Towards the justification of warrant in a legal hard case: How to justify a legal rule by the backing

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Though Toulmin model is a heated topic, it is usually studied in the general sense, which oversimplifies some valuable issues, e.g., the process of justifying warrant by its backing. This paper, situated in the legal field, makes a start to this issue. This type of justification can be divided into two sub–justifications, justifying the existence and the interpretation of the legal rule, respectively. Focusing on the first sub-justification, we present two types of argumentation structures based on two main positions in legal philosophy.

KEYWORDS: backing, legal justification, legal hard cases, Toulmin model, warrant, legal philosophy

1. INTRODUCTION

Toulmin model has been an important issue in argumentation theory since its born. Its significance comes from its functional perspective, in which an argument is explained as constituted of six layouts with different functions, rather than simply by 'premise' and 'conclusion'. However, some authors doubt whether Toulmin has adequately discussed about his model. For instance, Goodnight points out, an additional inference should be added into Toulmin model to certify the choice of backing for a warrant. This idea somehow comes from Toulmin's 'field-dependence'-concept, which can be captured by "allowing for different backings of [the] warrant" (Prakken, 2005, p. 318). Goodnight's inference is useful, especially when some alternative backings have been found, and we need to show "an argument [is] certified by an appropriate, proper, or correct choice of backing" (Goodnight, 1993, p. 41).

Nevertheless, we disagree on Goodnight's assertion that such inference is a "move from warrant to backing" (ibid.). We draw three figures to illustrate our disagreement. While Fig. 1 exhibits that people could get different backings from one (assumed) warrant, Fig. 2 shows the warrant can be justified by a backing, and Fig. 3 presents the backing 2, comparing with other alternatives, constitutes the best choice. Arrows in these figures also possess different meanings. In Fig. 1, each arrow refers to an *inference* from the warrant to a backing, while in both Fig. 2 and Fig. 3, each arrow represents a *justification* of the warrant by a backing. (But the arrows in Fig. 3 are less important, they only indicate that those backings in the dotted box are qualified candidates for electing the best.)

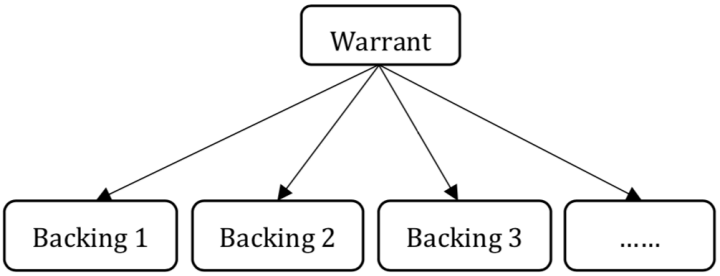

Figure 1 – Inferences from the warrant to backings

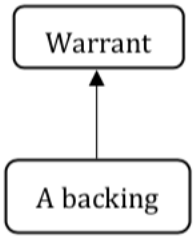

Figure 2 – Justification of warrant by a backing

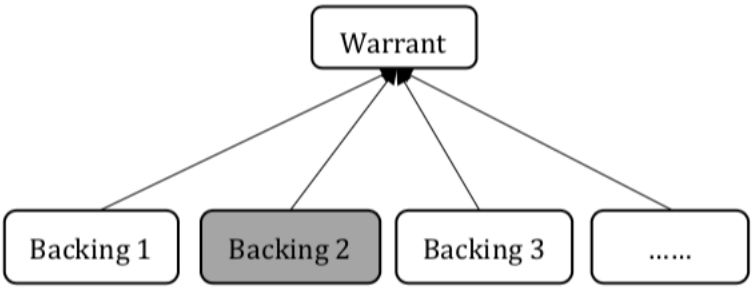

Figure 3 – An election of backings for best justifying the warrant

We use this set of figures to explain that, to justify our choice of the backing concerns more with Fig. 2 and Fig. 3 where the arrows go form backings to the warrant (rather than, like Goodnight suggests, going from the warrant to backings). Because after the proponent has asserted such a choice of backing, he implies, and needs to justify, the backing is a support to the warrant.

