VALIDITY *VERSUS* APPLICABILITY: A (SMALL) DOSE OF SCEPTICISM

MATHIEU **CARPENTIER**

Validity *versus* Applicability: a (Small) Dose of Scepticism

MATHIEU CARPENTIER

Professor of Public Law, Université Toulouse 1 Capitole.
E-mail: mathieu.carpentier@ut-capitole.fr

ABSTRACT

Analytical jurisprudence has grown fond of a distinction between the notion of validity – understood as the membership of a norm within a given legal system – and that of applicability. A norm's membership within a legal system is neither a sufficient nor a necessary condition of its applicability in that system. This article takes issue with the non-sufficiency component of this distinction, and raises some doubts about it. During the latency period in which a legal norm is valid but not yet applicable, or not applicable anymore, it is difficult to ascertain what, in fact, does belong to the legal system: how can a non-applicable norm be a "norm" in the first place and give its addressees any reason for action? There is indeed a danger of undue formalism here: a norm's formal validity should not be confused with its normativity. The last part of the paper tries to deal with these doubts and to adumbrate tentative solutions. It shows that a norm's membership within a legal system does have practical effects regardless of its applicability; and it tries to show that it sometimes can give its addressees reasons for action in some attenuated way.

KEYWORDS

Legal validity, applicability, reasons, supererogation, rule of recognition

Validity *versus* Applicability: a (Small) Dose of Scepticism

MATHIEU CARPENTIER

1. *Introduction*

The distinction[1] between validity, understood as membership[2], and applicability is now commonplace in legal philosophy[3]. To put it in a nutshell, a norm[4]'s membership within a particular legal system is neither a sufficient nor a necessary condition of its applicability in that legal system.

Let us take for granted (as perhaps we should not) that in any legal system *social sources* are the sole criteria of membership. Any norm which is traceable to a source, that is, to a fact or set of facts picked out as "legality-endowing" by the rule of recognition, is a norm of that legal system. If we accept this definition, the membership/applicability distinction means that a norm may very well be traceable to a set of facts characterized as "sources of law" in legal system S, and, therefore belong to S, without being applicable in S. Let me call this the Non Sufficiency Argument: a norm's membership is not a sufficient condition of its applicability. And a norm may be applicable in S which does not belong to it. Let me call that the Non Necessity Argument.

To be quite honest, I think that basically both arguments are sound, and I actually

[1] I would like to thank Giorgio Pino, Jose Juan Moreso, David Duarte, Mauro Barberis and Pierluigi Chiassoni for their very acute comments on this paper. Some of the arguments made here result from an ongoing conversation with Themis Raptopoulos. All errors and fallacies are mine.

[2] In what follows, I will deal only with validity in the membership sense. I discuss other notions of validity in my *Sources and Validity* (CARPENTIER 2018, forthcoming).

[3] See e.g. BULYGIN 2015, 170-175 and 318-320; RAZ 1970, 196 f.; RAZ 1979, 149; MORESO 1998, 102; MORESO, NAVARRO 1998, 286; NAVARRO, ORUNESU, RODRIGUEZ, SUCAR 2004; MUNZER 1970, 58; MUNZER 1973, 1149 f.; GRABOWSKI 2013, 256; COMANDUCCI 2010, 124; PINO 2011, 159.

[4] In what follows I will use "norm" and "rule" interchangeably. This, of course, is not quite correct: many norms are not rule-like (for instance individual norms), and many rules are not normative *per se* (for instance constitutive rules). When I talk of rules, I will always mean normative rules; and unless specified otherwise, norms will always be understood in the sense of "general" (rule-like) norms.

use them routinely in my own work[5]. However, lest I be plunged in some dogmatic slumber – and in order to avoid that this be the shortest paper ever – I must confess that I have been ridden with doubts regarding the soundness of the Non Sufficiency Argument. I will say very little about the Non Necessity Argument since I still believe it to be both right and rather intuitive. It is often the case that the officials of a legal system ought to apply some norms which do not belong to that legal system: for instance, under the choice-of-laws rules of her legal system, a French judge may be bound to apply some norm belonging to another legal system[6]. It also happens quite often that a norm derogated at a certain time goes on being applicable quite a long time after its removal from the legal system (because e.g. of so-called "grandfather clauses"). I take all that to be quite uncontroversial.

However, the same does not go for the Non Sufficiency Argument. In this paper I will try to address some of the doubts I have about it. At the end of this Cartesian journey, I will try and show that ultimately some of these doubts may be dispensed with.

2. *Distinctions*

2.1. *Applicability: conceptual and normative*

There needs to be made a clarification in the very concept of applicability. A distinction should be made between *conceptual* and *normative* applicability. When we ask whether a norm is applicable to a given case, we generally ask two things. First, is it conceptually possible to apply the norm to the case? In other words, do the facts of the case instantiate the set of properties set out in the norm's antecedent? This is what I call conceptual applicability, which is most and foremost a matter of subsumption. The second notion refers to the fact that law-applying organs are bound to apply legal norm. In this second sense, applicability is quite close to bindingness: a norm is applicable if and only if there is an obligation for law-applying organs to apply it (or at least they are empowered to do so)[7]. When I ask my tax lawyer: is this tax deduction applicable to me? I do

[5] See e.g. CARPENTIER 2014, 143-156 and 248-257.

[6] I will not address the difficult question regarding the membership within municipal legal systems of international and supranational norms: do treaties or EU laws belong to the French legal system, or are they only applicable to it? I will not settle this difficult question here, although it may be of considerable practical interest: see e.g. the *Miller* decision of the Supreme Court of the UK, (*R* (*on the application of Miller and Dos Santos) v. Secretary of State for Exiting the European Union* [2017] UKSC 5[19]) regarding the status of EU law as an «independent source of law in the UK».

[7] Pino rightly notes that normative applicability ought not to be framed only in terms of an obligation to apply, but so as to cover the whole deontic range (PINO 2011, 837-841).

not ask whether a judge is bound to apply this tax deduction to me. I only ask whether I meet the conditions necessary to be entitled a certain tax deduction. This is a matter of conceptual applicability. However, when I ask whether a newly enacted criminal statute is retroactively applicable *in mitius*, the question I ask is one of normative applicability: it is about what law-applying organs are empowered or under the obligation to do.

This distinction is quite close to the internal/external distinction made by Jose Juan Moreso and Pablo Navarro[8] except that it does not rest on the very problematic kelsenian notion of spheres of validity. External validity, as it is defined by them, is virtually identical to what I call normative applicability. Internal validity is defined as "subsumptibility": a norm is internally applicable to case *c* if *c* is an instance of a generic case C, which is defined in terms of spheres of validity (personal, temporal, spatial, material etc.). The notion of spheres of validity poses a serious problem for any theory of norm individuation and it is also ridden with confusions. The material and personal spheres are nothing but the properties of a generic case, which is part of the norm-content. As far as the spatial and temporal parameters of norms are concerned, they fulfil two distinct functions that should be carefully kept distinct. There is a clear difference between the temporal aspect of the norm-content (e.g. if a murder is committed *at night*) and the parameters of the norm's normative applicability (e.g. the law's retroactivity). The former obviously determines the conceptual applicability of the norm (it is not applicable to murders committed by day), the latter determines the obligation that a judge is under to apply the law to cases which have occurred before the law's enactment. The same goes for the so-called spatial sphere of validity: if the Saudi statute prohibiting homosexuality is not applicable to gays in France, it is not because not being in France is a property of the generic case regulated by that Saudi law; it is, rather, because French judges are under no obligation, and moreover they have no right, to apply that law.

This is why I suggest that we abandon the notion of spheres of validity, and that we distinguish between conceptual and normative applicability. In what follows I will only deal with *normative* applicability.

