

Wrestling With Criteria of Legal Validity

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Abstract: We speak of law as a system of norms for regulating human conduct in society. Diverse people see law as relative to cultures, and views concerning absence of a universal legal culture tend to eliminate the idea of ultimate criterion of legal validity. Notable attempts to do so have been swept under the carpet by sceptics. But we will construct such a criterion based on the constitution as articulating its necessary and sufficient conditions. This paper attempts to eclecticify the relevant features of the criteria of legal validity of particular school of thought into a constitutional universal that takes its origin from society. The intention is to reconstruct and ultimate criterion of legal validity on the bases of a world constitution generated by the amalgamation of all constitutions of the world. The growth of contemporary world legal order inspires belief in the reality of international law, thus paving the way for a universal legal culture side by side a constitution that promote supremacy of the law and equality of all citizens of the world before the law. With a universal constitution in place we can correct distortions in particular constitutions that do not conform to the stability in the universal. We will agree that the laws of many nations of the world today are seeking update to the international ideal. The advantage of adopting this strategy is to straighten the rationality of law throughout the world and thereby checkmate tyrannical laws in contemporary societies – as another dimension to law reforms.

Keywords: Diverse people, contemporary, electrify, amalgamation.

INTRODUCTION

The idea of question the possibility of an ultimate criterion of legal validity is a highly welcomed development, since the history of world progress in thought and practice bears some marks of scepticism in nearly all areas of human activity. The legal sphere is one of such areas in human activities in the 21st century that needs to be revolutionalised. Theoretical positions in general jurisprudence tend to group three large kinds, namely natural law, legal positivism and legal realism. Thus question about legal validity are usually brought within these rubrics or a combination of them. But in this study we shall include historical and sociological theories to supplement those efforts. The debate over what constitutes a valid law or legal system stretches across time and space drawing ideas from ancient through medieval to modern and contemporary periods in many parts of the world including Europe and America. Law considers human action in terms of right or wrong. On the one hand, law is believed to be co-existent with society and therefore grows or expands with society. On the other hand, it is associated with enactment and is therefore an event in the modern time. For some thinkers, it is difficult to understand the idea of legal validity from the conflicting standpoints of differing schools of thought. However, some views favour the traditional society in which every citizen participates in the law making and decision taking

processes. The difficulty in understanding the operation of the law and legal institution comes with the arrival of modern democracy in which a few people take over the functions of the whole body of citizens who thus surrender their wills to the constitution. The yearning of society is therefore how these few can act to reflect the cultural universal. Arguably society makes laws for the security of its members. But it would seem that sometimes those who govern society use law to exploit or oppress the governed while society goes on preaching the ideal of justice in terms of supremacy of the law and equality of all persons before the law. This renders beliefs about legal validity questionable; and such appears to be the case whether we are talking about legislation, adjudication or administration.

Questions about an ultimate criterion of legal validity are diverse, with scholars separating into various camps. Some scholars seek an ultimate standard in a universal criterion; some search for particular criteria; while others grow suspicious of the possibility of any such criterion. Consequentially, it would seem that the debate over the possibility of an ultimate criterion of legal validity remains perennial and more so begging for the best answer. The aim of this study is to seek ways of eclecticifying legal traditions or the views of the various schools of thought on law for the purpose of constructing an ultimate criterion of legal validity.

The phenomenon of criterion of legal validity, its precise characteristics, and the means by which it is most effectively realised and protected are issues that have engaged many distinguished scholars representing a variety of disciplines including political theory, sociology and jurisprudence. Efforts to identify the specific demands of the criterion of valid law and the conditions necessary for its satisfaction generate both theoretical and practical challenges. The intention of this study is not just to argue for what makes valid laws and legal institutions but to join other thinkers in charting the course of legal philosophy as an attempt to ensuring the future of our laws. Our central thesis lies in seeing society as the platform for erecting a people's constitution. The three philosophical attitudes considered relevant for this enquiry are deconstructionist, incorporationist and Reconstructionist. At this point it would seem that before we can isolate the problems generated by criterion of legal validity and develop a productive response to them, it is necessary to determine what is meant by both "validity" and "criterion of validity".

On Criterion of Validity

The aim of this section is to identify the parameters for adjudging a belief or set of beliefs both as valid and as a criterion of validity. The term "validity" is a concept with various meanings. Primarily, validity is used as a property of argument. Simon Blackburn believes that it is argument that is valid or invalid depending on whether or not the conclusion follows logically from the premise [1]. According to Blackburn, this property specifically belongs to the deductive system. Truth or falsity is the property of propositions, thus the premise or conclusion of an argument may be either true or false but certainly they cannot logically be regarded as valid or invalid. In model theory validity is used as the property of a formula. It maintains that a formula is valid when it is true in all its interpretations. Michael Rundell gives us the general and popular use of the term. In popular parlance validity is used interchangeably with "acceptability" [2]. For instance, the Nigerian fifty naira (₦50) note is currently (as at 2016) a valid legal tender. Hence, Rundell describes the term valid as legally accepted [3]. It is in this sense that lawyers and judicial officers are quite apt to use the term when they talk about a valid law, claim, or evidence to show that it is conventionally adoptable. Incidentally the term has come to be used rather ambiguously with a shift in meaning from one of logical necessity to that of causal connection. But the problem of replacing the word "valid" with the word "acceptable" is to be seen in its reference to time and space, thus distinguishing our conceptions of validity of law between the particular and the universal. Should we in this enquiry depend on the notion of validity as it applies to argument or on the notion of acceptability of a practice to formulate a

criterion of validity? Or, is there any other way of looking at the criterion of validity? To say that an argument is valid is to say that it has satisfied certain formal rules, but the validity of law is not about such formal rules. What then do we mean by saying that law is valid? If we are to speak of its acceptability to society, then what are the conditions for social acceptability of law? Incidentally it would seem that questions concerning the possibility of such a condition argue for the necessity of an ultimate criterion of validity. Robert

