WHAT IS LEGAL VALIDITY? LESSONS FROM SOFT LAW

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Abstract

The purpose of this article is to use the elusive phenomena of legal validity and soft law to illuminate each other. Three notions of legal validity are distinguished. Source validity and binding force (in a special technical sense) are internal legal notions that are used in legal argumentation. On the contrary, efficacy (also in a special technical sense) is an external notion, used in descriptive theories about law such as sociology of law or legal theory. Source validity is a characteristic of, amongst others, legal sources and something was validly made in this sense if it was made by a competent agent in accordance with the relevant procedure. A rule has binding force if this rule exists and generates legal consequences when applied. A rule is efficacious if its consequences are accepted by the relevant legal subjects, including officials.

With these three notions of legal validity in place, the focus of the argument shifts to the nature of soft law and how it combines with the three notions of legal validity. For a proper analysis of soft law three elements are required. First it is necessary to replace the traditional rule-based view of legal reasoning by a view in which reasons, rather than rules, take the central place. For this purpose a special logic for reasons, reason-based logic, is introduced into the argument. Second it is necessary to replace the view of legal justification according to which justification consists of an argument with the object of justification as its conclusion, by a view that emphasizes the dialogical nature of justification. For this purpose, a dialogical variant of reason-based logic is briefly explained. And third, the view of legal reasoning as a reconstruction of legal effects that exist independently has to be replaced by a constructivist view according to which legal consequences are determined by means of legal argumentation.

On the basis of these three changes of perspective, the definition of soft law as law that can less easily be used in legal argumentation becomes understandable. Moreover, the tools that have become available by the introduction of the three notions of validity, dialogical reason-based logic and constructivism make it possible to identify different reasons why legal rules may be soft: limited applicability, dubious binding force, frequent exceptions, and weak reasons for the rule consequences.

Keywords: applicability, balancing, binding force, commitment, constructivism, dialogs, contributory reasons, efficacy, exceptions, exclusionary reasons, reason-based logic, rule-based logic, soft law, source validity

1. Introduction

The nature of legal validity was and still is intensely debated. Highlights in the jurisprudential literature of the 20th century are the works of Kelsen (1960), Ross (1946 and 1959), Hart (2012),

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Dworkin (1978 and 1986), Raz (1979), Alexy (1994 and 2002), Munzer (1972) and Grabowski (2013),[1] and the contributions to the present collection testify to the continuation of this lively discussion. Looking at the ongoing discussion, one might wonder with Mackor and Westerman (present volume) whether philosophical hair-splitting has not sometimes taken the lead over practical relevance. Yet, practical relevance there is, and this contribution will focus on one issue where the nature of legal validity plays a central role, that is the validity of soft law.

Phenomena that are labeled as 'soft law' are omnipresent. The expression 'soft law' is often used to refer to rules based on quasi-legal instruments, which lack legally 'binding force', whatever that may be, or whose binding force is somewhat weaker than the binding force of traditional law. Examples include the UN Declaration of Human Rights, recommendations in the law of the European Union, tax resolutions, published governmental policies, self-regulation in particular branches of society, codes of conduct for companies and governmental organizations, restatements of the common law, and case law in the civil law tradition. Despite this ubiquity of soft law – which, by the way, does not always go by that name - the precise nature of soft law is not yet clear, and it is possible that there is more than one kind of soft law (Westerman, present volume).

In the present contribution the elusive phenomenon of soft law will be used to shed light on the at least equally elusive phenomenon of legal validity, and the other way round. As we will see, the binding force that soft law seemingly does not possess is often identified with legal validity. If that identification is made, an analysis of the binding force of soft law may shed light on the nature of legal validity, and the other way round. This mutual illumination, or at least an attempt to bring it about, constitutes the guiding principle of the present article.

To achieve this illumination, first a fundamental distinction between 'internal' and 'external' claims about the validity of rules will be made and elaborated (section 2). Then an attempt will be made to give soft law a place in the preliminary account of legal validity that will by then be available. To that purpose, attention will be paid to a version of legal logic that takes reasons rather rules as its foundation (section 3), and to a representation of legal reasoning as a real debate between parties (section 4). The findings of the sections 3 and 4 will be used to modify the existing account of validity and to give soft law a place in this account (section 5). The contribution will be summarized and concluded in section 6.

2. Internal and external claims about legal validity

2.1 Binding force

Because soft law is often considered to be law without or with weaker binding force, it is useful to first get some grip on the notion of binding force, and its relation to legal validity. There are two fundamentally different views of law's binding force. One view sees the binding force of law as a causal influence. Law is binding because and to the extent that it influences human behavior. The other view emphasizes the immaterial nature of law's binding force: law is binding if it imposes obligations.

Law is almost literally binding if it is a causal influence in bringing about the behavior or the results that it prescribes. For example, if a person who has been sentenced to a term in jail is arrested by the

[1] The contributions of Von der Pfordten and Kirste to the present volume contain historical overviews with emphasis on the German-language literature.

police and handed over to the prison authorities, the law enforces the duty to go to prison in the strongest possible way. Almost the same holds when the law brings about the obligatory transfer of some real estate without the cooperation of the owner, or when the law allows attachment in case a debtor does not perform. The binding force of law would in this case consist in being enforced.

