Legally Valid and Morally Just: The Futility of Separation?

George P. Kyprianides
Advocate-Legal Consultant
LLB, LLM with Distinction

Abstract

This paper will seek to argue that the positivist attempts at separating legally valid rules from assessments of their moral justness are futile and incomplete at best. Throughout each stage that a legal rule is applied requires some reference to moral standards, so that it may never be simply legally valid without being morally evaluated also.

Introduction

Why do we obey the law? This question has resounded in jurisprudential minds for centuries, and since the birth of law, the reasons behind what makes it law as such has become just as important a question as its actual content. The central and complex concept of this issue is whether our obeying of the law can be strictly free from moral assessments. Can a rule be legally valid without it being morally just?

This paper will seek to argue that the positivist attempts at separating legally valid rules from assessments of their moral justness are futile and incomplete at best.
Throughout each stage that a legal rule is applied requires some reference to moral standards, so that it may never be simply legally valid without being morally evaluated also.

This is not to state that unjust laws cannot exist, it is rather to claim that the very principles which make a rule legally valid are in themselves evidence of the moral valuations, or the expectations of a society subjected to it. Fundamentally, while there is an inherent difference in the content and criteria of legally valid rules and morally just rules, they are interconnected and co-dependent, so that what becomes legally valid must be morally just and vice versa.

**When a Rule is Valid Law – Legal Obligations**

The determination of when rules are valid law is the subject of debate amongst positivist theories, though all claim the irrelevance of moralistic judgements as determining the legal validity of a rule. Let us begin with a rule which states that drinking alcohol in public is illegal, and will be punishable at law by six months community service. How do we recognise this cluster of words as a law which we must either abide by or accept the sanction for breaching it? What characteristics does it possess that cause members of a society to observe and obey it as law?

a. Bentham- Codification of law

It is important to preliminarily state Bentham’s vast contributions to the law and why we obey rules. A harsh critic of the unpredictability of common law, Bentham focused on the codification of law, so that ‘man need but open the book in
order to inform himself what...acts it is his duty to perform...what acts he has the
right to do’. ¹ Yet deeper than simply allowing the layman to understand what the
law states, Bentham aimed to give an individual rule status as such by placing it
within the complete body of law ‘in a manner inseparably connected’. ² This is one
method of viewing how persons can acknowledge the validity of a law, that it may
be viewed as part of a compendium of the law, just as one would view or use a
kitchen as thus by its being part of a house.

However, if we are to view a rule as part of a legal system, it does not
necessarily follow that it automatically be accepted as law. Rather someone can
claim that it is by virtue of it being a law that it is part of the legal system.
Alternatively, a kitchen can still be a kitchen even if it stands alone without the rest
of the house, must there not be some other qualities a rule possesses to give it
validity as law?

b. Austin- a Command by a Sovereign

Austin expressed valid law in the form of a rule enforced by a sovereign and
backed by a sanction: a rule posited by an act of government is thus valid law. ³ For
Austin, a rule becomes valid by virtue of it being or embodying a command by a
sovereign.

---

³ Austin, J., The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence,
But is it really as simple as Austin would have one assume? If one’s attention is drawn to examples such as customs, his theory appears perhaps a little too simplistic. For example, the concept of sovereign and sanction ignores the existence of such elements in life which may be possessed and administered by a non-governmental person, but which we nonetheless abide by.

Suppose A is part of a notorious violent gang in B’s local neighbourhood, and A has passed a ‘rule’ that each person must give the gang fifty pounds every Friday or have their property vandalised. This could be classed, under Austin’s theory, as some form of a valid law, for the power held by the gang (albeit brutal and by force) can be called sovereignty on some level, and the threat of vandalism a sanction. Does this make their fifty pounds rule a valid law? Must the ‘sovereign’ enforcing the rule with sanctions be necessarily governmental?

c. Hart- Law is a ‘social phenomenon’

It is argued that the legal validity of rules is a much more complex concept than a sovereign’s order backed by sanction. Human beings are arguably able to rationalise and reason on a much deeper level than Austin suggests, and the threat of sanction is often not enough to establish a rule as law per se. This concept will be explored further below. Hart’s more intricate theory of what makes rules valid law is worthy of some attention, at least in terms of his rule of recognition.