2.2. *Applying v. following a rule*

When we talk about the application of legal rules, we generally refer to a set of institutions which are entrusted with the task of "applying" the law. When we talk about law-application, we do not quite mean the mere act of following legal rules, as Giorgio Pino has shown[9]. If a rule prohibits murder, applying the law

[8] MORESO, NAVARRO 1997.

[9] PINO 2011, 802-809. See also CARPENTIER 2014, 137-140.

does not really consist in refraining from committing murder. Especially in the case of *prohibitions*, which generally involve omissions, one generally follows rules without even realizing it[10]. However, applying a rule *always* refers to a conscious process, which involves a special kind of deliberation and decision-making. The process of applying a rule presupposes a specific institutional setting, where a pre-determined institution is empowered to draw the normative consequences of a breach of the rule by its addressee. It can be the case that, in some instance, the addressee and the law-applying organ are one and the same person. For instance, when a court finds that its current composition fails to meet the standard of impartiality set out by Article 6 § 1 of European Convention on Human Rights, and rules that its composition should be modified, e.g. by recusing one of its members, it follows and applies the rule at the same time: it shows impartiality by drawing the normative consequences of its past failure to be impartial[11]. But it should be agreed that, in most cases, the addressees of the rules and its appliers are two different (legal) persons.

What, then, does it mean to apply a legal rule? Once again, it all boils down to a problem of norm-individuation, one which I do not intend to solve here. If, for instance, we individuate every legal norm as a conditional norm, the consequent of which is some kind of normative consequence, e.g. a sanction, attached to a set of facts, then applying a rule consists in the process of deriving this consequence from a set of factual premises. If a norm, let us call it a "primary rule", prohibits murder, then applying such a norm will consist in deriving the normative consequence, for instance a sanction, attached to murderous acts. When doing so, the law-applying organ will be *following* (and not applying) some secondary rule, for instance a so-called rule of adjudication directing her to apply primary rules. Another way to put it is to use the famous distinction made by Meir Dan-Cohen[12]

[10] This may seem a bit surprising. After all, how can we follow a rule without even being aware of it? It is a complex and controversial topic, one to which I cannot hope to do justice here. Let it suffice to say that the notion of rule-following must be distinguished from the notion of guidance. Being guided by a rule means taking the kind of reason it claims to give to you into account in your own practical deliberation, and give it the role it is intended to have: that of displacing other reasons. The same goes for any normative reason of any kind: you are guided by a reason, whenever you act on that reason, that is, whenever you comply with it after having weighed it against other reasons. Such a deliberative process is obviously a conscious one; it is a necessary condition for an action to be an intentional one. However, as Raz has shown, in some (not unusual) situations conformity with our reasons (as opposed to the stronger notion of *compliance*) is all that is required from us (RAZ 1975b, 178-182; RAZ 1999, 90-94). In fact, as Raz notices, it seems that we better conform to our reasons if we do not act on them: it seems intuitively that someone who never thinks about the fact that murder is prohibited and therefore never kills better conforms to the reason he has not to kill than someone who is about to kill, then remembers that killing other people is prohibited and refrains from acting because he took that very reason into account. For a strong critique of Raz's arguments, see RODRIGUEZ-BLANCO 2014, 157 ff.

[11] In the next section I will say a bit more on the notion of "self-application".

[12] DAN-COHEN 1984.

between conduct rules and decision rules. Decision rules, in Dan-Cohen's view, are specific obligation-creating norms directed at judges, whereas conduct rules are directed to ordinary citizens. Decision rules guide the behaviour of judges who apply conduct rules; and there may be a discrepancy (e.g. due to some "acoustic separation", on which more later) between conduct rules and decision rules, that is between what is required of the general public and what is required of judges and other officials. So we could say that when a judge applies a conduct rule, he is in fact following a decision rule.

I am not claiming that such a way of individuating legal norms is correct (I have my own doubts). I only use it to explain the distinction between following and applying a rule, which actually only makes sense in a legal context, or a paralegal one (such as sports, games, clubs, etc.). In any case I will not try to present a theory of the individuation of laws, and I will take for granted that following and applying a rule are two distinct operations.

2.3. *Applicability v. Justiciability*

Application does not only refer to the deliberative operation of deriving a normative conclusion from a set of factual premises. It also involves some kind of authoritative decision[13]. A norm is applied when a law-applying organ makes a decision, that is, issues a *new* norm whose function is to concretize the norm that is being applied. Judges are typical law-appliers, in so that not only do they make a deliberation regarding the normative solution to the case at hand, they also issue a new norm, for instance a norm imposing a sanction on a particular individual.

However, one should not confuse applicability with justiciability. A norm's applicability does not necessary mean that such a norm may be or ought to be concretized by a judge through the issuing of an individual norm. So when we say that a norm becomes applicable, that is, "enters into force" at some date, we do not necessarily mean that such norm ought to be applied by courts, or even by any law-applying organ.

This is so because in many parts of the law one founds a lot of norms which, though applicable, are not justiciable. Such is the case of many constitutional norms. For instance, when the French President decides to dissolve the National Assembly, his decision is not justiciable: no court is empowered to review it and, in the process, to apply the relevant constitutional norms. But it is often the case that some non-justiciable dispositions of the constitution enter into force (become applicable) at a certain time after their promulgation: this is a constitutional version of the notion of *vacatio legis* (see *infra*). For instance, the new dispositions

[13] PINO 2011, 803. A similar distinction can be found in HART 1994, 134 f.

of article 11[14] of the French Constitution regarding the referendum process were promulgated on July, 23rd, 2008, but became "applicable" on January 1st, 2015. Many of these dispositions are not justiciable.

How are we to describe such a situation? There are actually two possible answers, both equally plausible. The first answer is to treat constitutional organs as self-appliers[15] of constitutional norms. Whereas there is difference to be made between a citizen who follows a law (e.g. does not commit murder) and the judge who applies it (e.g. sentences the murderer), constitutional organs are both law-followers and law-appliers: they apply the law to themselves. The second answer is to treat justiciability as an instance of *actual* applicability and use the term "applicability" to refer also to some kind of counterfactual justiciability. When we say that a constitutional norm enters into force, and becomes applicable, we mean that, *were it the case that such a disposition could ever be justiciable*, it would become justiciable on such a date.

3. *The argument*

Because normative applicability is a form of bindingness, and because validity has sometimes been defined as bindingness, it is easy to confuse membership and applicability. Such confusion is what the Non Sufficiency Argument aims to dispel.

The Non Sufficiency Argument aims to break the link between membership and bindingness[16]. Membership is not a sufficient condition of normative applicability; and normative applicability is not a necessary condition of membership. This means that there may be norms which, though valid, are not applicable in the legal system they belong to; and that a norm may lose its applicability without ceasing to belong to the legal system.

As Bulygin has shown[17], a norm's normative applicability is contingent on the legal system containing *norms of applicability*, i.e. norms which regulate the way

[14] The constitutional revision of July 23rd, 2008 created a new kind of legislative referendum, whose initiative belongs to members of parliament and ordinary citizens.

[15] The notion of self-application was used in the 1950s by Hart and Sachs (HART, SACKS 1994, 120-122) and has recently been revived by Jeremy Waldron (WALDRON 2011, 65; WALDRON 2012, 52-57).

[16] Some authors reject outright the Non Sufficiency Argument as a conceptual matter. See e.g. SARTOR 2008, 219-221, who claims that validity is a strict (indefeasible) sufficient condition of bindingness, understood in the sense of what I call normative applicability. The doubts I will be formulating about the Non Sufficiency Argument are not conceptual; even if we grant that validity is not a sufficient condition of applicability, my fear is that such a distinction is of no great heuristic value. Indeed I will claim in the very last section of this paper that the core of the legal experience is one in which validity *defeasibly* (or *prima facie*) implies applicability, though it is conceptually distinct from it.