In this essay, we focus on Fig. 2. Thus, our intention is to show how to justify the warrant by a backing, or say, how to justify the supportive relation between backing and warrant. We choose legal field to exemplify such justification—since judicial process is parallel to the rational process set out by arguments (see Toulmin, 2003, p. 15). Moreover, for throwing more light on legal justification, we choice hard cases, rather than easy ones. Thus, our purpose in this essay is to present the justification of warrant by backing in the legal justification of hard cases (LJOHC).

We first introduce Toulmin model and its layouts (Sect. 2), then present the counterpart of such justification in legal field and divide it into two sub-justifications (Sect. 3). We conclude in Sect. 4.

2. TOULMIN MODEL AND ITS LAYOUTS

2.1 Toulmin's original model

Toulmin distinguishes six layouts in his model, which, respectively, are data, claim, warrant, backing, qualifier and rebuttal. The criterion to distinguish them is the function in arguments. We illustrate their functions by his famous example,

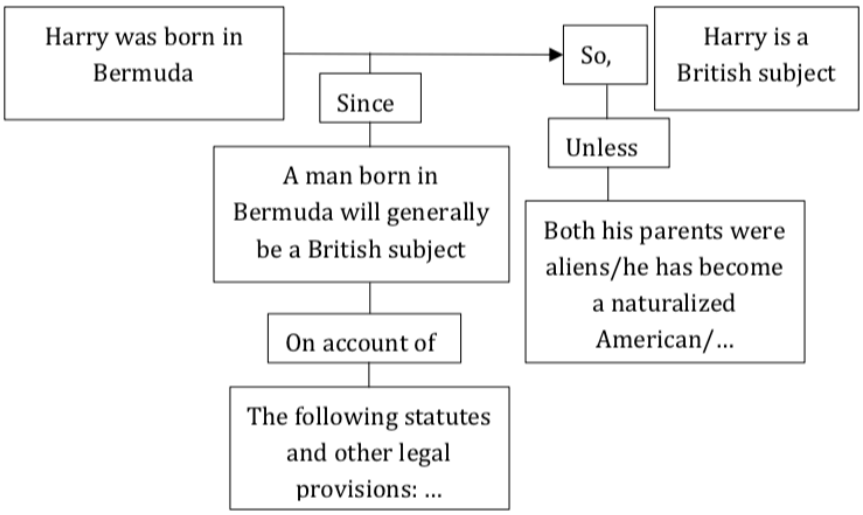

Figure 4 – Toulmin's "Harry is a British subject"–example

In this example, claim (C) is "Harry is a British subject," "whose merits we are seeking to establish" (Toulmin, 2003, p. 90). Data (D) is "Harry was born in Bermuda," which are "the facts we appeal to as a foundation for the claim" (ibid.).

Warrant (W) is "[a] general, hypothetical statement" that can "authorize the sort of step to which our specific argument commits us," which is "[a] man born in Bermuda will generally be a British subject" in this case. It gets authority and currency from the backing (B)—"[t]he following statues and other legal provisions: ..." in this example (see ibid., 96f.). Meantime, rebuttal (R) reveals some "exceptional conditions […] might be capable of defeating or rebutting the warranted conclusion," which can be either "[b]oth his parents were aliens" or by "[h]e has become a naturalized American" in this instance. Thus, "the strength conferred by the warrant on this step" is not absolute, and represented by qualifier—"presumably" in his example.

Based on such distinctions, components of an argument are reassembled in a functional view. In the next section, we introduce a revised model to Toulmin's original model by Yu & Zenker (2019).

2.2 A revised understanding of Toulmin model

Yu & Zenker (2019) transform Fig. 5—Toulmin's original model—into their revised Fig. 6.