Hart views law as a ‘social phenomenon’ which can be explained by reference to the social practices of humans in any given society. According to Hart,

---

those who make law must create it according to the rule of recognition in order to assign rules legal validity. A form of secondary rule, the rule of recognition provides us with a set of criteria which those in power must follow if a primary rule is to be classed as legally valid by citizens: a ‘common, public standard of correct judicial decision’. Yet it is much more profound than this seemingly simple explanation.

Hart refers to certain human weaknesses which we are able to recognise and acknowledge that, if we are to co-exist in society, we must refrain from committing certain acts. The authority we assign to law is thus based on social traits, and this allows Hart to escape the criticisms attracted by Austin’s account of law. The concept of law as a set of social norms is effective as a method of explaining how legal validity is assigned to rules, but is it not a form of morality? If a rule is not recognised by superiors as law, and if it does not comply with the social norms of society, does this not mean that it is also morally unjust?

i. Weakness in Hart’s theory

The evident weakness in Hart’s theory is the effect of both legally invalid and morally unjust rules – neither realistically requires that citizens obey it or recognise it as law. Can we not also categorise these social norms as moral valuations? Hart claims that valid legal rules ‘must be effectively accepted as common public standards of official behaviour by its officials’, but are these

---

common public standards not partly attributable to the shared moral values of society?

Many positivist accounts of the validity of law appear to fall victim to this potential pitfall; Kelsen’s novel *Grundnorm* also contains connotations of a moral basis for his pyramid structure of legal norms. The query is thus as follows. Can accounts of what makes rules legally valid be completely disconnected from value judgements? Can (or does) a legally valid but morally unjust rule lose the support of its citizens?

**Can Law ever be Free From Values?**

Suppose the English government passes a law which makes driving a red vehicle a punishable offence. In purely positivist terms, it is a legally valid law, but it nonetheless causes uproar. Protests occur and the people of England refute this law. How can positivist theories explain this reaction, and why would it not be useful to refer to the obvious moral elements which have been stirred in this situation? Do not the social norms which make rules legally valid also affect the justness of a rule? It is proposed that existing theories are at pains to explain how rules can be classed as legally valid without recourse to moral valuations of its content. It will be further argued that little justice is done to the concept of law and rules if no recourse to morals is made; to keep the two separate is unnecessary and unrealistic.

---

While positivists do not deny a connection between law and morality, they claim that it does not affect its *legal validity as a legal rule.*\(^9\) In other terms, the question of what makes a rule *legally valid* is very different from what makes a rule *just*; while assessments of the latter can be made, they cannot affect the degree of the former.

a. Nazi laws

An obvious example of this would be Nazi laws. While they were undoubtedly unjust, they were nonetheless law insofar as they were procured and recognised as law. But if positivist accounts of law do not ascribe to the justness of laws, then what is their purpose? Does a legally valid but unjust law require obedience?

While Kelsen claims that ‘the science of law does not prescribe that one ought to obey the commands of the creator’,\(^{10}\) Hart ascribes to a duty to obey the law as being grounded in concepts of fairness.\(^{11}\) If this is the case, then how can accounts of law be entirely segregated from their moral validity? Should we not turn to concepts of morality in order to understand fully why we obey the law? Is it not more important and enlightening to assess the justness of a rule to explain our adherence to it, for what is even a legally valid rule without the support of those subjected to it?

b. Courtroom example.

---

\(^{10}\) Ibid., p.204.  
Let’s turn to the art of interpretation and decision in the courtroom. Judges have the task of applying the law to individual cases and circumstances. Can this be adequately undertaken without reference to some moral bases underlying the law? Does not the existence of differing opinions and dicta between judges highlight that perhaps moral validity is relevant at least in the courtroom? Cases such as Re A (Conjoined Twins)\(^\text{12}\) highlight the unavoidable imposition of moral valuations in many cases, where recourse to legally valid law is simply not enough.