[17] BULYGIN 2015, 75-78.

other norms ought to be applied. Such norms of applicability regulate both norms of the legal system – as the Non Sufficiency Argument claims –, and norms belonging to other normative (not necessary legal)[18] systems – as the Non Necessity Argument shows. Norms of applicability may be of various types. They may be general norms meant to be applied to a vast range of norms: for instance the *nullum crimen* principle and the principle of retroactivity *in mitius* are such general norms of applicability. They may also be particular norms regulating the applicability of a specific norm or set of norms: for instance the section of a statute which deals with the statute's own "entry into force".

According to the Non Sufficiency Argument, a norm may belong to the legal system and still not be applicable: a norm's applicability does not depend on its membership within the system, but on the fact that norms of applicability regulate the way it ought to be applied. Two examples may be used to illustrate this argument.

The first example is drawn from the notion of *vacatio legis*: it happens quite often that a norm becomes applicable some time after becoming a valid norm of the legal system. For instance the New Penal Code, passed by the French Parliament in 1992, "entered into force", i.e. became applicable, only on March 1st, 1994. Such a postponed applicability is sometimes required by general principles, such as the principle of legal certainty[19]. (It bears noticing that – for the same reasons – such cases of *vacatio legis* also cover derogating norms. A derogating norm may be enacted at time t_1, only to become applicable at time t_2, which means that both the derogating and the derogated norms are and remain valid until t_2) In any case, the continuing membership of a not-yet applicable norm is proved by the fact that such a norm may be derogated on the very day of its enactment. You cannot repeal a non-valid[20] norm, that is, a norm that does not belong to the legal system in the first place.

Vacatio legis is quite commonplace, and it is even required by most legal systems. For instance article 1 of the French Civil Code contains a default rule of applicability: statutes become applicable the day after their publication in the *Journal Officiel*, unless of course they provide otherwise. So the norm starts belonging to the legal system well before it is published, and there is almost always a short latency period or *vacatio legis* between the enactment, the publication, and the beginning of the norm's applicability: some fundamental

[18] For instance, the Non Necessity Argument is instrumental in Raz's refutation of Inclusive Positivism's claims that legal systems sometimes incorporate moral norms (see RAZ 2009, 193-195).

[19] On legal certainty and *vacatio legis*, see ÁVILA 2016, 209.

[20] Non-valid (non-belonging) should be distinguished from *invalid* (inconsistent with higher ranking norms). Of course an *invalid* norm can, and often should, be repealed. See my *Sources and Validity* (CARPENTIER 2018).

principles, such as the prohibition of secret laws, prevent in most cases any coincidence between a norm's enactment and its entry into force

The second example may be taken from the practice of constitutional review of legislation. In many legal systems, courts may review the constitutionality of statutes, but they are not empowered to repeal statutes they find unconstitutional. In some other systems, such as France or Germany, constitutional courts may repeal unconstitutional statutes, that is, deprive them of their membership in the legal system, sometimes with retroactive effect (as is the case in Germany). When a court (e.g. the US Supreme Court) is not empowered to do that, the statutes which are found unconstitutional remain fully valid in terms of their membership within the legal system. Although the court's decision prevents officials from applying such unconstitutional statutes, those laws remain "on the books" until properly repealed by the legislature. They still belong to the legal system although they are not applicable anymore[21].

4. *Doubts*

The Non Sufficiency Argument rests on what could be called a "latency period" between the time when a norm starts belonging to the legal system and the time when it starts being applicable; or between the time when it stops being applicable and the time when it stops belonging to the system. This "latency period" is an important aspect of what Bulygin has called the gap between a norm's internal and external times.

What is the status of the norm during this latency period? The Non Sufficiency Argument claims that the norm, however inapplicable, is and remains a valid norm of the legal system, since it still belongs to it. This raises the question of the heuristic value of the very concept of norm-membership. If valid norms (in the sense of membership) can be absolutely nonbinding on anybody, then the question is: what is it exactly that "belongs" to the legal system in the meanwhile? How could we be sure that a "norm", that is, the requirement that such and such

[21] Some authors have another view of the membership/applicability dynamic in the practice of the judicial review. For instance Moreso (see MORESO 1993, 101) and Moreso and Navarro (MORESO, NAVARRO 1998, 288) claim that unconstitutional norms are not valid: they do not belong to the legal system. However between their "enactment" and a judicial decision striking it down, they may be applicable. (This would be an illustration of the Non Necessity Argument). So, for Moreso and Navarro, judges striking down unconstitutional laws *never* derogate norms, since the norm never was valid in the first place – it never was a member of the legal system. They only deprive those norms of their applicability –. I will not explain here why I think such a theory is not plausible. However the "reinstatement *versus* reenactment" issue discussed below should pose a real problem for that theory. The only way to explain it away is to show that somehow there was some kind of "implicit reenactment" by the organ empowered to amend the constitution or by the judges themselves.

state-of-affairs ought to obtain in such-and-such case or set of cases, belongs to the legal system, rather than a *text* or a normative disposition?

4.1. *Naked membership*

Norms belong to legal systems insofar as, and as long as, they are traceable to a source of law. In my previous work, I have described sources of law as legality-endowing facts: a norm *N* may be described as "legal norm", that is a norm belonging to some legal system, insofar as certain facts obtain. For instance, among those facts, there may be the fact that a certain text has been written, that it has been "passed" by an organ empowered to do so, for instance through a vote, and then it has been enacted or "signed into law", by another organ. All those facts are not brute facts. They are institutional facts, heavily laden with their own sets of constitutive rules. Because of such facts, "it is the law" that in case C, one ought to φ. Such facts do not give rise to norms *per se*, they give rise to the legality, or rather the "legalness", of such norms. I take it as undisputed that for a norm, being a *legal* norm just means belonging to a legal system.

In such an outlook, a norm is nothing but the content of a specific kind of utterances, which may be called directives, or "norm-formulations". I do not mean to rehearse some old-age controversies, so I will not delve into the nature of a normative content, i.e. a norm. Such a definition is already problematic enough as it is[22]. Suffice it to say that legal texts, which contain legal dispositions, are not to be confused with norms: such texts are directives, the content of which are norms[23]. The very existence of such a text points to the existence of a norm. If I say: "all men aged 15-65 who scratch their heads shall be sentenced to decapitation", I utter a directive which aims to formulate a norm. Whether it succeeds to do so is not a particularly interesting question to solve: at least it has some "subjective normative meaning", as Kelsen would say[24]. What is interesting is that such a norm is not a *legal* norm: it may exist on another level, different from the legal one. It does not exist *qua* law: it does not belong to any legal system, absent any legality-endowing facts (such as legislation, precedent, custom, etc.). Therefore, we can safely say that

[22] For instance there is the problem of unuttered norms, such as norms that exist only through practice (e.g. customary norms) or, for instance, moral norms, which do not receive any canonic norm formulation (on canonic norm-formulations, see SCHAUER 1991, 68-73). So I need to amend my definition: a norm is what *could be* the content of a directive, if such a directive were ever to be uttered. The question of the language-dependence of norms is a topic *à part entière*, to which I cannot expect to do justice here. See BLACK 1962, 101-130; VON WRIGHT 1963, 94; BARBERIS 1990, 143; MAZZARESE, 2000, 169-172.

[23] On the necessity to distinguish the norm from its formulation, see e.g. BLACK 1962, 101; VON WRIGHT 1963, 93; ROSS 1958, 8-11; MORESO 1998, 3; GUASTINI 1993, 332-334; GUASTINI 2004, 99-110; WROBLEWSKI 1985, 239.