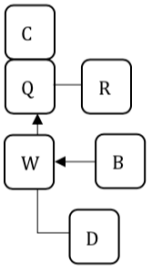

Figure 5 – Original Toulmin model

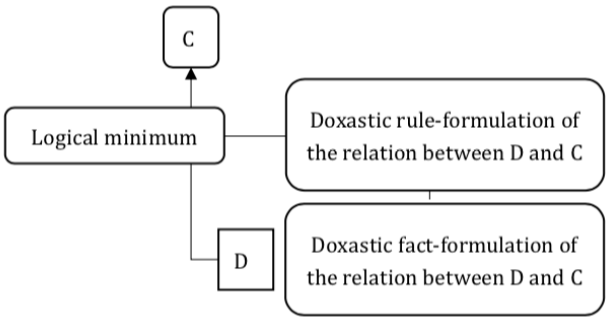

Figure 6 – Revised Toulmin model

The revised model makes three main changes to the original: Firstly, they consider that the essence of 'W' refers to a kind of substantial relation between 'D' and 'C', and the presentation of 'W' is a doxastic rule-formulation of the relation between 'D' and 'C'. Secondly, parallel to considering 'W' as a type of doxastic rule-formulation, they treat 'B' as a type of doxastic fact-formulation of the relation between 'D' and 'C'. It represents how people know, or what has been implied by the doxastic rule-formulation of the relation between 'D' and 'C'. Thirdly, 'Q' is omitted, since in their revised model, 'Q' has been accommodated into 'C', jointly being regarded as a new claim. In addition, 'R' is neither explicit. Because, in their view, 'R' points out the weaknesses not only of the 'W', but also of other components. For clarity, they omit 'R'-mark and use critical questions (CQs) to reveal these weaknesses.

So to speak, such a revised version is not only to reinterpret elements of Toulmin model, but also intends to expand this model. Our following discussion starts from their revised version.

3. THE JUSTIFICATIONS OF THE EXISTENCE OF RULE IN LJOHC

In this section, we divide the justification of warrant by backing in LJOHC into two sub-justifications, one for justifying the existence of a rule, the other for justifying the interpretation of the rule (3.1). Focusing on the

former, we introduce another type of backing (3.2). However, such backing still needs further backings, which are decided by legal positions. We introduce two main positions in legal philosophy, and construct justifications of the rule under each position (3.3). Finally, taking natural lawyers' position, we improve their justifications (3.4).

3.1 Two main sub-justifications of warrant from backing in LJOHC

For presenting sub-justifications of 'W' by 'B' in LJOHC, we firstly have to identify the starting- and ending-points of the whole justification. We apply the revised Toulmin model to analyze a legal case: Mary has stolen a car, so the judge intends to claim a two years-sentence by law (please see Fig. 7).

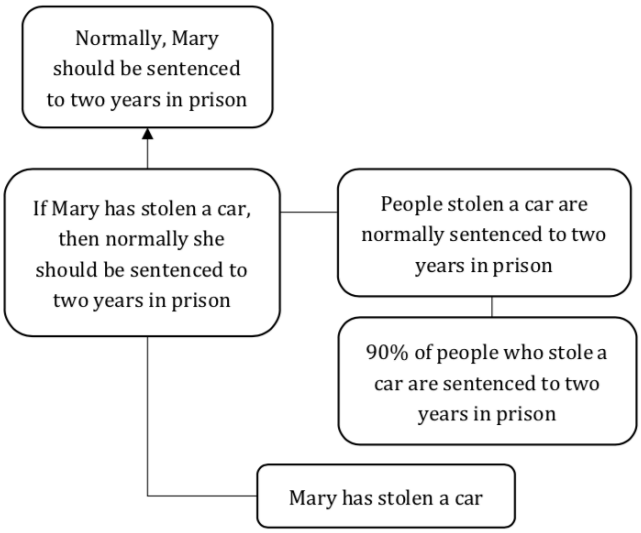

Figure 7 – Applying the revised Toulmin model to Mary-example

The 'W', in this example, is "People stolen a car are normally sentenced to two years in prison." Although it seems like a legal rule, some people may consider it as a legal interpretation. This view is correct, especially in legal hard cases, since in which legal rules need to be interpreted before applied. Thus, we consider 'W' as legal interpretation in LJOHC.

