Brief Notes on Validity and Justice

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Maris Köpcke, *Legal Validity — The Fabric of Justice* (2019).

Köpcke's Legal Validity — The Fabric of Justice is an extremely rich and significant book which displays the excellent analytical and philosophical gifts of its author. It is, to my knowledge, the first book-length treatment of its subject, and contains much food for thought, and comfort, especially for hard and soft positivists. It is a manifesto for neither of those arguments, but its central topic, legal validity, is a preoccupation of both. But its treatment of its other central topic, justice, provides numerous arguments that are of keen interest for natural lawyers. The book, then, puts new ideas onto the table that promise to help break new ground in existing debates about the nature of law.

This brief review cannot hope to mention, even in passing, all of the many insights and lines of argument contained in the book, and, where necessary, simplifies points that are in fact very complex. Furthermore, since this is a review of what the reviewer likes about the book, it will for the most part refrain from intellectual criticism of some of the book's arguments. I shall, however, raise parenthetical questions. (These are friendly questions. I do not suggest that these questions particularly disturb the author's account, merely that they are raised by that account.)

It should be noted that the book's project is pursued further in another book by the same author, *A Short History of Legal Validity and Invalidity* (2019) that is not reviewed here.

The book begins by drawing attention to the numerous contexts in which lawyers and legal scholars talk about legal validity: legally valid marriages, passports, licences and legally valid criminal statutes. (P. 1.) It asks (i) whether the uses of the term 'validity' across these contexts are united by underlying similarities; (ii) what is the moral import of legal validity; and (iii) whether legal validity is limited? (Pp. 3-4.) It answers (i) by noting that legally valid acts are always *made*, and always amount to a legal *power* to *change legal relations*; (Pp. 4, 14) (ii) by replying that legal validity makes possible, and defends, crucial aspects of human good, through 'specific convergence' (P. 4); and (iii) by answering that, although legal validity brings specificity to aspects of human wellbeing that are under-determined, it cannot completely close off room for human choice without annihilating human wellbeing. (Question: if legal validity is always a *power*, what is the significance—legal and moral—of rights, immunities and liberties?) It is an important characteristic of legal validity, or rather of legally valid *acts*, that they are often the product of many minds at different points in time. (P. 5.) For, by contrast, a tyrannous or repressive regime would typically involve acts of a small number of officials deciding everything about human conduct in advance.

Next, the book briefly examines the treatment of legal validity, or valid legal rules, by Hart and Raz (Pp. 20-24), but the book's own examination begins (P. 26) with the claim that legal validity is a form of 'say-so', e.g. by making an application or concluding a contract. By saying so, one changes one's legal position (and therefore the legal position of another or others). (Question: is the say-so *itself* capable of being valid or invalid? Would it thus lose explanatory power?) Oftentimes, one's say-so produces changes that are not envisaged in the mind of the agent him/herself: for example one rarely reads the lengthy terms and conditions to which one is 'agreeing' when downloading an update to a computer's operating system. But legal relations are changed nonetheless. For this reason it is necessary to

contrast certain ranges of legal changes (such as a contract of employment ending one's entitlement to unemployment benefit) from the acts that trigger those changes. (Pp. 49-50.)

Because a legally valid act comes into being by saying so, the book enters into an analysis of speech-acts (ways of doing/acting by saying) (Pp. 37-48) but wisely avoids a foray into formal semantics (theories of substantive meaning). (Question: is something always legally *so* because it has been *said*? Are there not some standards that are *so* prior to being said? Common law principles/'rules' are given their first *expression* by judges but are held to have existed unformulated and implicit in the common law.) It might be wondered how legally valid acts (one's say-so) can exist over time, but it is obvious that legal powers and relationships last over time, or 'circulate' as the author puts it. (P. 51.) Furthermore, it is possible to commit unintentional legally valid acts, for legally valid acts manifest an intention, but not necessarily an intention to manifest an intention (P. 55), for example by entering into a contract to which one does not wish to be bound, and it is for this reason that the law contains provisions for the avoidance of such acts: the need for witnesses, procedures or other formalities. (Pp. 54-55, 58.) (Question: a tortious wrong changes legal relations unintentionally, but is surely not a legally valid act?)

Valid choices can be identified without recourse to justice. (P. 69.) This makes validity hazardous, but the law achieves justice not despite but because of this feature. For justice requires 'specific convergence': the convergent conduct of many persons following specific patterns; it highlights the specific conduct that is due from each individual in the context of a human good that can only be brought about by collective efforts, e.g. refraining from maliciously injuring another as an aspect of promoting the human good of health. (P. 71.) But such conduct only becomes 'especially apt' (due?) when there is a context of other practices that foster that good (such as clean air, water and easy availability of food). Such convergent conduct does not mean the same conduct: a tax system typically does not require the same contribution from every person. (P. 74.)

It is necessary to distinguish the law's *marking* mechanisms from its *enforcement* mechanisms (P. 82); both are required for convergence, but legal validity is the law's mark (P. 83); it is not only a mechanism for change, but a signal that a change has happened. The identification of a valid choice *must* not be based *predominantly* upon its merits or content. (P. 87.) (Question: what is the scope and force of this 'predominantly'? Could this, e.g. leave open the door to natural law theories?)

The next part of the book's argument is subtle and complex, and impossible to summarise in a short review. It deals with 'reasons to empower', which are considerations of justice (Pp. 101-118): these involve four types of reasons: expertise and capacity, proximity, the rule of law and self-direction. The book's analysis in these pages summarises the principle of subsidiarity and its implications, and contains a lengthy discussion of the rule of law in a manner reminiscent of Fuller: not only in kind, but also in the ambition to connect the abstract requirements of 'inner-morality' with concrete legal concerns. If it were possible to identify the best part of an excellent book, this would be it.

In the book's final chapter, we are told that justice requires the law's positivity, that is (i) its relative determinacy, (ii) its relative identifiability, and (iii) that it is relatively targeted in approach. What stands out in this section is the following proposition: 'By the law's positivity I mean the fact that the legal positions persons are in at any point are determined by the legal meaning of valid acts rather than by moral considerations that are not part of the legal meaning of valid acts.' (Pp. 124.) Critics may come to ponder the significance of this proposition alongside Gardner's definition of positivism and Raz's sources thesis. (Pp. 151-52.) (Question: if moral considerations are *sometimes* part of the 'legal meaning' of valid acts, how does one distinguish between this morality and the morality that is not part of legal meaning? For this is unlikely to be amenable to sharp distinction.)

Later, the author repeats the warning given in this section that ‘validity could not serve as a technique . . . if identifying valid decisions predominantly turned on moral judgments.’ (P. 160.) But I close this very brief and exceedingly schematic review with a quotation from its last page (I hope the author will forgive the very short treatment given to the book’s very rich and complex arguments): ‘Validity makes it possible to craft just relations between persons by dressing those relations in clothing that hides their justice from view. This is why injustice, too, can bear validity’s mark.’ (P. 163.)

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