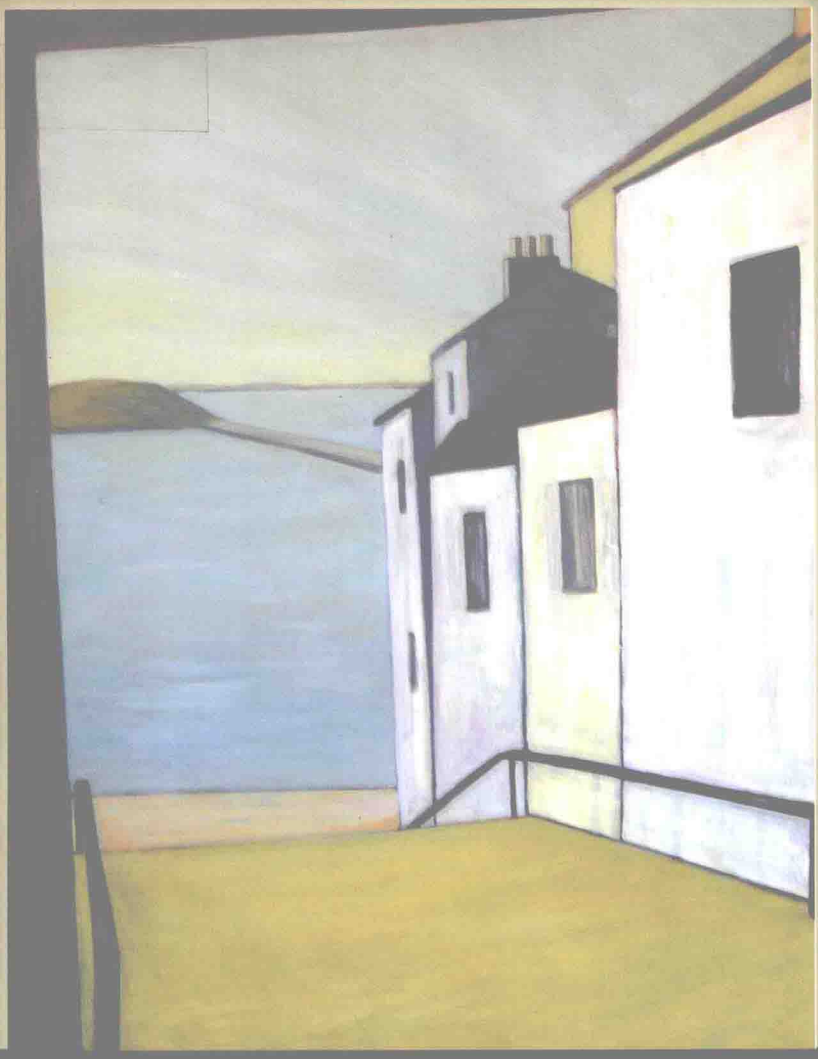

LAW AND PRACTICAL REASON

THE NORMATIVE CLAIM OF LAW

STEFANO BERTEA

The Normative Claim of Law

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THE NORMATIVE CLAIM OF LAW

This book focuses on a specific component of the normative dimension of law, namely, the normative claim of law. By 'normative claim' we mean the claim that inherent in the law is an ability to guide action by generating practical reasons having a special status. The thesis that law lays the normative claim has become a subject of controversy: it has its defenders, as well as many scholars of different orientations who have acknowledged the normative claim of law without making a point of defending it head-on. It has also come under attack from other contemporary legal theorists, and around the normative claim a lively debate has sprung up. This debate makes up the main subject of this book, which is in essence an attempt to account for the normative claim and see how its recognition moulds our understanding of the law itself. This involves (a) specifying the exact content, boundaries, quality and essential traits of the normative claim; (b) explaining how the law can make a claim so specified; and (c) justifying why this should happen in the first place. The argument is set out in two stages, corresponding to the two parts into which the book is divided. In the first part, the author introduces and discusses the meaning, status and fundamental traits of the normative claim of law; in the second, he explores some foundational questions and determines the grounds of the normative claim of law by framing an account that elaborates on some contemporary discussions of Kant's conception of humanity as the source of the normativity of practical reason.