Following Yu & Zenker (2019), the 'B' should be "90% of people who stole a car are sentenced to two years in prison," which offers factual basis for the 'W'. Thus, the justification of 'W' by 'B' in LJOHC is to justify the legal interpretation of legal rule by the factual basis of the interpretation.

Nevertheless, two problems need to be solved. Firstly, we did not see legal rule as a component yet, which is essential to legal justification. Secondly, we need to explain what can be called as a factual basis of legal interpretation of a rule.

For solving both problems, we need to consider the rule as an implicit component in the justification, which can be inserted between 'W' and 'B'. Then, not only the legal rule becomes a component (first problem solved), but also the factual basis of legal interpretation of rule turns to be, more directly related with, the basis of rule (second problem solved). Thus, the whole justification can be divided into two parts. The first is to justify the legal interpretation of rule, advancing from the rule to 'W'. The second is to justify the rule itself, advancing from 'B' to the rule. However, we still face a further problem, i.e., what is, or can be called as, the factual basis of a rule. Although "90% of people who stole a car are sentenced to two years in prison" is a fact, it is more like a social (statistical) fact, describing a social, rather than legal, affair. Alas, situating in the legal field, it can not satisfy those people who maintain the factual basis should have been more legal. Further, it seems only to present the outcome of a rule, rather than to justify the validity of a rule. Thus, it is not able to be a *basis* of the rule. We solve this problem in the next section.

3.2 An additional type of backing

To reform the factual basis more legally, we need 'B' to express legal facts. Shapiro (2011, p. 25), a famous legal philosopher, defines legal fact as "a fact [that is] about either the existence or the content of a particular legal system," for instance, "the Bulgaria has a legal system" or "the law in California prohibits driving in excess of 65 miles per hour."

Shapiro claims that "legal fact […] cannot be ultimate," which needs to be made "reference to other facts" about its "existence" (ibid., 26). For instance, although "authority-conferring laws" could "confer authority on officials," the former could also be called into question. Then "we might trace […] back to the fundamental rules of the legal system" which, in United States, would in turn get help from "constitutional law" (ibid., 26). Since we could find no other legal facts on which constitutional law relies, "the Constitutional is fundamental law" (ibid., 27).

Nevertheless, based on "an obvious query: what happens when we run out of legal facts upon which to rely?" (ibid.), we may ask what does the Constitution rely on? To answer this question, Shapiro borrows a pair of answers from two groups, i.e., legal positivists and natural lawyers. Their main difference is decided by the type of facts that are used to support the fundamental law. While "natural lawyers […] hold that legal facts are ultimately [and simultaneously] determined by moral *and*

social facts," "legal positivists [maintain] that all legal facts are ultimately determined by social facts alone" (ibid., 27; *his italics*; also see Patterson, 2010). Indeed, such "disagreement […] concerns the *necessary properties of law* and, therefore, *the nature of law*" (ibid., 27f.; *his italics*). "[T]he positivist treats the law like custom," but "natural lawyers […] believe that the nature of law is similar in this regard to the nature of political morality" (ibid., 28).

So, although we could consider the 'backing' as some legal fact, it always needs further backing(s) outside law. In other words, if we want the justification by backing to be more revealing, to consider the backing fundamentally as legal fact is not enough. To think of the justification more essentially, we introduce two legal positions with more detail in the next section.

3.3 Two legal positions and three types of facts

First of all, since many think the natural laws are self-evident, the main difference between legal positivists and natural lawyers embodies in their views on how to justify the legal validity of positive laws. Thus, all justifications involved in the following are of positive laws.