Dworkin claims that in such hard cases political and moral assessments are necessary: ‘the diversity suggests that there is no single social rule that validates all relevant reasons...for judicial decisions’\(^\text{13}\). Non-legal standards can be found in judge decisions constantly; where legislation does not provide the answer, judges have no choice but to refer to moral and political assessments in order to decide on a hard case and thus ‘justify the network as a whole’\(^\text{14}\). If we are to assess this element in conjunction with hard cases, then the argument is vastly strengthened, that decisions cannot always be free from non-legal considerations.

It thus follows that moralistic assessments simply cannot be adequately separated from the legal validity of the law. Moreover, the constant reforming and development of the law symbolises the ever-changing outlooks of society and its attitudes towards the moral undertones of legal rules and the acts it prohibits. Critics of this statement claim that such non-legal assessments take place because legal sources enable them to,\(^\text{15}\) but this appears to be a weak attempt to direct all

\(^{12}\) (2000) 4 All ER 961, (2001) 1 FLR 1 CA.

\(^{13}\) Green, L., ‘Legal Positivism’ Available at: http://plato.stanford.edu/entries/legal-positivism/.


moralistic judgements back to legally valid law. This criticism does not appear to withstand many examples or explain the thousands of morally challenging cases that have been decided to date.

c. \textit{R v Brown}^{16}

If we are to take the case of \textit{R v Brown}^{17} for example, this statement becomes clearer. The judges decided in this case that harm caused between consensual adults in the privacy of their home was not legal, on moral grounds of public decency. This was not a decision based purely on legal evaluations, for the law did not provide for such acts. Effectively the judges had placed moral limitations on the concept of consent. Such cases suggest that a simple ‘legal or illegal’ decision can often not be made, and that moral considerations which reflect the outlook of a particular society must often be placed or inferred into decisions.

It is also important to place the argument that moral valuations take place because the law provides for this on a reversed playing field. If inclusive positivists can argue this, can it not be argued that the law contains the validity it does (even procedurally) because \textit{moral assessments} of what law is valid allows it to? For example, a law passed in England goes through the necessary stages of Parliament, drafting, and so on. These stages which a rule must pass through in order to become valid law could also be evident of society’s requirement that rules adhere to a specific procedure in order to be valid. This in itself could be labelled a moral standard: to prevent retroactive legislation, to be accessible, to be passed by an elected government – are these not all some form of moral standard of fairness?

\footnotesize
\begin{itemize}
\item \textsuperscript{16} (1993) 2 All ER.
\item \textsuperscript{17} (1993) 2 All ER.
\end{itemize}
Raz suggests that the mere existence of law is suggestive of moral value, and it is important to note that a claim to the connection between law and morality does not lead to a claim that law is necessarily just by virtue of such a connection.

**Conclusion**

While a full account of the rich topic is beyond the scope of this paper, it has necessarily sought to disprove, or highlight the weaknesses in the positivist separation of legal and moral valuations of the law. It has been argued that such a separation is both impossible and of little use. It is also the case that claims to the moral validity of law do not fall victim to criticisms as to why we may obey unjust law and the dreaded subjectivity of moralistic outlooks.

It is simply unavoidable that claims against the legal validity of law being connected to the justness of law are weak: ‘natural and positive law govern the same subject-matter, and relate, therefore, to the same norm-object’. The law informs us what we must do and what we must refrain from doing. So to focus on its legal validity in isolation does nothing to explain from where such prohibitions and obligations derive. It is necessary to ask whether law is just, else legally valid laws prohibiting the driving of red vehicles would not attract the public outrage it is (rationally) predicted to.

---

The positivist placing of legal validity upon social facts is arguably in itself a moral concept, in that the law embodies the moral outlook of a society: what is right and what is wrong, what is acceptable and what is not. Without this, rules would lose their force on several levels and legal validity would be nothing more than a driving licence in the hands of a terrible driver.