Audi defines criterion in broad, general and typical ways as:

...broadly, a sufficient condition for the presence of a certain property or for the truth of a certain proposition. Generally, a criterion need be sufficient merely in normal circumstances rather than absolutely sufficient. Typically, a criterion is salient in some way, often by virtue of being a necessary condition as well as a sufficient one. The plural form, 'criteria', is commonly used for a set of single necessary and jointly sufficient conditions. A set of truth conditions is said to be criterial for the truth of propositions of a certain form [4].

It is argued here that a conceptual clarification of a philosophically important concept may assume the form of a proposed set of truth conditions for a paradigmatic proposition containing the concept in question. A special use of criterion may be found in the attempt by Ludwig Wittgenstein that seeks to explain the interaction between inner states and outward behaviour. The view maintains that an inner process stands in need of outward criteria [5]. An instance is to relate moans and groans with aches and pains. This implies that a criteriological conception is required to forge a conceptual link between items of a sort believe to be intelligible and knowable to items of a sort that (but for the connection) would not be intelligible or knowable.

Throughout the history of philosophy, sceptics have maintained that it is not possible to find any independent criterion from which to pass judgments on the contributions of truth or falsity of beliefs. Godfrey O. Ozumba refers to this attitude as a request for foundation [6]. He argues that it would be arbitrary to justify any knowledge without a foundation. According to him foundationalism is the view that knowledge must be regarded as a structure raised upon a foundation that is both secure and certain. It would seem here that the foundation of an activity is its criterion of validity. But this position appears to stand in need of justification. Blackburn defines "criterion" as a sufficient condition of something else or a condition that may seem *a priori*

to provide good ground for something else even though it might not be sufficient for it [7]. As the solipsism would have it, the fact that a person behaves appropriately does not guarantee logically that he or she is in pain, but it can serve as the basis of *a priori* truth that such were the case. We will attribute this latter way of looking at the problem to Wittgenstein's ordinary use of language which is tied to semantic relations rather than strict logical relations. Incidentally the attempt to justify this view leads us to the regress theory, which says that if one justifies a perspective by appealing to another, then one will need to appeal to yet another perspective in the other to justify the previous [8]. This is the kind of problem to be found in the attempt to justify foundations. Of course, it is possible that a particular kind of justification requires a deductive, an inductive or analogical procedure.

To what extent then may foundation be acceptable as criterion of validity? Michel de Montaigne presents us with a rather sceptical but profound answer. In the quest for a judicatory instrument of verification, he advances the argument that the absence of a criterion of justification leaves us entangled in a circularity of judgement [9], which means that we will be entangled in an infinite regress of justifications. Following this trend of thought, Sextus Empiricus writes:

In order to decide the dispute which has arisen about the criterion, we must possess an accepted criterion by which we shall be able to judge the dispute, and in order to possess an accepted criterion, the dispute about the criterion must first be decided. And when the argument thus reduces itself to the form of circular reasoning the discovery of the criterion becomes impracticable, since we do not allow them to adopt a criterion by assumption, while if they offer to judge the criterion by a criterion we force them to a regress *ad infinitum*. And furthermore, since demonstration requires a demonstrated criterion, while the criterion requires an approved demonstration, they are forced into circular reasoning [10].

As Empiricus sees it, it is not possible to accept a circular argument or a foundation by assumption, or even a regress argument as criterion of validity for any practice including law. It seems then reasonable to argue for standards with which to weigh the acceptability of our justificatory arguments. For instance, it is possible that the definition of a term serves as a criterion of validity of a system of beliefs applicable to life. We may ask, would a definition of law serve as a criterion of legal validity? We will come back to this in the next section.

