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Maris Köpcke, A Short History of Legal Validity and Invalidity. Foundations of Private and Public Law

Cambridge, Intersentia, 2019, xiii + 158 p. ISBN 9781780688152.

1 This book (as the title indicates) is a short and breath-taking overview of the history of validity in Western legal culture from Roman law to constitutional control.[1] KÖPCKE tackles an essential normative problem: what is the role of lawyers' 'intentional say-so' (8) in changing 'legal positions'? How did the 'legal technique' (p. 3) of validity originate in private law, to assess or empower legal 'transactions' (translation of Savigny's *Rechtsgeschäft*)? If transactions (contract, testament) exist in their own, validity is the technique used by lawyers to restrain or remove them. Hence private law's initial focus on invalidity (8). How did it develop in the *ius commune*, and, finally, how did it apply to public decisions (administrative adjudication) and law-making (judicial review)? Constitutionalism (implying the precedence of fundamental norms over legislation) is presented as 'just another sense' of the 'long-standing technique' of validity (7).

2 KÖPCKE situates her research by expounding Hart's concept of rule of recognition and Kelsen's *Grundnorm* (2). However, she aims to go further than artificial reasoning, by analysing the 'reality of the legal craft'. The exercise is framed as a 'foundational enquiry' or sound reflection on the roots of validity, not as a work of legal theory. The author takes a 'lawyery perspective' (12), symbolised by the common practice of verifying draft contracts for clients. The contract in itself is an artefact, but the lawyers' intervention is a positing and enacting choice. If a stipulation is deemed invalid by a lawyer, this does not deprive it from having legal consequences. However, the change in normative position is considered relevant. This is illustrated further on, in Suarez's analysis of merely prohibitive rules on marriage, causing the imposition of a fine, but not the cancellation of the transaction. KÖPCKE takes a broad approach, whereby private and public actors alike can cause a change in legal position. Not the changes as such are central, but the process by which they are brought about (13). The author intends to 'delimit' the technique of legal validity (18).

3 KÖPCKE identifies six aspects permitting to trace the technique of legal validity across time. First, the results of a verification of validity (a change in the legal position: rights, duties, competences). Second, the way in which validity is conceived. Third, the conditions under which validity operates. Fourth, the legal system (an essential element, since validity is linked to the presence of a self-reflexive system of norms, which can explain the consequences of an (in)valid transaction or norm, and which ought to lead back to the validating *Grundnorm*). Fifth, the result of the circulation of valid legal norms and transactions. Finally, the specific term used to coin validity.

4 The analysis starts with Ulpianus' description of *leges perfectae* and the earlier *leges imperfectae* and *leges minusquamperfectae* (p. 25), designed to curb the development of the *ius honorarium*, which had created more flexible transactions than the traditional *ius civile*. The nullity of transactions followed from the former, but the latter corresponded to a possibility for the praetor to block excessive claims, and leave the essence of the legal act untouched (p. 30). The jurist's 'say-so' is linked to the *stipulatio*, a formal form of contracts which required the contracting parties to repeat specific phrases. For KÖPCKE, the operation of language ('hereby') indicates that a lawyer is conscious of the change in legal position following from his or her words. Roman public law, according to KÖPCKE, presented too many occasions whereby power was usurped, and does not constitute a fruitful case to trace the history of validity. The Senate's right to block legislation approved by the *comitia*, or to check it for '*auspicia vitiata*' generates a broad similitude, but does not amount to genuine technical-legal control by lawyers of the popular assemblies' right to enact

legislation.

5 The following step in KÖPCKE's analysis is the *Decretum Gratiani* (1140), a coordination of the various sources of canon law (Scripture, synods and councils, patristic, papal decisions, interpretations and instructions). Through the use of glosses and reasoning, distinctions could be established, allowing for a systematisation and harmonisation of canon law. Gratianus' '*glossa ordinaria*' (56) explained that, in general, what has been accepted as a violation of the *leges*, ought to be corrected by the *leges*. However, three exceptions existed, whereby the sinful nature of a situation caused a prohibition, but did not prevent the transaction from being maintained (*tenet*), even if that was *contra legem* (57). Only 'perpetual causes' brought about the vitiation of a marriage. The legal status of transactions could thus be envisaged in more subtle terms. For enactments, Gratianus foresaw a hierarchy between natural law, on the one hand, and *leges* and customary norms, on the other hand. The law of the Church took precedence over civil law. In case of conflict, the just (*jus*) ought to prevail over the potentially evil (*lex*).