[24] KELSEN 1934, 2.

membership is the *legal mode of existence* of norms: if they are to be legal norms, they have to belong to a legal system.

But this raises the question: how does a norm's membership within the legal system differ from a text's membership within a certain corpus? We know that a certain text is a "legal text" or an "authoritative text" because, for instance, it was published in the *Official Gazette*. What is interesting about those texts is the way lawyers and officials use it. For instance an attorney invokes statute S, such as it is printed in the *Official Gazette*, in order to defend her client: statute S creates a new cause of contractual non-liability, and the client did not perform the contract as he should have. However if S has not yet "entered into force", if it is not yet applicable (or, rather, was not yet applicable when the facts of the case occurred) the judge will not accept to treat that statute as anything else than a piece of paper, not very different from my anti-head-scratching law.

What, then, does it mean for a norm to belong to a legal system when it is not yet, or not anymore, applicable in that system? During the latency period, we can describe the status of those norms as a "naked membership", that is, membership without applicability. The Non Sufficiency Argument presupposes that a norm's naked membership ought to be distinguished from a text's membership within a certain textual corpus. As a technical matter, there is a difference: statutes (or administrative regulations) are deemed to belong to the French legal system at the very moment they are promulgated or signed. Their publication does not change that; it actually modifies their applicability, as we saw earlier when we discussed Article 1 of the French Civil Code. In any case, the norm generally starts belonging to the legal system before the text which aims to express it starts belonging to the official textual corpus. And the second example above, taken from the practice of judicial review, shows that a norm may stop being applicable without stopping belonging to the legal system.

Be that as it may, the real philosophical question is: how is there a *norm* in the latency period? It cannot be doubted that there is some X which, being traceable to a source (that is to a set of legality-endowing facts) is a legal X. But how is that X a *norm*? If a statute prohibiting vaping in public spaces is enacted today, but becomes applicable next year, how can I say that such a statute expresses a norm, since it appears that I will have no obligation to stop vaping in public spaces during the latency period (or so it seems)? Even more to the point, I may be, in the meantime, prohibited from doing what the not-yet-applicable "norm" authorizes or even prescribes. For instance, between 2008 and 2015, French constitutional organs could not have started proceedings for the purpose of applying the new referendum process set out by article 11 of the French Constitution as amended in 2008.

Of course, as we saw earlier, there is a distinction between applying a norm and obeying it. But if a norm is not applicable, we have no reason to obey it, and

sometimes other norms of the legal system give us a reason not to obey it. During the latency period, such an X, albeit a legal X, does not modify the deontic landscape. It does not give any reason for action. And it cannot be backed by coercive means. So there is reason to doubt that naked membership involves norm at any level: contrary to what the Non Sufficiency Argument aims to show, a legal X becomes a legal *norm* only when it starts being applicable, and it stops being a legal *norm* as soon as it stops being applicable.

4.2. *Why should we care about membership?*

These doubts raise the question: why should we care about membership? How is membership an interesting feature of legal norms since what is philosophically interesting seems to be the way norms which are in force in a given legal system may give citizens and officials reasons for action.

In two recent articles, Kenneth Himma has made a very similar point. Himma discusses the distinction between validity (understood as legality, i.e. as membership) and "enforceability" in the context of judicial review in the US. (It is the Non Sufficiency Argument's second example above). When a court "strikes down" a statute in the US, the statute is not "removed from the books". The text still goes on belonging to the official corpus. But the statute becomes "unenforceable", which means that officials may not apply it to individual cases. As Himma argues, such a distinction is not especially interesting, and legality without force does not amount to much:

> «[n]one of this makes much difference because the Court's declaration of a norm as unconstitutional clearly renders the norm unenforceable and hence as lacking the force that partly constitutes an enacted bill as law; norms of a system S that may not be legally enforced are not properly characterized as "law" or as having the status of "legal validity" or "legality". Legal norms are backed up by the police power of the state. Once this latter feature is removed, their status as "law," as far as positivism is concerned, has for all practical purposes been removed – regardless of whether such norms remain on the books»[25].

This is quite sensible. And although these remarks are made about the latency period set at the end of a norm's life (not applicable anymore, but still valid), they are equally valid in what regards the beginning of the norm's life (e.g. the cases of *vacatio legis*). In determining what counts as a "valid norm" jurisprudents need not be bothered by what appears to be insignificant technicalities. What is or stays "on the books" is not relevant *per se*. It is only relevant when it is able to *make a*

[25] HIMMA 2009, 103; see also HIMMA 2013, 160.

difference in people's lives and in their decision-making. If a "law" is enacted but, for some reason, never becomes applicable, it will not amount to anything more than a few words on a page.

Moreover, a law that is inapplicable is bound to be left unapplied. There is a very short step from normative inapplicability to inefficacy. And many legal systems deal with the inefficacy of norms by making *desuetude* a part of their rule of recognition[26]: not only inapplicable norms are not efficient, but they are bound to lose any formal validity anyway from a certain point onwards. To be sure, this last remark does not hold as far as *vacatio legis* is concerned. But there would still be an analogy to be made with desuetude; it could indeed be argued that just as an inefficient norm stops belonging to the legal system, so a norm really starts belonging to a legal system as soon as it is applicable, and as soon as it is in fact capable of efficacy.

If we look at law as a set of tools that aim to create or pre-empt reasons in people's decision-making, then we can understand why the Non Sufficiency Argument may prove somewhat deceptive. It rests only on purely technical ways of identifying "valid law" through the use of formal sources, provided that no act of derogation has intervened in the meantime. But if we concede that what lawyers call "valid law" during the latency period has no normative weight or potency whatsoever, there is no reason to treat it as a set of norms[27]. What interests us in legal membership is the fact that usually traceability to a source gives officials – and generally laymen as well – reasons for making legal statements, i.e. statements relative to the scope of rights and obligations to be allocated in particular cases. This is why naked membership does not appear to be interesting since in the latency period we have no reason to make any legal statement involving the "norm" which belongs nakedly to the legal system.

This is why many jurisprudents accept Raz's definition of valid law as the set of norms which are binding on law-applying officials[28]. This definition is all the more remarkable since, as we saw, Raz accepts, and actually endorses, the Non Necessity Argument[29], according to which a legal system may render applicable, i.e. binding, norms which do not belong the legal system. Membership, in that perspective, is obtained by subtraction: it is the set of all binding norms, except for those which, though binding, belong to another legal system[30].

[26] See on this HART 1994, 103. Kelsen develops the notion of "negative custom" (KELSEN 1934, 213).

[27] In another context (the study of the relationships between law and morality), see Christoph Kletzer's critique of the attempts to divorce validity from bindingness, which «divest validity of its normative nature and relegates it to the role of a mere indicator of membership» (KLETZER 2017).

[28] RAZ 1979, 149.

[29] See RAZ 1979, 118-120 and 148 f.

[30] For instance, Raz writes: «[w]e want a test which will identify as belonging to a system all the norms which its norm-applying institutions are bound to apply (by norms which they practice) except for those

So here we are. Naked membership is primarily a matter of some texts belonging to an official corpus. It has no normative potency: whatever X belongs to the legal system (i.e. is a legal X) during the latency period is not a norm. This is enough to give us a reason to be sceptical about the relevance of the Non Sufficiency Argument. Since that argument does not really bear on what a jurisprudent may consider an interesting feature of law, there is not much reason why we should care about it. The so-called applicability of a norm is nothing but the point from which an X really starts being a norm. What happens before or after that is not relevant.

Or is it?

5. *Solutions?*

In the remaining of this paper, I shall try and propose some very sketchy solutions to the scepticism expressed in the last section. I think the Non Sufficiency Argument can be salvaged, and could actually reveal some features of the law which are worthy of jurisprudential interest.