Perspectives on Criterion of Legal Validity

There are various considerations seeking recognition as criterion of validity in law. If we study the various schools of thought on jurisprudence such as hermeneutical school, natural law school, positive law school, legal realism, historical law school, sociological law school, Marxian law school, postmodernist school and critical legal studies, we hope to find some trails of idea about criterion of legal validity either within the central thesis of a school itself or as the pre-occupation of members within them. Such views may consist in the attempt to show origin of law or the reason for law, or its acceptability to society. But as we have already noted in the preceding section, many thinkers would argue that the mere fact of stating the origin of law is not a sufficient condition for it to be regarded as the criterion of legal validity. This calls for conditions which would afford us the reason to regard it as such by all persons. Now we begin with the question of seeing the definition of law as a criterion of legal validity. We may locate this in the study of hermeneutics which may be described as the art or theory of interpretation [11]. Here we are concerned with the meaning of law and its explanation. The interpretation of the law provides an example of ontological events, an interaction between the interpreter and text that is part of the history of what is understood. This is because the process of applying the law inevitably transforms it. Generally, the attempt to understand the subjective feelings of a people through text may not give rise to objective knowledge of the law. We may then bring ourselves to realise that definitions have no importance in themselves apart from the expression and ascertainment of meaning. It follows that the only way to deal with the definition of criterion of legal validity is to recognise that being of the ordinary meaning, the definition of this term must be multiple. At this point, we shall be concerned with the meaning of law while we leave the larger question of interpretation for legal realism. Interestingly a valid definition of law is expected to cover issues such as purpose, essence, intrinsic properties of law and what it stands for among other issues. The question now is: are we to see existence as part of the definition of a perfect legal object of validity or set of necessary and sufficient conditions for justifying it? Questions of this kind have generated quite a large number of criticisms in many areas of philosophy; including philosophy of religion and quantifier logic where it has come to be resolved that existence is not a predicate. The implication seems to be that we cannot define the criterion of legal validity into existence by trying to discover perfect conditions with which to justify it. The requirement therefore seems to be that a theory suggesting such a criterion should be true. Michael D. Freeman points out that the confusion in defining law arises because jurists fail to clearly distinguish between a definition, a criterion of legal validity, and a general scheme for the criterion of validity for any legal system whatever. We can therefore think of some definition of law in terms of the

attempt to elucidate meaning. Questions concerning the criterion of legal validity tend in the present to be relative to particular legal systems and are therefore questions that belong more appropriately to constitutional law. And, it would seem that in talking about a general scheme for the criterion of validity of any legal system we mean that there should be a universal criterion of a formal kind that relates to any legal system. The history of jurisprudence records it that this is what Jeremy Bentham and John Austin in the nineteenth century and Hans Kelsen and Herbert Lionel Hart in the twentieth century tried to attain, with varying degrees of success. We can then hope to go on with the efforts of these scholars with a greater critical attitude to philosophising.

The pursuit of natural law theorists is of the overwhelming kind, in seeking universal conformity of social facts to the purposive character of the physical world. Natural law theory regards the question of whether a law was consonant with practical reason, or whether a legal system was morally and politically legitimate as wholly or partly determinative of legal validity, or of whether a legal norm granted a legal right. Natural law theory regards the relation between a legal system and liberty or justice as wholly or partly determinative of the normative force and the justification for that system and its laws [12]. Aristotle emphasises the fact that nature is teleological and the end of species is the good [13]. He believes that the order of life conforms to the course of nature, which implies that law must tend toward the good life in society for it to be acceptable. His sense of valid law is judged by the standard of the Greek situation as inviolable, which maintains that the law which heralds as inviolable is common to all city states. Marcus Titulus Cicero moves a step further to assert the leadership of the Deity as the source of valid laws [14]. He argues that it is not the dictate of reason for there to be one law at Rome and another at Athens or one law today and another tomorrow, but the same law everywhere and everlasting under the leadership of one God. It is based on this that Thomas Aquinas maintains that law is designed for the common good by one who has charge of the community [15]. The validity of law therefore lies in recognising the infallibility of reason to emphasise the reality of just laws. The belief is that an immoral law is no law at all. John Finnis sees natural law as the set of principles of practical reasonableness in ordering human life and human community [16]. The bases of natural law principles is basic goods, considered as objective values towards which all human beings must strive. A valid law therefore lies in human flourishing such as life, knowledge, play, aesthetic experience, friendship, religion and practical reasonableness. These objective factors, according to Finnis, are both pre-moral and have no need of a Deity.

Logical positivism tends to concentrate on internal problems of law, and therefore typically gives formal or content-independent solutions to such problems. Legal positivism regards legal validity as a property of a legal rule that the rule derives merely from its formal relation to other legal rules. It also regards a morally iniquitous law as a valid law if it satisfies the required formal existence condition. It follows that to speak of legal rights is to speak of normative consequences of valid legal rules. Based on the positivist outlook, James Harris provides four senses in which philosophers have concerned themselves to describe the notion of legal validity. He maintains that validity may be used to express conformity of a lower norm to a higher one in order to show that it is not *ultra vires* or void; it may be used to show that a norm is a constituent part of a normative field of meaning; it may be used to mean the correspondence of a norm with social reality; and it may be used to express the belief that a norm has inherent claim to the possibility of being fulfilled [17]. The sense of validity which concerns meaning shows the existence of a hierarchical structure of norms and how they are derived. To think of validity as correspondence of a norm with social reality is to equate it with effectiveness. More so to think of validity in terms of claim to fulfillment is to argue that a legal rule has political or moral value. All these approaches may be deemed acceptable, and we may refer to them as varying stages of validation in law. Perhaps, it might be argued that we need an independent criterion of validity for every aspect of social life. Classical positivism is an imperative system of legal rules, which shares the belief that law is the command of the sovereign. The command thesis implies one and the same thing: when it says that in the past sovereignty lay in the hands of kings and aristocrats who made laws, whereas in the modern time it rests with the legislature. Whatever the merit of each case, does this approach make a valid law? To say that law is a rule laid down by X (a sovereign) for Y (his subject) with X having power over Y, tends to suggest some form of dictatorship. On the one hand, Bentham argues that the definition of law is to be sought from legally relevant facts while the issue of good laws is to be answered from the point of view of utility [18]. On the other hand, Austin maintains that what we mean by a good or bad law is that the law agrees with or differs from a something to which we tacitly refer it as to a measure of test [19]. A law is therefore good in virtue of its utility or bad in virtue of its harmful effect. The imperative law theory is an intellectual reaction against natural law reasoning. Unfortunately, the imperative law theory does not provide any scientific basis for calculating the utility of human action; instead it undermines the role of justice in the operation of law and the judicial process.