A somewhat weaker way in which law can influence people is when law motivates people to behave in a particular way. If law directly motivates people, human behavior is the result of the internalization of legal obligations: the very awareness of an existing obligation normally suffices to motivate the agent to comply with the obligation. If law indirectly motivates people, the threat of sanctions, in a very broad sense, plays a role. Legal subjects are aware of existing obligations and of sanctions that may be applied if the obligations are violated. This combined awareness motivates them to comply with the law. The binding force of law would in this case consist in intentional – although not necessarily voluntary – compliance.

It is entirely possible to speak about the validity of law if one means to say that law is being enforced, or intentionally complied with. However, this is not the meaning of binding force that Kelsen had in mind when he identified validity and binding force. According to Kelsen, validity in the sense of binding force is something that does not consist in facts alone (Kelsen 1960, p. 196). If we want to understand what is meant by the idea that the validity of a legal rule consists in its binding force, and we want to stay close to Kelsen's view on validity as binding force, we should look further than pure enforcement or compliance.

Law has obligatory binding force if it can create obligations. Since it is one of the purposes of law to guide human behavior by imposing obligations, it almost seems true by definition that law has this obligatory binding force. However, some legal rules impose obligations, while other legal rules have other functions. They confer competences, or establish that some entities legally also count as entities of some other kind. For instance, a rule of constitutional law grants the formal legislator the competence to make statutes, and a definitional rule establishes that certain persons count as suspects in the sense of procedural criminal law. There should be one kind of binding force which applies to all legal rules in the same manner and it should be the same for rules that impose obligations on the one hand and for competence conferring and counts-as rules on the other hand. In the following discussion of this issue, I will use counts-as rules as representative of legal rules that do not impose obligations.

A rule of criminal procedure might be that a person about whom a serious suspicion exists, on the grounds of facts and circumstances, that he has committed a crime, counts as a criminal suspect.[2] This rule establishes that a person who satisfies its conditions is a suspect in the sense of the law. It does not impose any obligation, in particular not the obligation (or even the permission) to consider or treat a person as a suspect. Somebody who does not recognize a person as a criminal suspect, even though the latter is a suspect according to the law, makes a legal error. But this error is an error of misclassification, not the violation of an obligation.

In general it holds that counts-as rules do not impose legal obligations and therefore cannot have binding force in the sense of imposing obligations. Therefore, if binding force is to be the same thing for all legal rules it cannot consist in the fact that they impose legal obligations. Not all individual legal rules have the obligatory force that is the topic of this subsection. This means that if we are

[2] The content of this example rule was inspired by Article 27 of the Dutch Code for Criminal Procedure.

looking for a kind of binding force that all legal rules have in common, it must be something other than obligatory force.

When we look for a notion of binding force that is equally applicable to obligation-imposing, competence-conferring, and counts-as rules, a suitable candidate presents itself. A rule has binding force if and only if it attaches legal consequences to operative facts. For instance, a rule of contract law attaches the existence of obligations to the operative fact that a contract has been concluded; a rule of constitutional law attaches the legal consequence that some governmental body has the competence to make statutes to the operative fact that this body is the formal legislator; and a rule of procedural criminal law attaches the legal consequence that a person is a suspect to the operative fact that there are serious suspicions about this person, based on facts and circumstances.

2.2 Introducing validity-claims

The claim that a particular rule is valid can be made both in legal discourse and in discourse about law. For example, a lawyer who wants a particular rule to be applied may argue that this rule is valid because it can be distilled from the case law of the court. A sociologist of law may argue that a particular rule has lost its validity, because after many years of use it has become obsolete and the rule is not complied with and no longer enforced by the courts. The former use of the notion of validity is part of legal reasoning. Rules play an important role in establishing the legal consequences of a case, and therefore also in legal disputes. A claim that a rule is valid can be made in such a dispute, and then its import is that the rule can or should be used in assigning the rule's consequences to a case. Such a claim, made with the purpose of justifying the use of the rule, is an internal validity claim.

A sociologist who studies the phenomenon of law will obviously find that rules play an important role in law. Part of his research may concern the issue which rules exist and what are the defining characteristics of rule existence. This sociologist may report on his findings by making claims about the validity of rules, and he may provide criteria for validity as part of a methodological underpinning of his research.[3] Such claims about the validity of rules and about the nature of legal validity are typical examples of external claims about validity.

The purpose of internal and external validity claims is very different and it should not be surprising that the truth conditions of internal and external validity claims differ. Since internal validity claims are part of legal discourse, the truth conditions of these claims are governed by law. In the next section we will pay more attention to these conditions, but legal sources often play an important role in this connection. Moreover, because the law of different countries may differ, the truth conditions of internal validity claims may also differ slightly between countries.[4] The truth conditions of external validity claims may depend on the purpose of these claims. Is the theory in which these claims play a

[3] To avoid ugly 'he/she'-constructions, I will adhere to the convention that the gender of the author is used when the gender of the person referred to in the text is immaterial: in the present case this means that 'he' is so used. I can only encourage female authors to use 'she' in this connection.

[4] If the differences between the truth conditions for internal validity claims were to be large, the question should be raised whether they are really truth conditions for the same claims. Suppose that German and English law have very different conditions for the validity of legal rules, can we then still say that the German '*Geltung*' as applied to legal rules means the same as the English 'valid'?

role predictive or explanatory,[5] and in the latter case what kind of explanation is aimed for? At first sight, one should not expect differences between different countries, however.