5.1. *The differences naked membership makes*

First of all, I shall argue that Naked Membership makes a practical difference on many levels. By practical difference, I do not mean generally a difference in terms of the practical deliberation of the agent (his deliberation regarding what to do) – as in the so-called Practical Difference Thesis which is deemed a challenge for inclusive positivists[31]. I mean something more down-to-earth: naked membership makes a difference for a great number of legal officials in that it entails specific obligations or specific constraints.

5.1.1. *Implementary and interim rules*

A first example of such a practical difference is *vacatio legis* itself. When a statute postpones its own applicability, one of the reasons often is that some further norms need to be adopted by the executive branch before it is materially possible to apply the statute. The statute cannot be applied unless governmental decrees specify its scope and exceptions. This kind of normative implementation process is more and more commonplace as the objects of legislation grow ever more complex. If the government fails to adopt those statute-implementing rules, the

norms which are merely "adopted"» (RAZ 1979, 119).

[31] See among an enormous literature COLEMAN 1998; WALUCHOW 2000; SHAPIRO 2001.

statute may never become applicable: the latency period may last forever. But in many legal systems, this is not the case. For instance in France, there is a positive obligation for the government to adopt those rules within a reasonable time and the State can be sued in the courts if it fails to comply with that obligation[32]. So I would say that, from the point of view of the government and the civil servants who actually write those texts, naked membership does make a difference, since it creates for them specific obligations.

Another duty that may arise during the latency period is the obligation to issue interim rules. Overarching legal principles, such as the principle of legal certainty, requires that when a law-making authority issues a new rule or set of rules which may upset existing legal situations (e.g. contractual situations), it should issue a set of *interim rules* in order to prepare the addressees of the new rule for the change to come in the law. Legal certainty not only requires postponing applicability, but sometimes it also requires issuing a new, albeit transitory, rule or set of rules. So I would say that here again, naked membership has at least some normative potency.

5.1.2. *Reinstatement versus re-enactment*

Another example may be taken from the practice of judicial review. As I hinted earlier, some courts (such as the Constitutional Council in France or the German Federal Constitutional Court) are empowered to "nullify", i.e. repeal, unconstitutional statutes, sometimes with retroactive effect. Other courts (such as the US Supreme Court) are only empowered to suspend the applicability of such statutes. When they do, a latency period begins which only ends when the law is removed "from the books". As we saw earlier, Himma argues that there is no significant difference between those two kinds of constitutional adjudication, since, in both cases, the unconstitutional statute loses its status as "law of the land" as soon as the court declares it to be so. However, as Himma himself seems to acknowledge a bit before the excerpt quoted above, in the second type of constitutional adjudication «the statute would take effect without other action by the legislature if the Court were to reverse itself»[33]. In other words, when a court is only empowered to disapply (or to suspend the applicability) of a legal norm, e.g. a statute, the norm may be *reinstated* without further action from the norm-creating authority, were it the case that the court reverses itself or that a constitutional amendment does so. Let me take an example: in *US v. Windsor*[34],

[32] See the famous case CE, Ass., 27 Nov. 1964, *Veuve Renard*.

[33] HIMMA 2013, 160.

[34] 570 U.S. (2013). *Windsor* was followed in 2015 by the *Obergefell* case (*Obergefell v. Hodges*, 576 U.S. [2015]) which struck down all State laws denying same sex couples a right to marry. I deal only with *Windsor* here, for simplicity's sake.

the US Supreme Court "struck down" a key part of the 1996 *Defense of Marriage Act* (*DOMA*), namely its article 3 (1 US Code §7), which defines marriage as the union between a man and a woman as far as the federal government is concerned. No action was taken by the legislature to formally repeal that law, which is still on the books, though inapplicable. Now, there are roughly two ways the Supreme Court's holding in *Windsor* could be reversed. The first way would be a self-reversal by the Court itself[35]: the Court may very well decide that *DOMA* is constitutional after all. The other way is through constitutional amendment (an unlikely route in a rigid constitutional system like the US): constitutional amendment may be used to remove the cause of the statute's unconstitutionality. In both cases, the statute needs no further action from the legislature in order to become fully applicable again. The statutory norms are, so to speak, reinstated[36]: it is so because, although they were inapplicable for some time, they never were removed from the legal order. This feature can be found in many legal systems, beyond the US legal system. For instance in India, where constitutional amendment is much more frequently practiced than in the US, legal scholars have developed a doctrine of "eclipse", which describes the fact that a law stricken down by the Indian Supreme Court may be revived, after an "eclipse", by way of constitutional amendment without further action from the legislature[37].

In systems where constitutional courts are empowered to repeal statutes, that is, to remove them from the legal system, unconstitutional statutes cannot be "reinstated" the way I just described. They have to be re-enacted: the legislative process must start over from scratch. This is obviously quite cumbersome; there was a majority for the first statute, there may not be one for the new one. Besides, the legislative majority which voted the first statute may be long gone by the time its unconstitutionality is reversed (be it because of the court's self-reversal or by way of constitutional amendment). In any case, this shows the difference naked membership makes. When a court is empowered to repeal a statute, there is nothing left to be "revived" or "reinstated" once its decision is reversed[38].

There are other consequences from the distinction between those two kinds of constitutional adjudication. For instance in the US, it sometimes happens that lower courts ignore a Supreme Court declaration of unconstitutionality, and that

[35] Not such a remote possibility given the likely future changes in the composition of the Court.

[36] This may be complicated by parasitic phenomena, such as desuetude.

[37] See CHANDRACHUD 2017, 34.

[38] Here is an example. In 1999, the French Constitutional Council struck down a law (Statute n° 99-36, 13 January 1999) which required that lists competing in regional elections be equally composed of men and women (see Cons. Const., Decision 98-407 DC, 14 January 1999). A constitutional amendment was passed shortly after in order to remove the constitutional obstacle (Constitutional Law n° 99-569, 8 July 1999). The parity list requirement was newly introduced by a subsequent statute (Statute n° 2000-493, 6 June 2000). It may be objected that my example is taken from an instance of *a priori* review, which takes place before the law is even promulgated. But it *a fortiori* applies to *a posteriori* review.

the Supreme Court declines to grant *certiorari*; such "resistance" from lower courts would be much more difficult absent any textual basis (any law "on the books"). It also happens that lower courts find a way to interpret the statute so as to make it consistent with the Supreme Court's constitutional rationale: a French court could not do that, since there would be no statute left to interpret.

5.2. *The Normativity in* vacatio legis

What I said in the previous section may well be discarded as focusing on petty, technical stuff, unworthy of the attention of jurisprudence (although I think it has considerable practical importance). In what follows I will try to show that there is still some jurisprudential or philosophical relevance to naked membership, and to the Non Sufficiency Argument. I will try to show that although what X belongs to the legal system during the latency period is not, strictly speaking, a norm, it is not just words on a page: it has some normative valence, albeit a weakened one. I am already willing to admit that this demonstration applies mainly to *vacatio legis* and not really to unconstitutional statutes and other cases of valid-yet-not-applicable-anymore rules.

5.2.1. *Bindingness and obligation*

Before we proceed to the proposed solution, a further distinction must be made. As I said earlier, applicability is some kind of bindingness, which may be understood as a duty regarding a certain use of norms: a duty to obey or a duty to apply. As Alf Ross showed in a famous article[39], a distinction must be made between a legal norm's bindingness and a legal obligation. For instance, legally you may not kill or steal. Legally a judge may not refuse to adjudicate a matter brought before her. Those are legal statements, referring to legal obligations (or rather prohibitions). Bindingness, on the other hand, has to be understood as a duty to obey. As Ross astutely noticed, there is no *legal obligation* to obey the law[40]. There only is a legal obligation or permission to φ (not steal, not commit denial of justice etc.). This is why Ross dismissed the kelsenian conception of validity as bindingness as hopelessly infected with some natural law disease. An obligation to obey the law cannot be *legal*; it must be a *moral* obligation. And as a matter of fact I do believe that we should resist the temptation, described above, to identify valid norms with a subset of binding norms.