Kelsen writes from the flank of pure jurisprudence, and his pure theory of law appears to have the goal of a science rather than a theory of pure law. His theory provides the basic forms of scientific knowledge of legal norms with content (though empirically contingent) that can be morally evaluated. The cognitive normative object of the theory may be analysed without reference to its content or to questions about whether or not to obey a rule. A norm expresses a proposition as to what ought to be the case rather than what is or must be the case, given certain conditions. It follows for Kelsen, that the existence of a norm implies its validity [20]. Incidentally it would seem that Kelsen does not use the concept of validity with any consistency. Harris points out that Kelsen primarily uses “valid” to show that a norm is a constituent part of a normative field of meaning [21]. It is therefore alien to Kelsenian thoughts to use validity either as correspondence to social reality or as having an inherent claim to fulfillment. Jules Coleman presents inclusive positivism that supposes the conventionality of criteria of legal validity. He maintains that the existence of the criterion of legality in any community depends on social facts rather than on moral arguments [22]. However all inclusive legal positivists agree that morality can be a condition of legality.

Hart writes from the perspective of modern analytical jurisprudence as an attempt to unite legal positivism and natural law theory. Hart restates the natural law position in a semi-sociological fashion, pointing to the reality of essential rules for continued social existence [23]. Also Hart argues that these simple facts constitute the core of indisputable truth in the doctrines of natural law [24]. These are facts about any social organisation which would afford us the reason to postulate content of natural law. But Hart does not specify the natural universal rules for this purpose; rather he states five facts about human condition of existence which include human vulnerability, approximate equality, limited altruism, limited resources, as well as limited understanding and strength of will. But it would seem that these principles in themselves are not necessarily rules with any specific content. Michael D. Freeman describes these facts as being extremely vague and uncertain because they derive from Hart’s intuitive understanding of the human condition rather than being based on sociological investigation [25]. Neil Mac Cormick argues that Hart’s position leaves out the important question of sex, as an urge whose promptings in all human beings far transcend the limits of their strength of will guided even by a supremely rational understanding of self-interest [26]. Hart’s sense of society is predicated upon a just legal order. But it does not follow from this description of society that its acceptance leads to a system of even minimal justice in any given community, for human societies at all periods of history tend to share a record

of melancholy of oppression and discrimination all in the name of security and legal order. We see his effort as an attempt to establish a sociological foundation for a minimum content of natural law rather than that of trying to establish a higher or overriding law in the sense of an eternally just moral or legal principle. It is in the attempt to achieve this goal that he shows regard for the fundamental nature of man, and this provides his justification for referring to natural law. But it is difficult to ascertain how Hart can give us a minimum number of rules from a complicated set of facts.

Legal realism sees the claimed role of the law in legitimising certain gender, race or class interest as the prime salient property of law for theoretical analysis. Added to this are questions about the determinacy of legal rules or of legal interpretations or legal rights as value in the service of explaining the political power of law and legal systems. Realists stake the validity of law on legal decisions, owing to the fact that modern legal theories focus on adjudication and are based on the inner working of the judicial system. Freeman maintains that:

The earlier attitude is to regard the judiciary as the priests of the law, the repository of its ancient rules and traditions, decisions are thus distilled in a mysterious way *in scrinio pectoris sui*: moreover, he never creates new law but only declares fresh applications of the ancient rule [27].

The earlier attitude of adjudication is often associated with the people’s law. Medieval attitude shows a tendency toward creating new customs. But despite this, it is certain that the legal system of society is gradually remoulded to meet new social needs. The current practice in the modern period still clings to the assumption that a judge is to apply law as it is and not to make new law. Modern theories explore the inner working of the legal system because legal sources provide the raw materials of the judicial process. But Paul Fitzgerald believes that they are merely contingent and not necessary, and that these sources differ in different systems of law and even in the same system in different periods of its growth [28]. What then is the validity of the legal sources used by lawyers and judges who are concerned with the judicial process? A somewhat cogent answer from the flank of Scandinavian legal realism is the view of Alf Ross, who describes all law as directives from the legislature to courts or officials. Ross stresses the point that rules of law constitute one species of the genus “directives”, more so a norm is to be defined as a directive which corresponds in a particular way to certain social facts [29]. Also Ross distinguishes between the law actually in force and textbook sentences concerning the law in force as the two kinds of legal knowledge, this

distinction being between prescriptive and descriptive laws [30]. To prescribe is to be a proposition of law whereas to describe is to make an assertion or assertions about law. Hence it would seem that the doctrinal study of law is normative in the sense that it is consisting of assertions which purport to describe valid law. Ross concludes that valid law means an abstract set of normative ideas which serve as a science of interpretation for the phenomena of law in action [31]. An important observation in Ross' distinction between a logical and a psychological point of view is that legal rules are about the exercise of force and are therefore directed to officials. Incidentally their observance is based on the experience of validity. Thus Freeman maintains that to speak of a statute prohibiting murder is implied in the rule directing the courts and other administrative agencies to deal with any case of murder brought before them in the requisite manner [32]. It follows logically that rules of substantive law do not have any independent existence; and psychologically that there are two sets of norms since rules addressed to citizens are felt as providing grounds for the reactions of the authority.