2.3 Internal validity-claims: binding force and source-validity

Claims that a particular rule is valid, or that it is not valid, often play a role in disputes about the legal consequences of a case. In a somewhat simplified representation, a solution for a case is argued by adducing a rule that leads to this conclusion, and by pointing out that the case at hand satisfies the conditions of this rule (cf. MacCormick 1978, p. 19-52).

An attack on such a rule-applying argument may consist in contesting the validity of the rule that is used. In that case, an additional argument is required to argue that the rule is valid. The validity at issue then means that the rule may be used in arguments that support claims about the legally correct outcome of a case.[6] We will denote this kind of validity as binding force. A claim about binding force is an internal validity-claim, typically made to support a rule-applying argument.

How can a claim about validity in the sense of binding force be supported? As we shall see in section 5, the answer to this question is controversial, but there is agreement that legal sources play an important role in establishing the binding force of a legal rule. A rule may be said to bind if it stems from such a validity-source. What these validity-sources are depends on the legal system at issue, but sources that are usually recognized are legislation, international treaties (conventions), custom (mainly in international law, but also in private law) and also, in the common law tradition, judicial decisions (case law).

Three of the main validity-sources concern rules that have been explicitly created: legislation, treaties and court decisions. Not everybody has the power to make legal rules, and those who do have this power are typically subject to procedures for doing so. As a consequence disputes may arise on whether some person or body had the power to create a rule, or whether the correct procedure was followed. Confusingly, such disputes are often also conducted by means of validity-claims. However, this time the validity does not concern the rules that were created but the instances of the legal source by means of which they were created.[7] Was this particular bill validly passed in the legislative chamber? Was the court competent to decide this case? Was the treaty already ratified by sufficiently many parties? These are the kind of questions that may arise in disputes about the source of an alleged legal rule, and these disputes are about the validity of the source.[8] Therefore we will from now on call this kind of validity 'source-validity'.

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[5] As Westerman and Mackor (this volume) both point out, claims about validity in the sense of efficacy, the kind of validity-claims one can expect in external discourse about law can sometimes be used to justify claims about the binding force of some rule. The latter kind of claim is most typically made in internal legal discourse. See also section 5.4 of the present contribution.

[6] This point was already made by Sartor (2005, pp. 335/6).

[7] Mackor (present volume) disagrees here, but the difference seems superficial. According to Mackor a rule is (source-)invalid if the rule stems from a defective source.

[8] To avoid misunderstandings: they are disputes about the validity of the instance of the source. So the validity of a particular bill may be questioned in this connection, but not the role of legislation in creating law. The latter discussion is also possible, but that would again be a discussion about the binding force of a rule, namely the social convention (the 'rule of recognition') that identifies the validity-sources of a particular legal system. This distinction is emphasized in Carpentier's contribution to the present volume.

Source-validity plays an important role in legal arguments, because one of the main reasons why a rule is binding is that it stems from a source that is valid: binding rules often stem from source-valid legislation. The validity of legislation is not the same as the validity of the rules created by that legislation. In the case of legislation and rules this is easy to see, because of the different words used ('legislation' as opposed to 'rules'). It is far less clear when the so-called process-product ambiguity applies, as is the case with contracts. A contract as a meeting of wills – if that is how one sees the creation of a contract – is not the same as a contract in the sense of a set of obligations. The set of obligations can be terminated and then its validity (binding force) ends, while the meeting of the wills is an event which cannot be turned back.[9]

2.4 External validity claims: validity as efficacy

External validity-claims can be defined as validity-claims that are not used to support legal conclusions in general and that are in particular not used in rule-applying arguments. Such claims are typically made by social scientists who are interested in the existence of rules, and they are discussed for methodological purposes not only by social scientists, but also by legal theorists, such as the Scandinavian realists, for example, Olivecrona and Alf Ross, as well as by Austin. Although the precise criteria for when a legal rule is valid in this sense are disputed, there seems to be no reason to assume that more than one external notion of validity is in use.

The hot issue with regard to this kind of validity is whether it can be defined in 'naturalistic' terms.[10] The Scandinavian realists made it a part of their research program to give such a naturalistic definition (e.g. Ross 1946), while Kelsen made it a starting point of his *Reine Rechtslehre* that such a naturalistic definition is not possible (Kelsen 1960, p. 1).

The internal validity-claim when applied to legal rules boils down to it that the rule generates legal consequences. But how can it be established that a rule actually does so? In other words, is there a way to check whether a valid rule really does what it should do given its binding force? Some authors might claim that it is a priori given that legal rules lead to legal consequences, and that no independent evidence is possible, let alone required. However, theorists with a more sociological mind-set would look for evidence in social reality, and more in particular in the recognition of these consequences by relevant persons. Such a search only makes sense if the facts embodied in the legal consequences are facts in social reality that can exist through being collectively recognized as existing. What would such recognition amount to? Important aspects of collective recognition are that sufficiently many and/or sufficiently important members of a social group believe the fact to be present, believe that sufficiently many and/or sufficiently important other members also believe the fact to be present, and believe that these mutual beliefs constitute the believed fact. Perhaps some examples can illustrate what this involves for different kinds of social facts.

Suppose that about 20 persons together make trip on foot to the top of a mountain. They each believe that they are *as a group* walking to the mountain top, they each believe that each of the others also believes that they are walking as a group to the top, and they all believe – minimally in

[9] However, it is in principle possible to 'avoid' juridical acts, including legislation and contracts. Such avoidance means that the legal consequences are no longer attached to the event in question and these consequences lose their validity in the sense of binding force.