[39] Ross 1961, 153.

[40] The question of the bindingness of *laws* (legal norms) must be distinguished from the question of the bindingness of *legal instruments* (contracts, wills, etc.): a contract may be *legally binding*, in that a law (for instance, a statute) requires performance from the co-contractors. But it makes *prima facie* no sense to argue that a statute would be, or would not be, "legally binding", in the sense that compliance with it would be required by law.

As Bulygin observed[41], the nexus of Ross's objection to Kelsen's notion of validity is that it ultimately rests on an absolute conception of bindingness: absolute bindingness means that a norm is binding on its own (moral) merits. However, the notion of applicability reveals a thoroughly relative conception of bindingness, which allows for a specifically legal kind of bindingness: courts are vested with a duty (or at least a power)[42] to apply legal norms, which is grounded in other legal norms, namely norms of applicability. When we say that laws are binding on judges we do not mean that they have a duty to obey, but rather a duty to apply. Legal norms are legally binding when a certain set of officials is under the duty to apply them. This kind of bindingness is strictly legal, since it is predicated on the existence of a specific set of legal norms.

Ross's notion of bindingness rests on a powerful intuition: legal bindingness is distinct from legal obligation. Legal obligation is one of the many possible deontic aspects of any legal norms. A legal norm may require you to φ, it may require you not to φ, and it may also grant rights, powers, and permissions. Bindingness is a feature of all legal norms, whatever deontic function they perform. A norm granting rights *is* binding, just as much as a norm creating an obligation or a prohibition. If we understand bindingness as a duty to obey, we cannot conceive that a norm granting rights or giving permission would ever be binding: how can I be under the duty to obey a norm which gives me a right to marry, for instance?[43] However as soon as we understand bindingness as a (relative) duty to apply, we may distinguish between the obligations (or rights, or permissions) created by legal norms and directed at law-abiding citizens and the bindingness of those norms, which rests on the norms of applicability of the legal system. Judges and other officials are under the duty to apply rights-granting norms as much as obligation-creating norms: they are under the duty to uphold rights as much as to punish breaches of obligation.

[41] BULYGIN 2015, 321.

[42] It may be disputed whether a simple power to apply may be counted as an instance of bindingness. Answering this objection would obviously take us too far, but I will assume that a power to apply entails a duty to apply correctly. For instance, there are optional choice-of-law rules: a court is empowered to apply a foreign legal norm, but it may choose to apply a domestic norm. The point with bindingness is that once the court has chosen which norm it will apply, it is under a duty to apply it correctly: for instance, it ought not to unduly restrict the norm's scope of application. This is why the court's decision will typically be reviewable by a higher court.

[43] Kelsen would retort that rights are just the reflex of positive obligations directed at third parties (KELSEN 1934, 127). I will not deal with such an objection here, since it is beyond the point: I am only trying to show that the obligations, rights, etc. directed by a norm at law-abiding citizens are distinct from that norm's bindingness. The argument from rights is only a way to illustrate the fact that the first set of normative aspects is distinct from the second. Even if we grant that rights are but a derivative from obligations, there would still be a distinction to be made between the obligations created by a norm and the norm's bindingness.

5.2.2. *Acoustic separation?*

During the latency period, it is plain that norms, though valid, are not binding. This is the whole point of the Non Sufficiency Argument. Does that show, as sceptics would have it, that what belongs to the legal system at that point is not a norm, but, for instance, a mere text? Does a norm which "nakedly" belongs to a legal system not create any reasons for action?

One way to understand the normativity of *vacatio legis* is to resort to the notion of an "acoustic separation" between "decision rules" and "conduct rules"[44]. Meir Dan-Cohen coined this phrase to refer to a thought experiment where the respective addressees of conduct rules and decision rules are locked into two different, acoustically sealed rooms. The addressees of one set of rules would not know the content of the other set of rules. This would allow a legal system to achieve competing values: for instance, legal excuses, such as duress, could be excluded from conduct rules, so as to achieve maximum obedience to the law, but they would be included among decision rules, so as to produce fairness and clemency in the criminal judgement.

Now we could use such a thought experiment to explain what happens during the period when a law is valid but not yet applicable, or not yet binding, as it were. Let us imagine that, on October, 23rd, 2017, a smoking ban is enacted, due for entry into force on January 1st, 2018. We could imagine an acoustic separation between the corresponding conduct rule ("thou shalt not smoke") and the corresponding decision rule (e.g. "smokers ought to be punished with up to one year in prison"). Ordinary citizens would be under the prohibition to smoke as soon as October 23rd, 2017, whereas judges would under the duty to apply the law, that is, to follow the decision rule, only from January 1st, 2018 on. Citizens would not be aware of the content of the decision rule; and they would not know that the decision rule is not yet binding on officials. Therefore the *vacatio legis* would not prevent the law, nonbinding as it is, from creating exclusionary reasons directed at ordinary citizens during the latency period.

Obviously such a system of acoustic separation is seldom found in actual legal systems. There is certainly a fair amount of ignorance of the law among ordinary citizens, but such ignorance extends not only to decision rules, but also to conduct rules themselves. Besides rules are seldom formulated – thus individuated – as distinct sets of decision rules on the one hand and conduct rules on the other hand. Acoustic separation is a thought experiment, and as such it can make us understand important truths about legal systems: for instance it helps us to discern some of the distinctive, yet competing, values instantiated by the law. But

[44] DAN-COHEN 1984, 630 ff. It should be noted that Dan-Cohen's model is intended to concern only criminal law. It may not apply in other subfields of the law.

as such it cannot explain how a nonbinding norm can create obligations, rights, etc. directed at citizens and how it can give them reasons for action.

So we need another way around. In order to do so, further distinctions are needed.

5.2.3. *Reasons and incentives*

It seems that during the latency period I have no reason to act in compliance with the not-yet-applicable norm; even worse, it may happen that I have a reason not to act in compliance with a norm which is not applicable anymore (because, for instance, it was stricken down by a court). Insofar as the practice of judicial review is concerned, it is very hard to find normative potency to a norm which, though still "nakedly" valid, is not binding anymore. So although Himma is wrong to underestimate the considerable practical difference the remaining of a law "on the books" may make (see *supra*), he is certainly right about the status of the norm in the interim. However, I will argue that his scepticism does not apply to *vacatio legis*.

During the *vacatio legis*, the norm is, *ex hypothesi*, not binding on anyone. But does that mean that during the latency period I have absolutely no reason to do what the not-yet-applicable law requires me to do? One ought to distinguish between the *incentives* a legal norm may provide and the *reasons* it creates. Incentives correspond to what is sometimes called "motivational reasons for action"[45], that is, facts which give an agent a certain motivation to act; whereas what I call "reasons" refers only to what is called "normative reasons". However my notion of an incentive is somewhat stricter than the loose idea of motivational reasons. An incentive supposes intentional action from a third party, the incentive-giver. You would not say that the fact that it is going to rain creates an incentive for me to stay home tonight. Incentives suppose an institutional and social setting, for instance the market. And law is naturally a big incentive-giver, part of law's efficacy is through incentive-giving, it involves both "good" and "bad" incentives, tax cuts on the one hand; prison on the other.

What makes naked membership look normatively inert is the fact that during the latency period, the "norm" does not provide any incentive to act in accordance with it. Let us use, once again, as an example our imaginary smoking ban enacted on October, 23rd 2017, but due for entry into force on January 1st, 2018. In such a context, I do not have any incentive not to smoke (let alone stop smoking) before January 1st. The bindingness of norms *on officials* is precisely what gives people incentives to do what the law requires. So I do not have any incentive not to smoke before January 1st, 2018.