The historical law school founded by Friedrich Karl Von Savigny and Sir Henry Maine traces the validity of all human laws to their origin in the traditional society. This school argues that the essence of law is to be sought in direct relationship with the lives of the people. Savigny maintains that positive law lives in the consciousness of the people and therefore we should regard it as the people's law [33]. Maine believes that the progress of thought no longer permits the solution of particular disputes to be explained by supposing an extra-human interpretation [34]. These scholars insist that laws are not only the expression of the will of a people, but also that it is for this reason alone that law can be regarded as just or valid. The belief makes it possible for customary law to be regarded as law *par excellence*. It implies that the authority of genuine laws does not lie in the particular will of the sovereign – as legal positivists say – but on the common agreement of the people. It follows that law is dynamic rather than static. The custom of a people is supreme to any legislation and for any legislation to be valid it must conform to the consciousness of the people. The sum total of the historical approach to jurisprudence is that law is culture bound for not only must the people be conscious of their law, they must also cognise its development.

Sociological jurisprudence represented by R. Von Jhering and Roger Cotterrell is concerned with questions about legal validity when law is seen as a means of social control. They share the belief that law is not unique from other means of social control like morality and custom and reject a jurisprudence of concepts which involves the view that law is a closed

legal order. For them society becomes the source of legal validity seen from the dynamic stand point of the social sciences. Jhering maintains that co-operation and conflict provide the reason for law [35]. His underlying philosophy for valid law is therefore the security of the satisfaction of human want. Cotterrell points out a myth according to which an inevitable division of labour governs legal inquiry, arguing that law is concerned with behaviour, its causes and consequences [36]. The method of sociology therefore argues that law is causally related to the welfare of society. Accordingly, the rule that misses its aim cannot justify its existence. This means that we cannot necessarily exclude ethical considerations from the administration of justice as the end and purpose of all civil laws. The view recognises the role of logic, history, custom and justice in law. Incidentally we can shape law to conform to them within certain reasonable bounds. Arguably norms and values of society are used to generate the good life. However, proponents of Critical Legal Studies (CLS) both challenge and further seek to overturn accepted norms and standards in legal theory and practice. They argue that the logic and structure attributed to law grow out of the power relations of society. One of the major proponents of the CLS movement is Mark Kelman who shares the view that law is politics and therefore exists to support the interests of the party or class that forms it. Law is a collection of beliefs and prejudices that legitimise the injustices of society. The vexing problem of the Crits lies in the attempt to deny liberalism as the foundation of law which is why Kelman sees liberalism as a system of thought that is simultaneously plagued by internal contradictions and by systematic repression of the presence of these contradictions [37]. The culmination of the critical analysis of law and legal institutions is that there is no ultimate criterion of legal validity for capitalist societies. Instead the Crits subscribe to the postmodernist's conception of minimalist state which argues against the possibility of a standpoint over and above involvement in some aspect of our activities from which these activities can be surveyed and described - a belief which may be seen as a fig-leaf for philosophical bankruptcy. So much of their beliefs are owed to historical and sociological Marxist scholars who berate liberal capitalist societies of exploiting the poor masses through the instrumentality of law. Karl Marx maintains that a valid sense of law is not possible within capitalist societies, thus the condition for a valid sense of law can only be achieved through a state of mind or set of communist attitudes made possible by the evolution of socialist legal consciousness to be arrived at with the withering away of law [38]. Marxists do not see legal validity as a product of human rationality, since a rational legal order is a product of western capitalism. They argue that an egalitarian society cannot emerge from private property. Thus socialist legal consciousness becomes the unwritten constitution of a valid communist world.

We will end this section with the Marxian thesis that there is no criterion of legal validity. Apart from committing a logical “leap” and lacking certainty as an inductive generalisation, the thesis does not state the necessary or sufficient conditions for what should count as a criterion of legal validity before denying existing theories and practices of law. It may now be seen that the contributions of the various schools of law may not be ignored in searching for an ultimate criterion of legal validity. Whether or not we can settle on a justifiable criterion of legal validity lies in our ability to sort out the points of strength and weakness in the beliefs of thinkers; and our intention in carrying out such an endeavour will be to eclecticify phenomena.