[10] The term 'naturalistic' is put between quotes, because it is not very clear what it means. The idea is often associated with empirical verifiability, or with physical properties. Cf. the distinction between methodological and substantive naturalism in Leiter 2014.

the sense of not denying it when asked – that their mutual beliefs about acting together establish that they are walking as a group to the mountain top, rather than as a set of individuals.[11] In this case the people in the group make a trip on foot to the mountain top as a group.

The above example deals with collective recognition of acting together, but collective recognition does not always deal with collective action. Suppose that one member of the group, say Henriette, utters strong opinions about which path to take to the top of the mountain and that most of the group members tend to act on these opinions. After having several times chosen a particular path for the reasons that Henriette proposed for taking it, most group members recognize the leading role of Henriette. They believe that Henriette has become the leader of the group, that most other group members hold the same belief, and that Henriette is the leader of the group because she is recognized as such by most group members. In this example, the social fact concerns the possession by Henriette of the status of leader of the group.

In the two examples above, recognition took the form of believing. However, sometimes mere believing does not suffice. If the leadership of Henriette in the group of mountain climbers has been sufficiently established, the group members may collectively recognize an order from Henriette as a reason for acting. Suppose that Henriette ordered Susan to walk at the back of the group to see to it that nobody stays behind. Then Susan is considered to be obligated to walk at the back on the basis of collective recognition. This involves that she is liable to be criticized by group members, including herself, if she does not walk at the back. This also involves that group members who recognize that they have an obligation will typically, but not without exceptions, be motivated to do what they believe they are obligated to do. Existence of an obligation as a social fact requires this 'critical reflective attitude' (Hart 2012, p. 57), which goes further than mere belief that the obligation exists, although it includes that belief.

Susan is obligated to walk at the back in the sense of collective recognition, but Henriette's competence to create such a duty for Susan is also based on this collective recognition. The group members collectively recognize an order from Henriette as creating a duty for the person who was ordered. They do this by collectively recognizing the duties that ensue from the orders. In combination, this amounts to the recognition of a power to create duties by giving orders. This power actually exists through being recognized. This is an example of a fact – the existence of a power – that exists in the sense of collective recognition, where the recognition does not consist in a belief, but in a complex set of dispositions to act.

The last two examples illustrate how the consequences of counts-as rules and mandatory rules can exist in social reality in the form of recognition. Rules may be said to be valid in the sense of efficacious if this kind of recognition of their legal consequences takes place. Following Hart (2012, p. 60/1), it is important to point out that in this connection there may be a division of recognition labor. The recognition of legal consequences may be delegated by the legal subjects to officials, who must in turn be recognized as officials by the 'people'.[12]

We see that it is possible to verify whether people recognize the consequences of rules, and therefore also whether they consider a rule to bind. It must be emphasized, however, that what is

[11] It is presupposed here that if the members of a group collectively believe that they are walking, they are actually walking. Collective delusions are somewhat problematic for social facts. This is not the place, however, to elaborate a theory of social actions that deals with this complication.

[12] In her contribution to this volume, Waltermann explores this role of the people and how this role sits together with different views on the nature of law.

verifiable is whether people consider a rule to have binding force, not whether a rule actually has this binding force. The claim that a rule is binding is a claim from the internal point of view, a claim that can be justified, but not one that can be verified independently.

The recognition of the legal consequences of a rule is not an all-or-nothing matter. A single person may recognize the consequences of a rule once, quite often, or always, and from a group of persons, one, some, or practically all may recognize the consequences.[13] It is clear that recognition comes in degrees, and since validity in the sense of efficacy is defined in terms of recognition, it comes in degrees too. This was recognized by Ross, who identified the validity of a rule with the probability that the rule would play a role in court decisions, and acknowledged that this probability may have different values (Ross 1959, p. 45; see also the contribution of Eliasz and Zaluski to the present volume). In the eyes of Ross this was a feature that distinguished his theory of validity from other theories (e.g. the Kelsenian) according to which the notion of validity must be absolute, an all-or-nothing matter. We can now see that this difference can be explained by the fact that Kelsen wrote about validity as binding force, while Ross was discussing validity as efficacy. Kelsen and Ross did not necessarily have different views of legal validity; they were writing about different kinds of validity.

3. Reason-based logic

3.1 Introduction

We have an overview of what is involved in validity, with the distinction between on the one hand source-validity and validity as binding force, which play a role in rule-applying arguments, and on the other hand validity as efficacy, which primarily plays a role in external discourses about law such as sociology of law and legal theory. It is now time to pay more attention to the phenomenon of soft law, to see whether it can still improve our insight into the nature of legal validity.

According to a popular view,[14] soft law consists of rules, in a broad sense, that were created by means of legal instruments that are not valid. This means that these instruments were either made by a body that did not have the power to do so, or by means of a procedure that is not suitable for creating binding legal instruments. In the eyes of a hard legal positivist who identifies validity of rules with being validly made, this means that soft law is not valid, or – which boils down to the same thing – has no binding force.[15] Moreover, if soft law lacks binding force, meaning that it has no legal consequences, soft law is not law either. This still leaves the possibility open that some instruments, which are seemingly legal, influence the behavior of people, including legal officials such as courts. They might therefore have some validity in the sense of efficacy, but efficacy cannot play a role in legal arguments and is from an internal perspective of limited interest.