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References to Kant's Works

References to Kant's writings will be given by the page numbers of the relevant volume of the Berlin Academy Edition (abbreviated 'AK') and take the following form. 'AK volume: page number'. The *Critique of Pure Reason*, however, is cited in its own standard way, by the page numbers of both the first (A) and second (B) editions.

For the editions and translations used, please see the Bibliography.

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Introduction

SEVERAL LEGAL THEORISTS associate the existence of the law not only with the normative function of guiding conduct by generating practical reasons of a special kind but also with a claim, or contention, to do so. The possibility of attaching some normative claim to applications of the law is at the origin of theoretically relevant questions, amongst which are: How can this claim be precisely defined? What is its status? What are its exact features? and What entitles the law to make any such claim? These questions will provide the structure of this monograph, which can be understood as a systematic attempt to examine the main issues surrounding the normative claim of law and so contribute to dispelling some of the puzzles vis-à-vis its normative dimension. This search will involve subjecting the normative claim of law to analytical scrutiny with a view both to explaining and to grounding that claim.

The significance of the normative claim of law—what justifies our concern for that claim—is twofold. On the one hand, the normative claim of law owes its importance to the overall realm, the normative experience, of which it is a specific component. Normativity is widely regarded as an element lying at the very core of the law and so one that is to be accounted for by any legal theory seeking to be comprehensive. A theory that suppresses the normativity of law 'fails to mark and explain the crucial distinction between mere regularities of human behaviour and rule-governed behaviour' (Hart 1983: 13). This is a serious drawback for a general theory of law, for a distinctive part of the legal domain concerns rule-governed behaviour and so may be expressed only by the use of paradigmatic normative notions such as norm, obligation, duty and right. As a result, scholars of different orientations would hardly disagree with Stephen Perry's (2001: 330) statement that 'the provision of an account of the normativity of law is a central task of jurisprudence, if not the central task'. On the other hand, the significance of the normative claim of law is due to its being a necessary constituent of legality. Necessary elements of the law are intrinsically significant for legal theory, which at its core is the study of the invariable, and so defining, features of the legal enterprise.

The second source of significance is apparently subordinate to the recognition of the *necessity* of the normative claim of law. This necessity is acknowledged by contemporary legal theorists of different convictions, among whom Joseph Raz, Philip Soper and Robert Alexy figure prominently.[1] From the common assumption that 'necessarily law, every legal system which is in force anywhere, has *de facto* authority', Raz (1994: 199), a proponent of legal positivism, argues that for

[1] Further statements of the thesis that some normative claim is of necessity attached to the law can be found in Gauss (1981: 333–5), Detmold (1984: 31), Lyons (1987: 115–18), Postema, (1987: 92–3), Burton (1989: 1956–62), Gavinson (1991: 737), Postema (1998: 333) and Green (2002: 519–20).

conceptual reasons the law claims legitimate authority, and concludes that 'though a legal system may not have legitimate authority, or though its legitimate authority may not be as extensive as it claims, every legal system claims that it possesses legitimate authority'. In other words, the claim to authority, which in Raz's work refers to the property of providing people with exclusionary reasons for action and so is to be regarded as a normative claim, is acknowledged to be 'part of the nature of law' (Raz 1994: 199) and then a claim the law necessarily makes.

Soper too endorses the thesis that legal systems are necessarily characterised by some normative claim. Contrary to Raz, however, he defends a moderate version of natural law theory—moderate, for Soper takes the positivist theory as the main point of reference against which his view of the law unfolds, which carries the implication that Soper's natural law theory is at least rooted in the research horizon framed by legal positivism. In Soper's (1984: 55) view, legal systems make the normative 'claim to justice', which takes the form of 'the claim in good faith by those who rule that they do so in the interests of all'. This claim can be further characterised as the assertion that 'when the state acts, it does so in the belief that it has chosen morally appropriate norms for enforcement' (Soper 1996: 219). The reference to moral appropriateness allows us to regard Soper's claim to justice as a normative claim, that is, a claim that relates to how people *ought to* guide their conduct.