Ultimate Criterion of Legal Validity

The process of reconstructing an ultimate criterion of legal validity is eclectic, reflecting the need for all societies of the world to come into a forum with a view to adjusting their laws to conform to aspirations of international moral standards. At the theoretical level the envisaged forum is imaginary. For now our imaginary forum represents the attempt to bring about a world constitution. Such constitution is the integrated idea of the constitutions of all nation of the world, whose details are not contained in one instrument. This strategy is intended to provide the bases for talking about such revolutionary programmes like the American Declaration of Independence (1776), the French Declaration of the Rights of Man and Citizens (1789), the Universal Declaration of Human Rights (1948) and the European Convention on Human Rights (1949). The tenets of these institutions are natural law principles, which are widely accepted and recognised by the United Nations as conditions for erecting valid laws and constitutions of independent states. The list is not foreclosed. In the main, it calls for a united effort to harmonise legal relations horizontally among members of particular societies and vertically across all societies of the world. There are important philosophical considerations for accessing legal validity constitutionally. A valid law traces its origin to society with the constitution satisfying its moral, aesthetic, epistemological, metaphysical, logical and political criteria. A constitution therefore receives societal assent where it recognises varying levels of life that social value support. This can be achieved by aggregating the fruitful results of the various schools of jurisprudence and tradition in legal history. Rundell sees an eclectic group of people, things, or ideas as interesting or unusual because it consists of many different types. On this note, eclecticism defines legal reality as an integrated system of people and their ideas about law. The attempt to eclecticify people of all nations of the world involves reference to international community. It means eclecticifying societies and their laws. Thus in order for us to establish an ultimate criterion of legal

validity, we have to show its connection with the identity theory of law and society. But the question is what roles do the constitutions of particular societies play in the attempt to bring about valid law?

Now let us go back to arguments about particular or general considerations concerning the existence of criterion of legal validity. If we take the criterion of legal validity to be sufficient condition of acceptability, then there are some questions to be answered. Are we talking about the validity of law as it is promulgated by the legislature or as it is decided in court, or as it is administered by the executive arm of government? We will agree that what makes legislation valid in the modern era is its conformity to the constitution of the state making that law. For instance, in Nigeria a bill must pass through three stages to become a law. And if a bill successfully goes through such stages in the convictions of a certain percentage (say, two thirds) of members of the legislature and assented to by the senate, then it is regarded as a valid rule of law. In other words, a rule of law is made valid by the inarticulate convictions of legislators, while the constitution serves as the criterion (or provides the set of necessary and sufficient conditions) of validity of the legal rule in question. Once a law emerges from the legitimate following of the people’s constitution, no one may question the authority of the legislature for making such a law. In this case the question of the validity of judge-made law is obliterated, since the business of a judge is to apply existing law and not to make a new law. Thus the issue of a valid judicial decision may be distinguished from that of a valid legal rule. Judicial interpretation of law is also a constitutional provision. A valid judicial decision is one which correctly interprets a rule of law (legislation) according to laid down procedure of legal reasoning. It pronounces penalties and rewards, which the administrator carries out as directed by the constitution. The executive enforces the law. Of course, it is expected that the roles of the executive, legislature and judiciary should come under proper checks and balances, so that questions about criterion of legal validity would rest on a continuum as a condition for justifying the constitution – these are questions about interaction of processes. But it might be argued that although the constitution of any nation provides the necessary framework for making law acceptable or legally valid, it nevertheless cannot guarantee the reality of such sufficient conditions for laws without a basis for justifying the constitution itself. It sounds paradoxical to argue that a valid law may be erected against the sole legal purpose of justice, as it quite often has been in many countries of the third world. We can then say that justice as the foundation of law should be based on the constitution. This means that the constitution as conventional practice should take cognisance of philosophical considerations in establishing relevant laws. Coleman [39] defends the

view that morality is a necessary and sufficient condition of legality. His central argument is that inclusive legal positivism both permits morality to function in legal arguments and can form part of a people's legal system [40]. Coleman justifies constitutional morality from the fact that:

...many constitutions and federal charters have clauses that on their face appear explicitly to make morality a condition of legality. The "due process" and "equal protection" clauses of the United States constitution and its prohibition of "cruel and unusual" language one often finds in written constitutions. Facially such clauses suggest that morality can be a condition of legality [41].

What Coleman means here is that inclusive legal positivism provides a better option to our constitutional theory of legal validity in opposition to exclusive legal positivism which rejects it. More so, we gain something of epistemically privileged status by referring to it. It is on this premise that we can speak of descriptive accuracy of legal validity.

The connection between particular constitutions and the universal kind may be established by referring to the phenomenon of reason for law. It shares the claim that the validity of law is its reason of being (*raison de être*). The two ways of looking at this reason are logical and causal. The logical approach says that certainly law is not valid in the same sense that argument is valid. Instead the logical basis of legal validity lies in the collection of all particular societies into one universal society. The causal basis of legal validity relates to the collection of all men and their activities, which is to say that it is both social and historical. These two conditions unite in the doctrine of the common good of society. History replaces the sovereign of positive law and the deity of natural law (as grounds for valid law) with the people themselves for the purpose of balancing conflicting claims. The very idea of law as a regulatory principle of social relations presupposes society. The central thesis of the societal position is that law is meant to foster co-operation and resolves conflicts among a people. The culmination of these arguments lies in the belief that law is necessary because social order is necessary. Although sanction is necessary to make law work, it is not its sufficient condition. The growth of science and technology as well as change in conditions of human existence does not seem to alter the significance of these observations, since it is clear that law assumes the status of the paradigm for judging permissible and impermissible actions. History tells us about the growth of laws with thoughts and practices of people organised around the central idea of the societal position – some acceptable and some unacceptable but which were

foisted on the people by their sovereigns. We speak of an orderly, peaceful and just society as one operating under universally recognised concept of the rule of law which allocates rights and duties to citizens in all true democracies. We may hereby argue that an ultimate criterion of legal validity is causally connected with the effect of law on society. The constitution therefore stands as the basis for raising the necessary and sufficient conditions that argue for legal validity.

