understanding, systemic validity has to be abandoned. Elsewhere, I have suggested axio-factual validity as an option. However, this suggestion requires dealing with and the justification of several important issues and claims such as 1) whether the adoption of different understandings regarding different norms within a legal system can be justified and 2) if the adoption of axio-factual validity violates the Hume’s Law. These cannot be further pursued here and need to be resolved elsewhere.

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