[45] Among an enormous literature on that matter, Dancy's *Practical Reality* stands out (DANCY 2000, 1-25).

My claim, however, is that I do have a reason not to smoke, even though smoking remains permissible until that date. Since acoustic separation cannot do the job of accounting for such an obligation, it should be clear that in our smoking ban example, there is not a full obligation not to smoke from October 23rd: I have no exclusionary reason not to smoke between October 23rd and January 1st, – or at least the law does not give me such a reason. However I am willing to defend the idea that a reason for action exists in some attenuated way.

5.2.4. *Supererogatory reasons?*

To what kind of reasons does naked membership give rise? It is plain that it cannot be an exclusionary reason. On October 23rd, I do not have a reason not to smoke which displaces my reasons to smoke or not to smoke.

My hypothesis is that, in some, but not all, cases, naked membership creates a kind of supererogatory reason. A supererogatory reason may be defined as a reason to do what is or may be otherwise required, jointed with a permission not to act as required. If the legal norm creates an obligation to φ, then during the latency period, there is a reason to φ, but there also is a permission not to φ. A supererogatory reason is a specific kind of *pro tanto* reasons which can always be overweighed by *weaker* reasons. As Raz puts it, supererogation involves a permission not to act on the balance of reasons[46]. I am aware that talking of "supererogatory reasons" is somewhat improper: an *act* is supererogatory[47] when it is both praiseworthy and not strictly required (by morality, law or any other system of norms and values). Reformulated in the language of reasons for action, an act is supererogatory when you have a conclusive reason to perform it, but a permission not to act on the balance of reasons. I use the phrase "supererogatory reason" to refer to the reasons to perform supererogatory acts.

So I would argue that the naked membership of the norm which bans smoking gives me a supererogatory reason not to smoke. This reason may be overweighed by weaker reasons: for instance the fact that the law still (weakly) permits smoking is surely a very weak reason for action. Obviously if the previous norm (the one repealed by the new, yet not applicable norm) not only authorized smoking, but made it *obligatory* (!), I would still have a strong reason to smoke during the latency period; in fact I would have an exclusionary reason to so, which displaces any other reason anyway, including, of course, supererogatory

[46] RAZ 1975a, 165; RAZ 1975b, 91 ff.

[47] I cannot do justice to the important literature devoted to supererogation, whose revival in contemporary moral philosophy is attributed to JO Urmson. A good place to start is HEYD 1982. Explaining supererogation in terms of reasons for action, which is central to Raz's theory of course, is not quite commonplace (for a penetrating criticism, see indeed HEYD 1982, 167 ff.). However Raz's theory will prove an apt starting point for the present purposes.

reasons. In my mind, the new norm does still give rise to a supererogatory reason, although that reason, like any other reason, is displaced by the fact that the previous norm still gives rise to an exclusionary reason.

An easy objection can be made to this attempt to salvage the normativity of naked membership. The idea of supererogatory reasons makes sense only when we talk about obligations or prohibitions. A supererogatory act is one that would otherwise be obligatory, and for which there is a conclusive reason for action, but which can be overweighed by weaker reasons. It makes no sense to claim that power-conferring, rights-conferring or permission-granting norms give rise to supererogatory reasons. Let us assume, for instance, that a new norm permits or authorizes what was before prohibited, like smoking cannabis in Colorado. It makes no sense to argue that there is a supererogatory reason to do what is permitted anyway (I am talking of strong permissions, not weak ones). Besides in the latency period, the old norm still applies. The same goes for power-conferring norms. If the new norm modifies the way contracts ought to be created, I cannot say that it could ever be supererogatory for me to sign a contract of the new kind. Unless a certain use of one's powers is compulsory, it makes no sense to say that using one's power is supererogatory, since supererogation is about what would otherwise be compulsory. The most we can say is that when two ways of using one's power are both lawful, choosing the best outcome is sometimes *morally* (and not *legally*) supererogatory. Anyway, that kind of reasons cannot occur during the latency period. Absent any retroactivity, I have no reason at all to sign a contract of the new kind while the law is still not yet applicable: my contract will not be upheld as valid by the courts.

There is no easy answer to that objection. I would argue that as far as powers are concerned, there is, in the latency period, a reason not to use the old powers – unless such use is made compulsory by law (as is often the case) – although using them is still permissible. But the same does certainly not hold for permissions or rights.

So my claim is that there still is some sort of soften normativity during the latency period in the cases of *vacatio legis*. It does not apply to all kinds of norms, and it does not apply to all instances of naked membership. It does not apply to not-applicable-anymore norms: it is difficult to imagine that a norm which, as the court has declared, ought not to be applied anymore could still provide reasons for action. But at least in some cases I believe there is room, conceptually, for some kind of normativity of nonbinding norms.

6. *Conclusion: a new look at the rule of recognition*

In this paper I have tried to present some doubts which may be raised by the distinction between membership and applicability, and especially by what I have called the Non Sufficiency Argument. To sum up those doubts: there may be a

latency period during which a valid norm is not yet applicable or a newly inapplicable norm is not repealed. During that period, the status of a norm is one of "naked membership": it is traceable to a source, therefore it satisfies the criteria of membership picked out by the rule of recognition, but it has absolutely no normative potency. During the latency period, we do not have a norm belonging to a legal system as much as a text, i.e. a set of dispositions, belonging to an official corpus. But what is philosophically interesting about the law is the fact that legal norms give (or claim to give) citizens and officials reasons for action. So even if it does not match the technical, legal definition of formal validity, it seems that the philosophically interesting definition of validity must be validity as bindingness. However I have tried to salvage the Non Sufficiency Argument by showing that naked membership can make a considerable practical difference. And I have also tried to show that, although not binding, certain norms may give rise to a certain type of reasons during the latency period.

The need to address the doubts expressed by some about the Non Sufficiency Argument shows that although a conceptual distinction between applicability (or bindingness, or duty to apply) and validity-as-membership is sound and necessary, there is still some considerable traction to the idea that a norm, in order to be "*really*" a norm, must somehow be binding. Of course, membership, which is the specific mode of existence of legal (and paralegal) norms, and bindingness *are* conceptually distinct. But it would make absolutely no sense to conceive of a legal system where valid norms (norms belonging to the system) would be massively inapplicable. That system would be absolutely chaotic, and would not really give anybody any reason for action. It would not even give rise to the kind of supererogatory reasons we have mentioned earlier, since what gives this supererogatory quality to the norms in question is the fact that they are destined to become applicable in the very near future.

Although conceptually distinct, legal validity (*qua* membership) and legal bindingness must somehow go hand in hand. This is why although membership is a purely conceptual matter[48], there is some validity (no pun) to the Hartian or Razian idea that valid norms are norms which the officials are under the obligation to apply; in other words, there is some validity to the idea that the rule of recognition, which picks out the system's criteria of validity, can somehow be deduced from the practice of officials as the set of criteria which allows them to determine which norms they are bound to apply. The rule of recognition, although conceptually a purely conceptual rule, must also be understood as a norm of (*prima facie*) applicability[49]. The norms which belong to the legal system are *prima facie* applicable: it is not a conceptual necessity *per se*, but rather it is a material necessity which fits best our

[48] That is something on which Bulygin has rightly insisted. See BULYGIN 2015, 313 f. and see his debate with Ruiz Manero: RUIZ MANERO 1990, 133 and BULYGIN 1991, 311-318.