Finally, Alexy, who champions a species of non-positivism informed by discourse theory, assigns a normative claim to the law in his argument from correctness.[2] By means of a presentation of different ideal-types of wicked legal systems (the senseless order, the predatory or rapacious order, and the governor system), Alexy argues that no institutional arrangement can be regarded as legal unless it implicitly or explicitly lays a claim to correctness.[3] This claim, which incorporates an action-guiding and justificatory component and so is normative, sets the boundaries of legality: it is the inclusion of the claim to correctness that turns an order of social control into a legal system.[4] This means that for Alexy, a normative claim figures as a necessary element of legality.

However, the necessary status of the normative claim has not gone undisputed. Recently, Carsten Heidemann, Kenneth Einar Himma and Neil MacCormick, amongst others, have deployed different arguments to show that the law does not of necessity make normative claims.[5] As a result, the status of the normative claim of law has become a subject of controversy, an issue around which a lively debate has arisen, especially among scholars working in the analytical tradition of legal philosophy. In consideration of its impact on the significance of the study of the normative claim of law, in chapter one I will take a position in this debate. The aim of the first chapter is twofold. First, I intend to settle the definitional, or semantic, issue by establishing unequivocally the *meaning* of the normative claim, which

[2] This argument is deployed in Alexy (2002b: 40–83).
[3] On these ideal-types, see Alexy (2002b: 31–5).
[4] See Alexy (2002b: 34–5).
[5] See Himma (2001), Heidemann (2005) and MacCormick (2007b).

various scholars have defined differently, as Alexy's, Soper's and Raz's accounts clearly show. The meaning I take the normative claim of law to have is basic and so configures it as a 'minimal' contention summarising the core of the richer definitions championed in the contemporary literature, where the normative claim of law is connected to notions (legitimate authority, justice, moral correctness) that are indeed normative but exceed sheer normativity. Focusing on a thin definition is instrumental in avoiding the incorporation from the outset of partisan and controvertible assumptions that aprioristically exclude admissible definitions of the normative claim of law. This inclusive attitude frames the discussion of the *status* of the normative claim of law (and this is the second concern of chapter one) at a highly general level of abstraction. The question relative to the status of the normative claim of law leads one to tackle the problem as to whether that claim is possible, optional or necessary. Because this problem confronts us with the modality of the normative claim of law, its nature is metaphysical or ontological. The metaphysical question is twofold: it bifurcates into the two distinct subquestions as to (a) whether the normative claim of law is possible and, if it is possible, (b) whether that claim is optional or necessary. In chapter one I argue not only that the law can meaningfully make the normative claim—that is, the claim is possible—but also that the normative claim is one of the necessary elements of legality, an element distinguishing legal governance from other, non-legal, forms of pursuing the action-guidance function.

With the semantic question and the metaphysical question addressed, I turn to a discussion of the essential features of the normative claim of law. To this purpose, I engage with the dominant tradition in contemporary jurisprudence, analytical legal positivism, which provides an account of the normative claim of law that is illuminating but needs also to be revised in some key aspects. In chapter two, the critical discussion of the treatment the normative claim of law undergoes within inclusive legal positivism will make it possible for me to characterise the normative claim as the contention that legal institutions make of necessity in order to guide action by providing citizens with practical reasons, the nature of which is moral. This picture of the normative claim of law, which is understood as an initial statement fleshing out the basic definition laid out in chapter one, requires one to take issue with some fundamental aspects of the characterisation of the normative claim of law provided by inclusive positivism. Inclusive positivism is committed to the views, here argued to be mistaken, (a) that the status of the normative claim of law is merely contingent; (b) its object is a peculiarly legal kind of normativity, radically distinct and autonomous from moral normativity, to the effect that the practical reasons the law claims to create are conceived not as moral reasons but as distinctively legal reasons; and (c) that the normative claim of law is addressed to legal officials, as opposed to the generality of people concerned with the existence of a legal practice. The argument showing that these statements are untenable will also carry with it an important implication for the grounds of the normative claim of law: it rules out the possibility that such a claim is grounded on an appeal to the notion of endorsement, or commitment, and therefore shows that

a non-cognitivist approach is ill-equipped to provide a theoretical justification of the normative claim of law.