As "one of the two great traditions in legal philosophy," legal positivism holds "two central beliefs: first, that what counts as law in any particular society is *fundamentally* a matter of social fact or convention ('the social thesis'); second, that there is no necessary connection between law and morality ('the separability thesis')" (Patterson, 2010, p. 228; *italics added*). In other words, the legality (or legal validity) of law comes from its institutional nature, having nothing to do with morality.[1] By distinguishing social and moral facts, in legal positivists' view, the legal validity is justified merely by social facts.

By contrast, natural lawyers, no matter traditional or modern ones, all deny the separability thesis: they believe morality and law are interrelated (see Patterson, 2010, pp. 211-226). For instance, such belief is well reflected in a famous claim—"an unjust law is no law at all." However, this statement seems self-contradictory in saying "an apparently valid law is 'not law'" (Patterson, 2010, p. 214). "A […]

[1] Nevertheless, there are two main approaches of positivism, one is "restrictive" construal, e.g., Joseph Raz, "hold[ing] that it can never be a criterion of legal validity that a norm possess moral value" (Patterson, 2010, p. 230; also see Raz, 1979, pp. 37-52; Raz, 1985, pp. 311-20), the other, which is named as "inclusive" construal ("incorporationism" or "inclusive legal positivism"), "only commit[s] to two weaker claims […]" (Patterson, 2010, p. 230; also see Hart, 1994). Discussions can be even more complicated, but in the sense that all legal positivists consider social conventions as the fundamental factor of deciding a norm legal, we draw Fig. 9.

reasonable interpretation […] is that unjust laws are not laws 'in the *fullest* sense'" (ibid.; *italics added*). Namely, "it does not carry the same moral force or offer the same reasons for action as laws consistent with 'higher law'" (ibid.). Thus, both social and moral facts are necessary for justifying the legality of law from natural lawyer's view.

Since two legal positions have different necessary components for justifying legal validity in mind, we could build two types of argumentation structures (see Fig. 8 and Fig. 9).

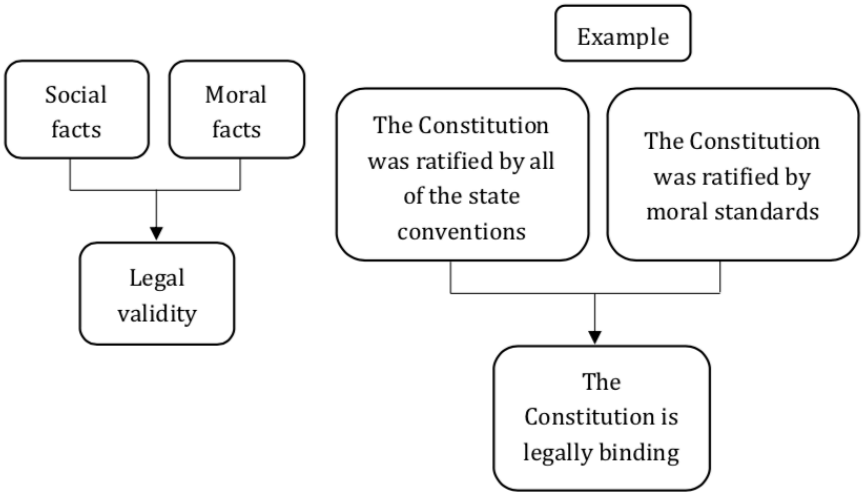

Figure 8–Coordinative justification of legal validity by natural lawyers[2]

[2] The justification of legal authority by moral fact can be complex argumentation. As we only show a single argumentation, "moral fact" is singular. Pragma-dialecticians distinguish single argumentation from complex argumentation by the number of reasons, saying that "a single argumentation […] consist[s] of one explicit 'reason' […], [while] 'complex' argumentation consist[s] of more reasons" (van Eemeren et al., 2014, p. 23; also see van Eemeren & Grootendorst, 1992).