6 Another famous text of canon law, Pope Gregory IX's Decretals of the *Liber Extra* (1234) is seen as decisive in establishing the terminology of validity. These texts constituted an enactment of their own, taking away the normative force of preceding papal legislation, and forbidding the use of other collections in ecclesiastical courts (67). The Pope posited himself on top of the Church's legal pyramid, or, in KÖPCKE's terms- the head of a self-conscious and reflexive legal order, established by his 'say-so'. The Decretals did not merely enact norms. They established 'law about law'. The Pope used his supremacy to issue 'binding legislation' at any time, even if its object concerned aspects governed by secular rulers' norms, such as the binding force of engagements taken under oath, criminal law or criminal procedure.

7 The Decretals attached verbs to the qualification of '*irritam et inanem*', to the expressions '*non potest*', '*non tenet*', '*ipso iure nulla*', '*cessare*' or '*revocare*' (68). A chain of validation existed between transactions and enactments controlled and, ultimately, the Pope. The subordinate bodies within the Church had a 'systemic awareness' (69). Whereas Gratianus had used '*validus*' as an indication of strength, validity concerned a legal quality for Gregory IX, to the extent that '*validitas*' became the term for the property of validity, and the adverb '*valide*' could connote the process. The Pope's own enactments were not objects of a validity control, since he was mandated by God alone (72).

8 KÖPCKE argues her inquiry is relevant to contemporary changes. The institutionalisation of validity in both private and public law offers opportunities for international law, human rights or transactions, 'non-state practices spoken of and heeded as law' and 'virtual forms of agency and community' (9, 144). Jurists' 'intentional say-so' would be able to craft harmony in a diversity of normative sources. In that respect, KÖPCKE's analysis of Bartolus' statute theory is the most eloquent example of such a reasoning. The merit of this book is that the inquiry cuts across the divide between private and public law. KÖPCKE demonstrates the implications for public law of Bartolus' conception of private international law: Bartolus permits the judicial territorialisation of power, and makes thus a 'world of states' thinkable. She explains how Bartolus catered to the practical needs of the Italian city-state's considerable autonomy, but did not forget to bring them under the rule of Roman law as more than a residuary framework (144). The waning of imperial power (75) weakened the normative force of Roman law as interpreted by the Emperor's lawyers. The German Emperors of the 14th century were in no way comparable to those of the Late Roman Empire, wherein the *Corpus Iuris Civilis* originated. The Emperor's 'say-so' could in practice be less relevant than the city-state's (85).

9 The case taken here is Bartolus' famous analysis of a Venetian statute limiting the number of witnesses for a 'valid' testament to two. Bartolus classified legislation into four categories. The first two concerned questions of private law: prohibitive and permissive laws. The legislator could increase or decrease the formalities for private transactions found in Roman law. Bartolus hereby distinguished between morally reprehensible, criminally punishable, on the one hand, and legally valid, on the other hand (78). He tried to explain how the validity of a transaction in one Italian polity could have consequences for its acceptation and legal effect in another entity (80). The circulation across multiple jurisdictions became a subject of legal reasoning: determining whether a transaction would have effect in another jurisdiction was truly a 'matter of law'.

10 Bartolus justified the validity of the local Venetian statute using various arguments, enabling in the end the city-state to enact legislation '*sive princeps*' (89). If Imperial approval (required in the Codex and the Digest) was lacking, Venice could be said to have acquired the right to legislate by prescription or

usurpation (89). The 'say-so' of the people had in practice replaced that of the Emperor (90). Was Bartolus instrumentalising Roman Law and purely legitimating facts? KÖPCKE argues this would go too far: Bartolus did not equate the existence of a legal system with the Emperor of ultimate source of law. If city-states acquired more power, this did not erase natural law, the law of nations or divine law. Reasons for a declaration of '*non valeat*' could be found in all of these legal layers, part of a complex system (92). Roman law provided the jurist with substantive rules to fall back on, with a certain leeway for local legislators relax or sharpen restrictions (93). The legal control of local legislation was entrusted to the judiciary: even if the city-state could act as the Emperor would have done, both would remain under the framework of Roman law. The latter was only approachable through scientific study. Hence, the book argues that Bartolus provided lawyers all over Italy with a grammar for the application of law in a landscape consisting of multiple jurisdictions. For KÖPCKE, the essential aspect of the reasoning is not that problems are solved 'by' (a material rule of) law, but 'through' (the practical-logical technique of) law (96).