These remarks, while falling short of an exhaustive account of the normative claim of law, do provide a sound beginning to it. Building on the results of the discussion of inclusive legal positivism, I turn in chapter three to Raz's writings concerning the concept of law and legal authority, which are argued to contribute further to the explanation of the normative claim of law. Bringing Raz's account into the picture contributes to the understanding of the normative claim of law in two ways. First, it provides further support for the theses (a) that the normative claim is a defining element of the concept of law; (b) that the practical reasons the law claims to create are moral reasons; and (c) that the scope of the normative claim is general. Secondly, the discussion of Raz's work makes it possible for us to elaborate on the distinctive traits of the reasons the law claims to produce. Raz depicts the reasons that the authoritative structures of the law claim to generate as content-independent and exclusionary. I argue that this view cannot be maintained. Legal provisions do not necessarily replace and pre-empt the substantive reasons they depend on. The relationship between legal directives and underlying moral reasons is not governed by an exclusionary logic on the basis of which a legal provision can be completely insulated from the moral arguments that justify it, but by a dialectical principle whereby legal authority and morality are mutually transparent and connected. This conclusion suggests that we should characterise the practical reasons the law claims to engender as reinforced reasons that hold valid only if they are not irremediably unreasonable or blatantly immoral. This leads us to characterise the normative claim of law further as the contention that, perforce, the law generates reinforced reasons to act, which, provided that their contents are not seriously flawed from a moral point of view, bind all citizens.

Once characterised—its meaning, status and essential features spelled out—the normative claim of law still remains partially unexplained unless it can also be theoretically justified, or grounded. Hence, determining the grounds of the normative claim of law, by addressing what is called here the grounding question, ought to be regarded as an essential element of any comprehensive study of the claim. This leads us to the subject matter of Part II, where an effort is made to offer a theoretical justification of the normative claim of law, namely, to put forward a theory elucidating what makes something normative: what entitles some objects or properties to (claim to) have the capacity to guide and justify conduct, and why, then, some objects or properties ought to be taken to be normative. Doing so requires two major changes in focus. First, we should look for assistance outside the debate among legal theorists, for legal theorists, with few exceptions, have shown little concern for theoretically justifying the normative claim of law. Secondly, the normative claim of law can be grounded only to the extent that the normativity of law, the notion shaping the very definition of that claim, is grounded. This means that in Part II I will be focusing the attention also on the *normativity* of law, not only on the *normative claim* of law. The shift in focus clearly distinguishes the argument laid out in Part I from the argument deployed in Part II, where I first discuss and reject

the sceptical view depicting the normativity of law as a certain arrangement of social facts, and then go on to embrace a constructivist account, which has its roots in the Kantian strand of practical philosophy, in order to provide both the theoretical justification of the normative dimension of the law and the related claim associated with the existence of the law.