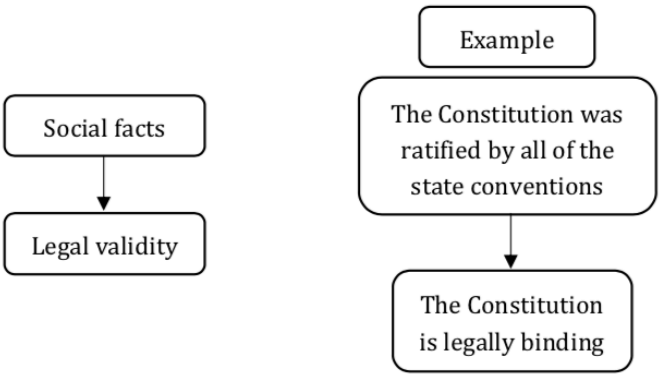

Figure 9–Justificatory of legal authority by legal positivists

We see the justification of legal validity is made of either social facts or social and moral facts. Thus, we need to identify and distinguish three types of facts more clearly. We begin with social facts. Like many others, Durkheim defined social facts as "... consist[ing] of manners of acting, thinking and feeling external to the individual, which are invested with a coercive power by virtue of which they exercise control over him" (Durkheim, 1982). Following this definition, we unfortunately find both legal and moral facts can be considered as social facts. For solving this problem, in this essay, we assume social facts as the facts other than legal and moral facts. We thus need to identify the scopes of legal and moral facts, respectively.

For moral facts, we should not bring all facts that are related with morality into the set of moral facts, since we only care about those which could directly support legal validity. To reach such a limited description, we define moral facts simply as a kind of fact stating something about the consistency between law and moral standards, e.g., a fact stating whether the law is consistent with moral standards, or stating the degree of their consistency. Moreover, we consider statements like "according to moral authority, the Constitution is (morally) good" as moral evaluations, rather than (moral) facts.[3]

To identify the scope of legal facts, let us see what revisions can be done to the definition—"a fact about either the existence or the content of a particular legal system" (Shapiro, 2011, p. 25). Firstly, we would like to add those statements claiming legal validity of a rule or system, for instance, both conclusions in Fig. 8 and Fig. 9. Secondly, although Shapiro maintains that the authoritative status of the person in

[3] Mulligan & Correia (2017) holds that "Facts […] are opposed to theories and to values (cf. Rundle 1993)."

question is a legal fact, we would like to preclude such kind of facts which only contain the facts of particular cases. Because they look more like social facts. By contrast, we agree with Shapiro that a fact contains the content of a rule is a legal fact, for instance, "the law in California prohibits driving in excess of 65 miles per hour."

Based on above considerations, we revise Shapiro's definition of legal fact as that *a general fact directly relates with the existence, content or validity of a legal system*. "General" is used for precluding those facts only stating any specific legal cases, while "directly" is for limiting the scope of legal facts so as to preclude irrelevant facts. Moreover, similar with Shapiro, we assume the "legal system" as containing all components inside of it.

Although we have offered argumentation structures of two legal positions, they are not final versions. In the next section, we offer a revised version from *natural lawyer*'s view.

3.4 How to justify a legal rule from natural lawyer's view

Following Shapiro's point of view, we can use legal authority of the Constitution to justify that of a rule (see Fig. 8 and Fig. 9). However, such authority of the Constitution given by social or moral facts is generally but not universally valid. For instance, "the Constitution was ratified by all of the state conventions" does not necessarily mean the *whole* Constitution was consistent with all state conventions. In other words, some other parts of the Constitution may conflict with state conventions, without denying that the Constitution being *generally* ratified. In turn, it is also quite impossible for the ratified parts of Constitution to align with all of the state conventions. Normally, the former only aligns with most conventions, for state conventions may even conflict among themselves.