A constitution makes provisions for what to and what not to legislate upon. This constitution represents the voice of the people. As will be seen in the remarks made by Etefia Ekanem in the next paragraph concerning legal requirement for moral conduct of judicial officers, we will agree that the constitution cannot expect legal practitioners to be morally oriented while permitting the promulgation of immoral laws. More so, all constitutions expect citizens to be law abiding. What makes the constitution work or prevent it from working is the human being rather than the constitution itself as the criterion of legal validity. It stands on its own as a moral and socio-legal construct. Just as the constitutions of particular nations of the world can serve the basis for generalising legal practice in such societies, international law is gradually seeking ways of reaching out to be recognised as a universal legal standard that would become the mould for standardising the laws of particular nations. This yearning is quite natural, as its thrust in world legal history is more powerful in the 21st century world legal order than it was in the preceding centuries. The possibility of achieving this fit can be implied from the pervasive role played by common law and the overwhelming desire of many societies of the world for globalisation. If the international community will not let itself out to be seen as another Tower of Babel while trying to forge the much needed international co-operation with the aim of resolving conflicts, by operating the unwritten constitution of the world community, then there remains some hope that it might one day be seen as the basis for formulating the world's constitution to guide in the operation of legal systems of particular nations. Such a constitution will then serve as an ultimate criterion of legal validity. The problem then will be that of showing the extent to which it receives assent of people across the strata of all societies. But it is enough, if it can guarantee genuine freedom, equality and security as basis for globalising justice.

Practical analysis in jurisprudence indicates attempts to explore existing world legal cultures and institutions of mediation. Such attitudes include common law, civil law, socialist law and Islamic law. Each of these traditions operates under existing constitution and the possibility of eclecticizing them into a universal system of legal rules may not be achieved through the revolutionary spirit of Marxism but by a

gradual tempering with contemporary sociological findings in the light of mistakes of the past. One of the suggestions offered by MacCormick is that Hart's sociological theory should avoid all forms of discrimination such as gender, racial and religious [42]. Natural lawyers have not provided us with any system of legal rules but legal positivists have done so. Lon Fuller tells us that positivism and natural law teachings were practiced in Germany at the wake and demise of the Nazi Regime respectively. He maintains that positivism was the dominant legal practice in Germany during the Nazi Regime but because of the atrocities and inhumanity caused by applying this legal philosophy, German jurists both found the need and actually returned to natural law teachings [43]. Fuller's legal thought is an attempt to show the consequences of trying to separate law from morals. The influence of historical law theory is particularly felt in Great Britain where law is said to have its origin in the traditional society. Historical lawyers argue that it is for the sake of the people that legal rules are made and so rules of law should reflect social consciousness. It follows that we can find what is legally tenable in customs and traditions of any people to legislate upon. Legal Realism is practiced throughout the world. But its practical influence is greatly felt in Sweden and America with pragmatism and legalism as the thrust of life. Sociological theory finds great impetus in America even though it is also observed in other parts of the world because of its emphasis on justice and social order. There is little or no doubt that historical and sociological law theories bear some traces of positivism. Marxism embodies moral imprints in legal matters, though Marxist thinkers claim that they are not preaching morality. Its major problem is that of eliminating law from society. Legal practices in African and other third world nations are coloured by colonial heritage and social change. The need for uniform practice is associated with the universal reason for law. It argues that law is necessary if we are to keep society alive, foster co-operation and resolve conflicting claims. The tendency to bring sociological and historical law theories together shows that we can replace the sovereigns of natural law, legal positivism and legal realism with the sovereign of historical law theory. This has the implication that in practice sovereignty should be located in the people regarded as society. Such is to say that law is identical with society. Thus the executive, legislative and judicial arms of government owe allegiance and responsibility to the people without any contradiction. Consequently, the doctrine of the rule of law should be treated as one in which the natural man comes into a positive society where co-operation and regulation become necessary. This is why 21st century Marxists should be concerned with methods that aspire to make law work out in the best interest and advancement of society rather than call out a revolution which might turn out to mar the possibility of a gradual