However, it is not necessary to adopt a hard legal positivist view and to demand source-validity as a condition for binding force. In section 5 we will pay some attention to the possibilities of assuming binding force for rules that were not validly created. However, before doing so we need an account of how soft law can seemingly exist without having binding force, or with only a limited amount of it. That account will be presented briefly in the present and the following sections. It consists of two

[13] This observation plays an important role in the contributions to this volume of Van Klink and Lembcke and Westerman.

[14] This view is represented by the rough delineation of soft law in the contribution of Mackor to this volume.

[15] This is emphasized in the contribution to this volume of Van Klink and Lembcke.

steps. The first step deals with the logic of legal reasoning and presents a logic based on reasons as a subtler alternative to a logic based on rules. This is necessary to account for the 'weaker binding force' of soft law. The second step replaces the view of legal reasoning as an argument leading from a case description and legal rules to a legal consequence by the view that legal argumentation consists in a debate between two or more parties, a debate in which the outcome of a case is fixed. This is necessary to translate the logical possibilities of reason-based logic into a characteristic of rules belonging to soft law.

3.2 Reasons instead of rules

Traditionally, legal reasoning on the basis of rules is represented as a kind of syllogism. We have a rule with the structure:

IF Conditions, THEN Legal Consequences

This rule functions as the major premise of the syllogism. The minor premise consists of a description of the facts of a case that satisfy the conditions of the rule:

Conditions

Together they allow the derivation by means of a modus ponens-style argument of the legal consequences:

Conclusion

This argument is deductively valid, which means that if both premises are true, the conclusion must logically also be true. There is no room for exceptions to the rule as it is formulated in the major premise, and neither is there an opportunity for balancing this argument against other arguments. Replacing this rule-based model of legal reasoning by a model where reasons take a central place makes it easy to account for the balancing of arguments (or reasons), and it also facilitates an account of exceptions to rules.[16]

3.3 Reasons

A reason is a fact (expressed by a true statement) which pleads for or against a particular conclusion. Some examples:

a. The fact this this body is the formal legislator is a reason why (pleading for the conclusion that) this body is competent to legislate.
b. The fact that Jane is a thief is a reason to punish her.
c. The fact that Jane is a minor is a reason not to punish her.
d. The fact that Gerald promised to return Jane's money to her is a reason why Gerald is obligated to return Jane's money.

A reason is characterized by two properties. The first is that something can only be a reason if it is really the case. Hypothetical facts can only be hypothetical reasons, not real ones. So if the present author had been the head of state of Belgium, that would be a reason to treat him in a ceremonial way. However since he is not the head of state, this merely hypothetical fact is not an actual reason.

[16] The logic proposed here is in the eyes of the author the most elegant way to deal with balancing, but during the last few decades many different logics for 'defeasible' legal reasoning have been developed. See: Verheij 1996, Hage 1997, Prakken 1997, and Sartor 2005.

The second characteristic is that reasons are relevant for some conclusion, either in a positive way (a pro-reason) or in a negative way (a con-reason). Moreover, this relevance is not confined to individual facts. If the fact that Jane is a thief is a reason to punish her, the fact that John is a thief is (normally) also a reason to punish him. Reasons can be universalized: if some fact of a particular kind is a reason for a particular kind of conclusion, then in principle all facts of that kind are reasons for conclusions of that kind.

3.4 Nexus

If a reason is universalized, the result is a general connection between kinds of facts. An example of such a connection would be that being a thief is a reason for being punished, or – somewhat ambiguous – that thieves should be punished. The ambiguity of the latter formulation rests in the fact that it may be the expression of a connection between kinds of facts which *establishes* that persons who are thieves are persons who should be punished, but that it may also be a descriptive sentence which claims that persons who happen to be thieves also happen to be persons who should be punished (for whatever reason). The connection between types of facts is a kind of rule which exists (has binding force) or not, but which cannot be true or false. The descriptive sentence is true or false.[17]

The connection between kinds of facts which establishes that facts of the one kind tend to be reasons for or against facts of the second kind may be (legal) rules, but also (legal) principles. We need a term that covers both possibilities and therefore adopt the technical term 'nexus' for this purpose. So a nexus is a connection between two kinds of facts which established that facts of the former type are reasons for or against facts of the latter type. Nexus are not true or false, but are valid or invalid in the sense of binding force.[18]

It is possible to give reasons for or against the binding force of nexus. A typical example would be a discussion in legal interpretation where different interpretations of a legislative text are defended. Each interpretation leads to a different rule, and a reason that pleads for a particular interpretation is also a reason for the binding force of the rule that corresponds to that interpretation of the text, and against the binding force of rules based on different interpretations (Hage 1997, p. 197). A different example would be an argument about the binding force of a rule of soft law such as the Charter of the United Nations. The authority of the General Assembly pleads as a reason for the binding force - and therefore the validity - of the rules based on the Charter, while the lack of competence of the General Assembly pleads against the validity of these rules.

3.5 Balancing

If there are several reasons pleading for or against a conclusion, these reasons need to be balanced, unless all the reasons point in the same direction. The outcome of this balancing operation is a decision on which set of reasons, the pro-reasons or the con-reasons, outweighs the other set.

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[17] Cf. the discussion of rules and their factual counterparts in Hage 2015.