Thus, we represent the relation between the Constitution with state conventions in Fig. 10. Both areas S1 and S3 are the parts that the Constitution does not coincide with state conventions. They, respectively, refer to the parts that are written or reflected in the Constitution but not in the state conventions and vice versa.

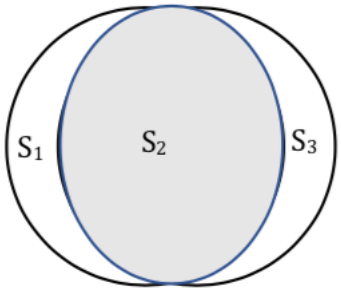

Figure 10 – The possible misalign relation between the Constitution with state conventions

We thus may fail, if we believe the validity of rules can be justified by moral facts on the Constitution. Because such moral facts could only generally justify the validity of the whole legal system rather than every part of it. To improve the strength for justification legal validity of a particular rule, we need another coordinative help from the moral facts directly related with the rule in question (see Fig. 11). We call the branch by appealing to the Constitution as method 1 (M1), the other as method 2 (M2). Nevertheless, the real difference between M1 and M2 is not whether appealing to the Constitution, but whether inside the legal system. When applying M1, there may be some intermediate steps on the way from the Constitution to justify legal validity of Rule A. For instance, the legal validity of Rule A is ratified by Rule B's legality, and so forth, but finally by the Constitution (or from the Constitution and related social and moral facts of Rule B at the same time). Consequently, we define M2 as a method that directly appeals to social and moral facts. To distinguish M1 and M2 in brief, we call M1 as the method inside of legal system, while M2 as the method outside of legal system.

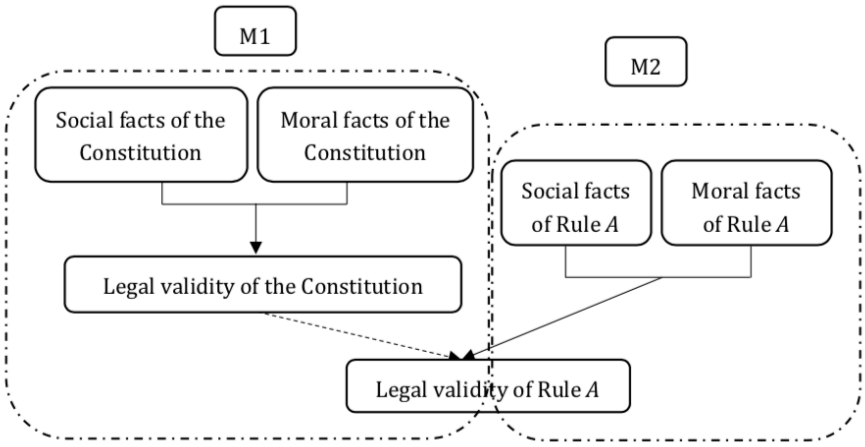

Figure 11 – Coordinative argumentation for justifying legal validity of rule *A*

Now we are able to answer the question—"what kinds of backing are *legal* backing of justification in hard cases?" Following natural lawyers' view, both social and moral facts are necessary. But the social fact appealed are not statistical facts, e.g., "90% of people who stole a car are sentenced to two years in prison," but, for instance, "the parliament has published a relevant legal statue" or "legal officials treat the state conventions as having had the power to ratify the Constitution." In the sense that these social facts offer legal validity to the rules, we call them validity facts. For the same reason, the moral facts considered as legal backings are also called validity facts. In a word, legal backings can be either social or moral facts, which are collectively called validity backing or validity facts.

4. CONCLUSION

In this essay, for laying the basis for justifying the 'W' in LJOHC, we presented how to justify a legal rule by 'B'. Based on the dichotomous distinction of legal positions, i.e., legal positivism and legal naturalism, we constructed two general argumentation structures, respectively. For a better construction, we also identified three types of facts. Finally, we focused on the justification from natural lawyers' view, and made some improvements.

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