More specifically, chapter four takes up the sceptical view, according to which the problem of grounding the normative claim of law is not one that need worry us, for it arises only if normativity is viewed as a dimension of human experience distinct from, and irreducible to, the factual dimension. As long as the distinctiveness and peculiarity of the normative sphere are not established, one is entitled to disregard the grounds for the normative claim of law. The possibility of this objection suggests that in order to secure the relevance of the grounding question, the thesis that the normative is a declination of the factual, as distinct from an independent dimension, should be discussed in a preliminary way. The position denying the distinctiveness of the normative finds a wide assortment of statements in the existing literature. In its strongest version, however, the sceptical thesis takes the shape of a model viewing the normative dimension through its accompanying facts and, ultimately, equating normativity with certain arrangements of social facts and properties. This model can be described as *reductive*: it understands normativity as wholly enveloped in the 'is' dimension, rather than as designating the category of human experience known as the 'ought' dimension, the specific existence of which category is denied in consequence. I will argue that the reductive model comes with a considerable strain, for it is packaged with two glaring yet unaddressed problems. For one thing, since we are being asked to equate the normative with the factual, we have to solve the problem of how an identity can ever be established between two categories (normative categories and factual categories) that are described by different sets of predicates. Norms can be described as valid or invalid; in contrast, this predicate ('valid') does not apply to facts. This leaves reductionism with the hard task of showing how two categories characterised by different predicates can be reduced the one to the other without distortion. Moreover, I will be claiming that the reductive thesis cannot explain normativity in the sense that matters in legal contexts, where a standard is normative in the sense that it has an unqualified capacity to guide action, meaning that the standard in question does not allow for any 'opting out' once it has been set down. Reductionism cannot do justice to the non-contingent forms of action-guidance peculiar to the law, although it may do justice to some (weaker) forms of action-guidance.

Having cleared the way by showing the significance of the question relative to the grounds of the normative claim of law, I set out in chapters five and six to answer that question. In completing the task, I will rely on and elaborate on some recent contributions that are informed by Immanuel Kant's practical philosophy. Specifically, I will hold that if we are to ground the normative claim of law, we will have to look at some contemporary discussions of Kant's conception of humanity as the source of the normativity of practical reason. My argument in chapter five

proceeds thus. First, I introduce the basics of Kant's account of normativity and clarify how, for Kant, the normativity of practical reason has its source in humanity. Kant's account applies to the normativity of *any* instantiation of practical reason and so of any practically rational requirement. Hence, in so far as we acknowledge the law as a specific, highly institutionalised, kind of practical reason, Kant's treatment of normativity applies to the normativity of law, too. Yet Kant's account proves problematic, for it relies on a peculiar and questionable metaphysics that is brought into play as a device by means of which a connection between normativity and humanity is established. Rather than defending this metaphysical view, I opt for a pragmatic reinterpretation of Kant's main ideas. Thus, we no longer have a metaphysical attempt to define the essence of *humanity*, but a pragmatic one that aims to single out the traits of *human agency*. I identify these distinctively human traits, which must be understood as necessary properties if a subject is to be regarded as a human agent, namely, one who is capable of performing action and who therefore has a distinctive existence in the practical realm, as reflectivity, rationality and autonomy. They frame human agency, understood as a broad basis without which individuals could not give content to any conception of themselves as acting beings. Hence, we can describe these traits as the minimum condition for the construction of a practical self-conception, and as an enabling condition for the process of identity-making in the practical sphere.

In this role, the self-conception stemming from human agency acts at the same time as a precondition and a product of human acting selves. A kind of weak dualism is thus established. The necessary self-conception exists before and beyond the agent as a deep conception enjoying a good measure of independence from this or that particular human agent, which is to say that it cannot be disposed of without thereby giving up one's distinctive existence as a human agent. At the same time, however, that self-conception is the outcome of the capacity for self-reflection that enables each human agent to move about in the practical sphere and makes every individual human agent capable of recognising herself as such. In this deep and dual role as constitutive of practical identity and as a product of the self, the self-conception stemming from human agency importantly explains the emergence of normativity. For the deep level at which this conception operates makes it possible not only to *describe* what human agents come to (describing the minimal, necessary features that everyone in the class has) but also to *prescribe* how human agents ought to behave, and so, by virtue of defining a model that no human agent can afford to ignore, ends up carrying normative force. It is in this prescriptive function that human agency—the identity rooted in it and shaped by it—accounts for, and grounds, normativity.