11 The Spanish theologian Francisco Suarez, a major figure of the second scholastics, provides the next stage for KÖPCKE's analysis. He is praised for addressing 'law about law' in a reflexive way, as a forerunner of HLA Hart (100). Suarez sees the operation of invalidity on transactions in two aspects. Serious shortcomings ought to lead to prohibition and direct invalidity. This type of validity is linked to a problem in conscience ('*in foro interno*'). Formal issues give rise to indirect validity, whereby the transaction is maintained, but its effects are modified. Formal invalidity is related to procedural issues, which regard the external manifestation of a transaction ('*in foro externo*') (102-103). Men are naturally free to enter into transactions, but the secular legislator can prohibit or invalidate either part of the transaction, or the transaction itself. However, man's natural freedom allows to conclude transactions without prior consent.

12 Suarez goes beyond Bartolus' check on secular enactments of law. The Spanish theologian refuses to recognise unjust laws (109): '*lex iniusta non est lex*'. The ultimate source of laws is pre-legal (142). For KÖPCKE, however, Suarez seems to indicate (without rendering this explicit in a consistent way) that the King's 'say-so' renders positive law valid in all occasions, irrespective of its moral qualities (113). This is essential, since private persons have to rely on judicial enforcement of their arrangements (142). Moral considerations do not undermine the validity of legislation. In conclusion, KÖPCKE regards Suarez as a forerunner to HLA Hart, in the sense that they both see the system of law as one that enables self-development. Adjudication and recognition can limit individual autonomy, but law primarily confers private power on individuals (114).

13 Nineteenth century codes and constitutions are considered as the definitive 'projection' (115) of private law-validity into the law-making process. Friedrich Carl von Savigny's aversion to legislation is contrasted with the rise of administrative law,[2] and the need to complement the French Revolution's consecration of the '*volonté générale*' with an effective judicial control of legislation (126). For KÖPCKE, Savigny's theory of rights and legal acts is based on an individual's declaration, and the purpose of that declaration: to create rights. If an individual has the general capacity to make legal acts, legislation contains the common rules of the '*Volksgeist*' enumerating the circumstances under which the individual's free will is vitiated (123). The state ought to act as the guarantor of individual rights, which exist prior to positive law or legislative enactment (129). KÖPCKE links the French Civil Code's partly constitutional ambitions to the broader project of creating a law-governed administration. Authors as Otto Mayer (who saw the administrative legal act as the culmination of the *Rechtsstaat*, since a judicial and hierarchical control of validity became possible) and Georg Jellinek (who saw state power as a non-delegated power, at the basis of valid legal norms which count as law) pave the way for Hans Kelsen. Jellinek tied individual autonomy in private law to public law, which enabled the individual to mobilise the legal machinery of the state (136). In KÖPCKE's view, this is an expression of the increasing self-consciousness of a professional class of lawyers, which consecrated legal reasoning.[3] Private individuals and official institutions alike had to 'act in the law'.

14 Kelsen's pure theory of law framed law as an empowering framework. Even constitutional law was not absolute, but depended on a chain of validation. 'Pure' theory of law implied that lawyers ought to see law as a system of norms, with its own self-understanding (137). Law was now a system of 'norm-producing acts', which comes close to the focus of KÖPCKE's inquiry into the 'say-so' of lawyers (138). Kelsen's logic was such, that the fundamental norm did not need to be old, as long as it was historically 'first' in the chain of validation. A recent *'coup d'état'* could also provide a new 'historically first' *Grundnorm* (138).

15 KÖPCKE concludes her inquiry by pointing to the wider echoes of this theory after World War II, allowing to apply Kelsen's grammar to a language of rights, which created constitutional constraints for the legislators.[4] In any case, validity now permits not merely to delegate power, but also to set limits on its

exercise (143). Jurists controlled the validity of enactments, and not just of private transactions. In sum, KÖPCKE suggests to bypass the framework of the state as unit of analysis, but to reuse the 'age-old and continually oiled legal toolkit' (144).