[49] For a related idea, see MUNZER 1970, 58; MUNZER 1973, 1149 f. See also PINO 2011, 823.

intuitions about the legal phenomenon. Other norms of applicability can defeat the norm of applicability contained in the rule of recognition: they can postpone the applicability of valid norms; they can render applicable norms which belong to other legal systems. But the core of the legal experience is one in which norms which are formally valid and therefore belong to the legal system are fully applicable in it, and may fully give rise to reasons for action.

References

Ávila H. 2016. *Legal Certainty*, Dordrecht, Springer, 2016.

Barberis M. 1990. *Il diritto come discorso e come comportamento*, Torino, Giappichelli, 1990.

Black M. 1962. *Models and Metaphors*, Ithaca, Cornell University Press, 1962.

Bulygin E. 1991. *Regla de Reconocimento. ¿Norma de obligacion o criterio conceptual?*, in «Doxa», 9, 1991, 257 ff.

Bulygin E. 2015. *Essays in Legal Philosophy*, Oxford, Oxford University Press, 2015.

Carpentier M. 2014. *Norme et exception. Essai sur la défaisabilité en droit*, Paris, LGDJ/Varenne, 2014.

Carpentier M. 2018. *Sources and Validity*, in Hage J., Kirste S., Mackor A.R., Westerman P. (eds.), *Legal Validity and Soft Law,* Dordrecht, Springer, 2018, forthcoming.

Chandrachud C. 2017. *Balanced Constitutionalism. Courts and Legislatures in India and the United Kingdom,* Oxford, Oxford University Press, 2017.

Coleman J. 1998. *Incorporationism, Conventionality and the Practical Difference Thesis,* in «Legal Theory», 4, 1998, 380 ff.

Comanducci P. 2010. *Alcuni problemi concettuali relativi all'applicazione del diritto*, in «Diritto & Questioni Pubbliche», 10, 2010, 121 ff.

Dan-Cohen M. 1984. *Decisions Rules and Conduct Rules: on Acoustic Separation in Criminal Law*, in «Harvard Law Review», 97, 1984, 625 ff.

Dancy J. 2000. *Practical Reality*, Oxford, Oxford University Press, 2000.

Grabowski A. 2013. *Juristic Concept of the Validity of Statutory Law*, Dordrecht, Springer, 2013.

Guastini R. 1993. *Le fonti del diritto e l'interpretazione*, Milano, Giuffré, 1993.

Guastini R. 2004. *L'interpretazione dei documenti normativi*, Milano, Giuffré, 2004.

Hart H.L.A. 1994. *The Concept of Law*, 2 ed., Oxford, Clarendon Press, 1994 (ed. or. 1961).

Hart H.M., Sacks A.M. 1994. *The Legal Process: Basic Problems in the Making and Application of Law*, Westbury, The Foundation Press, 1994.

Heyd D. 1982. *Supererogation. Its status in ethical theory*, Cambridge, Cambridge University Press, 1982.

Himma K.E. 2009. *Understanding the Relationship Between the U.S. Constitution and the Conventional Rule of Recognition*, in Adler M., Himma K.E. (eds.), *The Rule*

of Recognition and the U.S. Constitution, New York, Oxford University Press, 2009, 95 ff.

HIMMA K.E. 2013. *The Rule of Law, Validity Criteria, and Judicial Supremacy*, in FLORES I.B., HIMMA K.E. (eds.), *Law, Liberty and the Rule of Law*, Dordrecht, Springer, 153 ff.

KELSEN H. 1934. *The Pure Theory of Law*, 2 ed., Berkeley, University of California Press, 1967 (ed. or. *Reine Rechtslehre*, Wien, Verlag Franz Deuticke, 1934, eng. trans. by M. Knight).

KLETZER C. 2017. *Normative Jinx*, in «Oxford Journal of Legal Studies», 37, 2017, 798 ff.

MAZZARESE T. 2000. *"Norm Proposition": a Tentative Defense of a Skeptical Ppoint of View*, in EGIDI R. (ed.), *In Search for a New Humanism. The Philosophy of Georg Henrik von Wright*, Dordrecht, Springer, 193 ff.

MORESO J.J. 1993. *Sobre normas inconstitucionales*, in «Revista Española de Derecho Constitucional», 38, 1993, 81 ff.

MORESO J.J. 1998. *Legal Indeterminacy and Constitutional Interpretation*, Dordrecht, Kluwer, 1998.

MORESO J.J., NAVARRO P. 1997. *Applicability and Effectiveness of Legal Norms*, in «Law and Philosophy», 16, 1997, 201 ff.

MORESO J.J., NAVARRO P. 1998. *The Reception of Norms and Open Legal Systems*, in PAULSON S., LITSCHWESKI PAULSON B. (eds.), *Normativity and Norms. Critical Perspectives on Kelsenian Themes*, Oxford, Clarendon Press, 273 ff.

MUNZER S. 1970. *Legal Validity*, The Hague, Martinus Nijhoff, 1970.

MUNZER S. 1973. *Validity and Legal Conflicts*, in «Yale Law Journal», 82, 1973, 1140 ff.

NAVARRO P., ORUNESU C., RODRIGUEZ J.L., SUCAR G. 2004. *Applicability of Legal Norms*, in «Canadian Journal of Law and Jurisprudence», 17, 2004, 337 ff.

PINO G. 2011. *L'applicabilità delle norme giuridiche*, in «Diritto & Questioni Pubbliche», 11, 2011, 799 ff.

RAZ J. 1970. *The Concept of a Legal System*, 2 ed., Oxford, Clarendon Press, 1980.

RAZ J. 1975a. *Permissions and Supererogation*, in «American Philosophical Quarterly», 12, 1975, 161 ff.

RAZ J. 1975b. *Practical Reason and Norms*, 2 ed., Oxford, Oxford University Press, 1999.

RAZ J. 1979. *The Authority of Law*, 2 ed., Oxford, Oxford University Press, 2009.

RAZ J. 1999. *Engaging Reason*, Oxford, Oxford University Press, 1999.

RAZ J. 2009. *Between Authority and Interpretation,* Oxford, Oxford University Press, 2009.

RODRIGUEZ-BLANCO V. 2014. *Law and Authority under the Guise of the Good*, Oxford, Oxford University Press, 2014.

ROSS A. 1958. *On Law and Justice*, London, Stevens & Sons, 1958.

ROSS A. 1961. *Validity and the Conflict Between Legal Positivism and Natural Law*, in PAULSON S., LITSCHWESKI PAULSON B. (eds.), *Normativity and Norms Critical Perspectives on Kelsenian Themes*, Oxford, Clarendon Press, 1998, 148 ff.

RUIZ MANERO J. 1990. *Juridiccion y norma*, Madrid, Marcial Pons, 1990.

SARTOR G. 2008. *Legal Validity: an Inferential Analysis*, in «Ratio Juris», 21, 2008, 212 ff.

SCHAUER F. 1991. *Playing by the Rules,* Oxford, Clarendon Press, 1991.

SHAPIRO S. 2001. *On Hart's Way Out*, in COLEMAN J. (ed.), *Hart's Postscript*, Oxford, Oxford University Press, 149 ff.

VON WRIGHT G.H. 1963. *Norm and Action*, London, Routledge, 1963.

WALDRON J. 2011. *Vagueness and the Guidance of Action*, in MARMOR A., SOAMES S. (eds.), *Philosophical Foundations of Language in the Law*, Oxford, Oxford University Press, 58 ff.

WALDRON J. 2012. *Dignity, Ranks and Rights*, Oxford, Oxford University Press, 2012.

WALUCHOW W. 2000. *Authority and the Practical Difference Thesis*, in «Legal Theory», 6, 2000, 45 ff.

WROBLEWSKI, J. 1985. *Legal Language and Interpretation*, in «Law and Philosophy», 4, 1985, 239 ff.