The conclusion that practical reason owes its normativity to human agency sets the stage for chapter six. There, I argue that the normativity and the normative claim of law can be grounded in the same way as we ground the normativity and the normative claim of practical reason, in that both normative kinds are grounded in human agency. I expand on these points by first looking at the main principle involved in the functioning of the normativity of law and then working

out the scheme in details. My first step is the observation that the normative claim of law can be further specified as the contention that human agency be protected and can be seen as an essential ingredient of the concept of law. Building on this point, I illustrate the open-ended and flexible way in which the source of normativity works, observing that this imparts to the normativity of law the shape of an optimisation command: normativity in law functions as something requiring that it be fulfilled to the highest degree possible. I then point out that optimisation commands cannot be accurately determined in their content except through a concrete argumentative process. This brings into view a necessary link between the normativity of law and legal reasoning and invites attention to the important role of legal argument in establishing the normative dimension of the law. There are, too, specific features of the normativity of law and the normative claim of law that depend on a number of distinctions I introduce and clarify in chapter six, including, importantly, the distinction between direct and indirect normativity, and between the normativity of individual legal provisions and the normativity of the legal system as a whole.

I go on in chapters five and six to defend an account of the normative claim of law that is undergirded in Kant's practical philosophy. I do so, working for the most part from his *Groundwork of the Metaphysics of Morals* and his *Critique of Practical Reason*. While these two sources contain the core of Kant's practical philosophy, however, neither of them deals specifically with the law, a topic that Kant addresses in *The Metaphysics of Morals*. This might lead one to wonder why an essay putting forward a Kantian account of *the normative claim of law*, however modified the account may be, should pay so little attention to Kant's primary discussion of the law. I address that concern in the appendix, answering the suspicion that my account of normativity requires an unorthodox reading of Kant's philosophy of law. In particular, by confronting the interpretation of Kant's legal philosophy defended, inter alia, by George Fletcher and Ernst Weinrib, I argue that my construction assumes nothing that Kant would reject. *The Metaphysics of Morals* offers no textual evidence for the view that a sharp line of demarcation should be drawn between the law and other practical realms. This line of argument is supported by Kant's thesis of the unity of practical reason, a thesis entailing the view that different spheres of practical reason are not separate but contiguous, with significant conceptual overlap. I conclude on this basis that Kant's philosophy of law in no way prevents us from conceiving the normativity of law as a special case of the normativity of practical reason.

As the reader might have observed from the foregoing introductory remarks, this study is primarily concerned with the normative claim made by the law *qua* legal system or domain. In the existing literature, 'law' is a term used to refer to single legal provisions or norms (a single statutory provision, a regulation or a judicial holding) as well as to the legal system as a whole, understood as the institutional context or domain within which individual legal provisions are found. The distinction matters, for the thesis that the law makes claims will mean one thing if we are referring to an individual legal provision, and will mean quite another if we

are taking up the legal domain as a whole. In the latter case, the law includes not only legal norms but also the machinery that is employed to create and apply them, including people, institutions, procedures, and the like. When the law as a *system* or *domain* is said to advance a claim, the thesis being argued is that this claim stems not simply from legal norms but from the ways in which different parts and constituents of the system come together and interact. There are different forces at play here (officials, norms, institutions and procedures) and the claims that the law makes stem from various combinations of such forces. A study of this nature, in which different kinds of entities are taken into account, brings up issues different from those that arise when one is considering legal provisions alone. For this reason, any account of the claim-making capacity associated with the law that seeks to be exhaustive will have to treat this as a twofold question, discussing this capacity with respect to both single legal provisions and the legal domain as a whole.

It is, moreover, the claims of the legal domain as a whole rather than those of single legal provisions that I will be primarily concerned with: this is in keeping with the current debate, in which greater theoretical importance is accorded to the claims made by the law understood as a system. The discussion that follows will therefore keep this focus front and centre, and the choice of vocabulary will reflect this, which is to say that unless otherwise specified, I will be using 'law' to refer to the legal domain as a whole rather than to individual legal norms. As an additional terminological detail, I will favour, throughout the monograph, the locution 'the law' over 'law' in order to point to the legal domain; the only exceptions being those phrases of wide currency that have the status of idioms, for example, 'concept of law', 'nature of law', 'normativity of law' and '(normative) claim of law', which all employ 'law' and not 'the law'.

I have worked over this project for a long enough period of time to warrant its qualification as a long-term project. As with any such project, it would not have been possible without the support of a number of institutions and people.

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