[18] Legal rules are one kind of nexus, but there are many other examples. For example the facts that somebody is a male and that he is unmarried are together a reason for the conclusion that this person is a bachelor. This reason is based on the definition (a nexus) that unmarried males are (count as) bachelors. The fact that the train departed too late is a reason why the train will probably not arrive on time. The underlying nexus is that trains which depart too late will probably arrive too late.

It is possible to give reasons for (or against) the conclusion that the one set outweighs the other set. Take the following example. The issue at stake is whether a motorized wheel-chair counts as a vehicle under the prohibition on using vehicles near the soccer-stadium. That a motorized wheel-chair satisfies the definition of vehicles in a by-law is a reason to count it as a vehicle. That a prohibition of motorized wheel-chairs near the stadium would make it practically impossible for some handicapped persons to attend soccer-matches would be a reason against counting them as vehicles. The newly adopted policy to give handicapped persons as much as possible equal opportunities to participate in social life is a reason why the con-reason outweighs the pro-reason. Therefore, on the balance of reasons, the conclusion should be that a motorized wheel-chair does not count as a vehicle for the purpose of the prohibition.

As this example illustrates, the presence of a reason for or against a conclusion in itself cannot determine whether the conclusion should be adopted. Only on the balance of all pro- and con-reasons can the decision be taken whether the conclusion should be adopted. That is why these ordinary reasons are sometimes called 'contributory reasons': they only contribute to the overall picture of reasons which together determine the status of the conclusion.

3.6 Exclusionary reasons and rules

Facts that satisfy the conditions of a nexus are normally reasons for the conclusion of the nexus. Take for instance the nexus that contracts must be complied with. This nexus normally makes the fact that X has contracted to do Y into a reason why X has an obligation to do Y. The existence of the nexus establishes that there is a general connection between the conditions and the conclusion of the nexus. However, there may be exceptional circumstances which establish that this general connection is blocked. For example, if X was forced into the contract, the fact that he contracted to do Y is no longer a reason why he should do Y. Raz dubbed such exceptional circumstances 'exclusionary reasons', and exclusionary reasons are best interpreted as reasons which block the operation of nexus.[19] If an exclusionary reason is present, a fact that would normally be a reason for a conclusion exceptionally does not count as such a reason.

Legal rules are often the result of a legislative decision-making process, in which a number of reasons, based on policies, goals, values, interests, principles, etc. are weighed to achieve a balanced result. In many of the cases to which these legal rules may be applied, the underlying goals, principles, etc. would also be relevant. However if the rule is applicable, there is no longer any need for the policies etc. underlying the rule, because if the reasons based on those were also taken into account, they would be counted twice: once as reasons based on the underlying policies etc. and once as reasons based on the rule. Therefore, if a rule is applicable to a case, it excludes all nexus that are already incorporated in the rule. The application of a rule to a case not only establishes that the rule generates a reason to resolve the case in a particular way (the way of the rule), but also that potential other reasons, based on the policies etc. underlying the rule, no longer count as reasons in this case (Raz 1975, p. 73-76). As a consequence, the reason generated by a rule typically does not have to be balanced against other reasons, because the potential other reasons were accounted for in the rule formulation, and are excluded by the application of the rule. Normally, when a rule is applicable to a case, there is only one reason indicating what the legal consequences of the case are: the reason generated by the applicable rule. Therefore, rules take a special place amongst nexus.

[19] This interpretation underlies the use of the term 'undercutters' or 'undercutting defeaters' for what Raz dubbed exclusionary reasons in the theory of defeasible reasoning. See Pollock and Cruz 1999, p. 196.

3.7 Exceptions to rules

A rule is applicable to a case if the case satisfies the conditions of the rule. Normally this means that the rule should be applied and that it generates a reason to attach particular legal consequences to a case. However, sometimes an applicable rule should not be applied and we then say that there is an exception to the rule. Two major reasons to make an exception to a rule are first that application of the rule would violate the purpose of the rule, and second that there is also another applicable rule with an incompatible conclusion which prevails in the case at hand over the first rule.

Take for example the rule that farmers are obligated to combat thistles that grow on their land, and that thistles can only be combated by using certain kinds of herbicides. The rule normally gives farmers a reason to use these herbicides to combat the thistles. Assume that there is also another rule that prohibits the use in open air of a chemical substance that is the main ingredient of the herbicide in question. Given this second rule, farmers are not allowed to use the herbicide. Let us also assume that, for reasons which are not relevant here, the second rule prevails over the first. This would create an exception to the first rule, and farmers would no longer have a reason to use the herbicide to combat thistles.

If there is an exception to a rule in a particular case, the rule should not be applied to that case and then it does not generate a reason.

3.8 Conclusion

Suppose that we have an argument in which a rule is applied to argue for particular legal consequences. To give a very simple example:

Thieves are punishable

John is a thief

Therefore, John is punishable

Under a legal logic based on rules, the conclusion can be avoided in two ways. First it is possible to deny that John is a thief, and second it is possible to attack the rule that thieves are punishable. Under reason-based logic both possibilities still exist, but there are two more possibilities. The one is to argue that an exception should be made to the rule, for example because the rule conflicts with some other applicable rule. The second possibility is to argue that the reason generated by the rule must be balanced against one or more other reasons, and that these latter reasons outweigh the former reason. For instance, the reason that John is a thief must be balanced against the reason (against punishability) that punishment would in this case lead to heavy riots, and this latter reason is stronger than the former.