evolution of a valid world legal order in which every section of society will become conscious of the legal needs of another. Critics may decry the legal significance of the Deity of medieval natural law theory and its ethical considerations, but their acceptability to the people are documented in the constitutions and relevant Acts of Parliament of many modern democracies. For instance, the 1999 constitution of the Federal Republic of Nigeria shares in its preamble the idea of operating her political and legal leadership under one God. Certain Acts of Parliament are dedicated to the codes of ethics associated with the moral conduct of legal practitioners. On this view Ekanem remarks that the constitution is the results of the ordinary laws of the land and stresses the requirement that every legal practitioner is duty bound to uphold and observe the principle of the rule of law which presupposes absolute supremacy of the regular law and equality before the law of the land [44]. We will agree that the constitutions of particular nations are gradually adjusting towards a global model through reforms in laws guided by international standard, so that today it has become necessary for nations of the world to forge International Corporation with a view to resolving conflicts anywhere in the world. Many nations have seen the need to join the global exchange of ideas and concrete schemes in the attempt to improve their lots and bring about a better social, economic, political and religious world order regulated by laws. Whether or not the situation has attained the requisite efficiency and accuracy at the moment is not the question at stake. But it is clear both to reason and experience that particular constitutions of these nations represent the diverse groups of people and interests in the world; and the possibility of realising the world universal lies in the constitutional reconstruction of all nations. What we are saying here is that the world or global constitution is already in place as an unwritten document derived from the constitutions of particular nations of the world. Its progress may be judged by belief in the purposive character of the world, which tends to show that there is an invisible hand working in the affairs of men and societies trying to direct them towards the common good. This invisible hand abides in the attitudes of men and character of societies both jointly and severally. It follows that the question of man-made world constitution arriving at perfection is obliterated, because it leaves out important questions regarding the people's stage of development in human history. The possibility of a world constitution which we advocate here reflects a realistic reconstruction of the universal, because it represents a practical interpretation of global systems of order. It has both core and peripheral elements. The core elements belong to the universal naturally and without them the constitution ceases to exist. The peripheral elements belong to distortions inherited from the constitutions of particular societies and therefore do not affect the

significance of the world constitution if they fail to be adopted in practice. We imply here that the attempt to eclecticify an ultimate criterion of legal validity is bound up with essentialism as a philosophical theory that asserts the correctness of distinguishing between essential and accidental features of the constitution that justifies the existence of such a criterion. The problem of locating the grounds for this intuitive distinction draws its resolution from the need to provide necessary conditions. Our world constitution is the mundane equivalent of ideal world order. It is argued here that we make progress in the world when changes in the mundane world are geared towards the ideal. The match towards globalisation began with emergence of international law in the 19th century. Since then we have made considerable progress in information and communication technology. We have attained remarkable heights in economic, social and political ties among nations. Although we have fumbled in the way we make, apply and administer our laws at local levels because of the influence of realism, there nevertheless appears to be some attempts at international level to unify the systems of practice. This means that it will be possible to improve upon legal practice and legal education globally in the short or long run. This position serves as the motivation for the perceived construction of world legal validity which revolves around society as its axiological whole.

CONCLUSION

The attempt to rebut the reality of an ultimate criterion of legal validity is not overwhelmingly acceptable. It is argued that particular criteria of legal validity belong to particular societies or schools of thought. This paper believes that we can rebut the thesis that there is no criterion of legal validity, because the thesis shares the problem that an inductive generalisation of this kind can be justified as valid. It is also saying that knowledge of ultimate criterion of legal validity is impossible and this expresses an absolute case of scepticism. Arguments about ultimate criterion of legal validity tend to rest more on conditions of certainty than on certainty itself. When we speak of criterion of legal validity, we mean that the conditions for the existence of a legal rule must render such a rule acceptable. It is one thing for law to be necessary for the purpose of regulating conduct, and quite another thing altogether for such law to be satisfactory and independent of particular wills. Some thinkers have used the idea of conformity with nature to convey the idea of legal validity. Others have spoken of its conformity with social facts. Still there are others who rely on its conformity with accepted norms, standards and values of society. But some others have argued for its foundation in tradition or ideology. But sceptics express the belief that the conditions for any of these approaches are not sufficient. To speak of conformity with nature is a universal scheme for all laws, whereas

all other considerations are about particular laws. At this point, it seems to us more desirable to eclecticify the relevant features of particular criteria of legal validity into a universal criterion. Perhaps, it might be the case that each of the suggested criteria need not be sufficient for all legal purposes. As rational beings, our choices of actions ought to be logical. Thus legal principles and standards evolve out of the need to justify legal actions. The sole legal purpose goes back to the common good of society which is concerned with the hope for attaining justice, peace and social order. Incidentally we will agree that social values in the world are directed towards these goals even though men may err in their ways of approaching them. There seems to be an ideal standard of justice to which all laws strive, which thus may be distilled from values of particular society to construct the world universal. This, if we may refer to it as a constitution, can serve as ultimate criterion of valid laws brought about by unity of the constitutions of all individual nations of the world at international level of legal realities. The ultimate constitution would therefore serve as the bases for generating the necessary and sufficient conditions of legal validity; and such a constitution must be self selecting and self regulating by means of an invisible hand judged historically. The search for a world legal order implies the attempt to checkmate the distortions often found within the systems of particular constitutions and to restore the novel ideal of human rationality. The advantage of our call for a world constitution tends to rest on the almost overwhelming desire of people in all nations to call for globalisation of justice. There is no doubt that individual criteria of validity may apply to different aspects of the legal order but it would seem that questions about an ultimate criterion of legal validity are not answerable by referring to them individually. It is therefore necessary that we become conscious of the existence of the realistically constructed ultimate constitution and how to adapt it to the solution of world legal problems. In this way all countries of the world would join hands together in the crusade to checkmate the excesses of tyrannical laws that have consistently plagued contemporary societies, especially in the third world.

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