16 KÖPCKE refers to the published versions of the above mentioned foundational texts, and regularly refers to publications by legal historians as Walter Ullmann, Antonio Padoa Schioppa, Max Kaser, Peter Landau, Thomas Duve and Marie Teres Fögen. Most of the literature is either in German or English, with some remarkable lacunae, as mentioned in the footnotes of this review (147-151). This does not constitute an obstacle, since the formulated hypothesis is designed to appeal to both common law and civil law-jurisdictions. From the perspective of legal history, this work stands at the beginning of a chain of research, not at the end of it. Other reviews emphasise the clarity of the writing in this book. I can only subscribe to these comments, albeit that the legal historian should be aware of the framing of this work, which is essentially a theoretical work on legal practice, requiring an attentive and careful reading. The delicate, astutely weighed and precise formulation triggers the attention of a broad audience of legal scholars confronted with 'jurists weaving a fabric of rules' (144), in different cultural, temporal and spatial settings. Nearly every sentence merits a second or third reading.

17 The 'history of validity' formulated by KÖPCKE can be tested as a hypothesis in a wide range of documents reflecting 'living law', taking into account the political, institutional and intellectual context of the treatises and authors mentioned above. The chapter on Bartolus (75) rightfully points to the interaction between learned Roman law and practice, its coexistence with customary law, and the need to theoretically translate the scattered exercise of public authority in the Italian peninsula. This theme is linked with the 'birth' of diplomacy, theorised with elements from theology, canon law, civil law and statute law: the language used by diplomats can imply recognition of sovereignty. Just as Bartolus' argued that city-states could validly legislate, this recognition did not equate a mere recognition of fact, but brought political entities under a common normative framework.[5] The focus on the operation and the logic of validity permits to scrutinise pleadings and judicial decisions, pamphlets and treatises on law, but also political documents wherein formal and material arguments are interwoven. The current attention devoted to the School of Salamanca[6] as well as the reinvigoration of international law in the late nineteenth century[7] complements her analysis of Suarez and 19th century domestic normativity.

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1 See also KÖPCKE, MARIS (2019): Legal Validity. The Fabric of Justice, Oxford, Hart, 2019.

2 STOLLEIS, MICHAEL (1992): Geschichte des öffentlichen Rechts in Deutschland Bd. 2: Staatsrechtslehre und Verwaltungswissenschaft 1800-1914, München, C.H. Beck. This standard work on the history of public law in Germany is, surprisingly, not cited in the book. Likewise, on the German Historical School, one would have expected HAFERKAMP, HANS-PETER (2018): Die Historische Rechtsschule, Frankfurt am Main, Vittorio Klostermann.

3 HALPÉRIN, JEAN-LOUIS (2015): Histoire de l'état des juristes en Allemagne, XIXe-XXe siècles, Paris, Classiques Garnier. Just as Stolleis's standard work, this recent encompassing study of the German *Juristenstand* is absent in the book's footnotes and bibliography.

4 VON BERNSTORFF, JOCHEN (2001): Der Glaube and das universale Recht. Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler, Baden-Baden, Nomos Verlag.

5 FEDELE, DANTE (2017) : Naissance de la diplomatie moderne (XIIIe-XVIIe siècles). L'ambassadeur au croisement du droit, de l'éthique et de la politique, Baden-Baden, Nomos ; Rossi, Guido (2018) : Baldus and the Limits of Representation, Tijdschrift voor Rechtsgeschiedenis, 86/1-2, 55-122.

6 DECOCK, WIM (2012): Theologians and Contract Law. The Moral Transformation of the Ius Commune ca. 1500-1650, Leiden/Boston, Martinus Nijhoff/Brill; BIRR, CHRISTIANE and DECOCK, WIM (2016): Recht und Moral in der Scholastik der Frühen Neuzeit 1500-1750, Berlin, DeGruyter.

7 BAKER RÖBEN, BETSY (2002): The Method Behind Bluntschli's "Modern" International Law" in Journal of the History of International Law-Revue d'histoire du droit international, 9/2, pp. 249-292.