4. Legal reasoning as dialog

We have seen that the replacement of a logic based on rules by a logic based on reasons provides legal reasoners with two more opportunities to challenge conclusions based on rule-applying arguments. However, traditional logic consists of chains of propositions, and opportunities to challenge only make sense in a pragmatic setting in which arguments are moves in real dialogs. In this section we will study a second deviation from the traditional logic for legal reasoning. After the replacement of rule-based logic by reason-based logic, we will replace monological logic, in which arguments are treated as timeless chains of propositions, by dialogical logic, which treats argumentation in the setting of real dialogs between parties who must reach agreement on the

outcome of a legal case. In this connection we will first consider an argument as to why it is important to treat legal reasoning in the context of real life dialogs, to continue with the development of a dialogical version of reason-based logic. After this has been done, we are finally in position to analyze the phenomenon of soft law in section 5.

4.1 Legal constructivism

According to Kelsen, legal systems are characterized by the *Grundnorm* on the one hand and facts about rule creation on the other hand. Given the *Grundnorm* and the facts, the content of a legal system is fixed, to be discovered by the investigation of rule-creating facts, or, in other words, by reading the official legal sources.

This view on the existence of legal rules is supplemented by a similar view on legal positions and legal status, such as a person being the owner of a good, or being a criminal suspect. These facts, which are the result of rule-application, are treated as if they existed in some independently existing 'world of law'. Legal decision makers such as courts are sometimes presented as bodies that 'find' and 'apply' the law, with as silent presupposition that there is law to be found and applied. According to this view of law, legal reasoning is not necessary to bring about the legal consequences of concrete cases, but only to obtain knowledge about the consequences which already exist independently. Legal reasoning is there to *reconstruct* the legal consequences, not to construct them.[20]

And yet, when we look at legal practice, we can see that this picture of law is at least incomplete. If law is a system, as Kelsen would have it, it is at best an open system. The insight that law is not merely a rule-based part of social reality has given rise to a different view of law. This other view is that legal rules etc. are tools which are used in legal argumentation to *construct* the legal consequences of cases. These consequences are not already there, merely to be reconstructed through reasoning. They only exist as the *result* of legal arguments; legal argumentation is on this view constructive. Let us therefore call this view *legal constructivism*. According to legal constructivism, the quality of legal arguments determines the truth of legal propositions, and not the other way round. Amongst others through the influence of Dworkin,[21] who proposed a theory of law according to which legal judgments are the result of constructive interpretation, constructivist views of law have become quite popular, although not necessarily under that name.

On the constructivist approach that is proposed here, law is not a closed system. What may count as law depends on the quality of arguments that are *actually* adduced for a legal position. As a consequence soft law can, at least in theory, play a role in legal arguments, and this may in turn be interpreted as the attribution of at least some kind of legal status to soft law. This is still very abstract, but in the following section we will go into some detail to make this argument about the legal status of soft law more explicit.

4.2 Reasons in a dialogical setting

To become more concrete about the role of soft law in a constructivist approach to law it is necessary to provide some background knowledge on how argumentation in a legal setting works, and in particular on its dialogical setting. The following account tries to be not too far removed from actual legal practice. However, it is an account that is remotely based on formal logic and is

[20] Hage 2012.

[21] Dworkin 1986, chapters 2 and 7.

therefore more structured than actual legal practices.[22] This should not vitiate its usefulness for understanding the constructive nature of legal reasoning, however.

Legal reasoning is not the mere production of arguments but an attempt to convince an audience to adopt a particular thesis. Examples of such theses are that a claimant is entitled to an unemployment benefit, that a state is obligated under international law to intervene in a civil war in a neighboring country, or that a suspect is liable to be punished for stealing an object in a computer game. The audience that needs to be convinced may be an opponent in a legal dispute, a forum of legal scholars, the producer of the argument who tries to convince himself, or a court.[23]

An important purpose of argumentation is to commit the audience to a thesis. For example, the court should become committed to the view that the suspect is to be convicted of stealing a virtual amulet. If a party in a dialog has become committed to a thesis, then the thesis may be said to have been justified to that party.

An audience can be convinced to accept a thesis by adducing reasons for the thesis. The audience may, if it wants, adduce reasons against the thesis, and whether the thesis should ultimately be accepted depends on the balance of the adduced reasons. If an audience is to be convinced that a particular fact is a reason to adopt a thesis, it must first be convinced that it is a fact, and not a falsehood, and second it must be convinced that this alleged fact is relevant, a reason, to adopt the conclusion. For instance, if a court is to be convinced that John is guilty of theft because he forced Pancho to give away an amulet in a computer game (a virtual amulet), the court must be convinced first that John forced Pancho to give away a virtual amulet (truth) and second that forcing somebody to give away a virtual amulet makes one guilty of theft (relevance). As the latter formulation already indicates, relevance is not confined to a single case: all facts consisting in forcing somebody to give away a virtual amulet should in principle be relevant to the conclusion that somebody is guilty of theft. Acceptance of relevance boils down to accepting the binding force of the nexus (often the rule) that makes a fact of a particular kind relevant for a particular kind of conclusion.

4.3 Commitment

A characteristic of dialogs which is important for our purposes is that the commitment of a party in the dialog to a particular thesis can – and often will – be the result of acceptance of the thesis by that party and in that sense voluntary. For example, the court accepts the thesis that John forced Pancho to give the virtual amulet to him (in the game, that is) and having accepted this thesis it also accepts that John should be sentenced to some punishment. Since acceptance is a voluntary act, it may be done for any reason, including a confession by the suspect, or even without a reason.[24] This establishes that legal argumentation is 'open' in the sense that new and possibly unexpected facts may play a role.

However, commitment is not always a matter of voluntary acceptance. Somebody may become committed to a thesis even if he is reluctant to accept it. Take for example the thesis that the

[22] More details on dialogical reason-based logic can be found in Lodder 1999.

[23] The description of an argumentative process as a dialog between the proponent of a thesis and his audience suggests that there are always two parties involved in a legal dialog. That does not have to be the case. It is possible to devise a model of 'dialogical' argumentation in which an arbiter plays a role who mediates between the other parties (Hage 2005, p. 255).

[24] A court will not normally accept theses without reasons, but in the end it must accept *some* theses without additional reasons, for instance the thesis that the suspect is telling the truth when he confesses his crime.

municipality Zutphen must grant an unemployment benefit to Denise. This thesis is justified for the audience consisting of Zutphen if either Zutphen directly accepts that it must grant the benefit, or if Zutphen is committed to other theses from which the duty to grant the benefit follows. This would for instance be the case if Zutphen is committed to:

- the rule (nexus) that it should grant the benefit to a citizen if this citizen believed she would receive the benefit and this belief was justified on the basis of the behavior of the municipality,[25] and also
- the theses that Denise believed that she would receive an unemployment benefit, and that this belief was justified because Zutphen published its policy for granting unemployment benefits and Denise met the conditions for a benefit as stated in the published policy.

Admittedly this is a simple example, but it illustrates two points. The one is that commitment can be forced because of logical considerations. Given the two theses to which Zutphen is already committed, it is merely 'logical' that it must provide the benefit, and this establishes that Zutphen is committed to the thesis that it should provide the benefit, even though it did not voluntarily accept this thesis. The important point here is that, although commitment may be based on acceptance and is voluntary, it may also be forced. Forced commitment is often a matter of logic: a party in a dialog is committed to a thesis because the thesis follows logically from other theses to which that party was already committed.

The second point is that dialogical argumentation works backwards: it starts from a thesis and works backwards to the premises needed to justify acceptance of this thesis. If the opponent in the dialog is already committed to the required premises, then he is also committed to the thesis and the thesis has been justified for the opponent. If the opponent is not yet committed to one or more of the required premises, the same procedure can be used to justify those premises. Theoretically the justification process may go infinitely deep, with justifications for premises that function as justifications for premises that … and so on.

4.4 The role of law

A possible misunderstanding about the dialogical approach to legal reasoning is that there would be no special role for the law, because the participants in a dialog can freely determine what they want to accept. There would only be one exception to this freedom, which exists when they are committed to a thesis because it 'follows' from what they were already committed to. But even then they ultimately determine for themselves what they will be committed to, because in the end every chain of commitments must end with premises to which a dialog party is committed because he accepted them.

This picture according to which dialog parties are ultimately free to accept what they want may be suitable for dialogs on unregulated topics, but it is not appropriate for legal dialogs. In legal dialogs, parties are committed to the law. By means of forced commitments it is possible to mimic not only the demands of logic, but also this commitment to the law. By assuming that all parties in a dialog are from the beginning of the dialog committed to the positive law, whether or not they accepted it spontaneously, it is possible to give law its rightful place in legal dialogs.

[25] Normally there would be additional conditions, for instance that the citizen undertook obligations because of her justified belief, but to keep the example manageable I will make some concessions on legal precision.

Commitment to the positive law would not make that legal reasoning on the dialogical approach work with a closed system of law, because parties can always accept other premises next to the fixed legal ones, thereby allowing more rules than only those of the given positive law. In this way the dialogical approach, even if it assigns a special place to positive law, allows more 'legal' arguments than Kelsen would allow.[26]

However, there is more. Until now it was assumed that a dialog starts from some (zero or more) commitments at the beginning and gradually adds more commitments until eventually the thesis defended by the proponent is added.[27] Although it is possible to work with such dialogs, in which the commitments of the parties can only expand, this is not very attractive. In realistic dialogs it should be possible to end commitments that were undertaken during the dialog, or which were assumed from the very beginning of the dialog. However, ending a commitment should not be possible without good reasons. Therefore a party who wants to end a commitment must commit his audience to recognize that the thesis to which he was originally committed is wrong. For example, if Zutphen originally accepted that Denise satisfied all the conditions for an unemployment benefit, but wants to renege on this, it must commit Denise to the thesis that she does not satisfy all the conditions. So where originally Denise would have had the burden of proving that she satisfied the conditions, the burden of proof shifts at the moment Zutphen accepts this. From that moment on, Zutphen has the burden of proving that Denise does not satisfy all the conditions.

This may be interesting as a general aspect of dialogical justification, but it becomes particularly important in connection with the commitment to positive law. It means that a party who is committed to positive law at the beginning of the dialog has at least theoretically the possibility of convincing his opponent that a particular rule is not binding after all. One way to do so is, for instance, to argue that the present rule is based on a wrong interpretation of the legislation, and that some other interpretation is to be preferred. Most often, this will not be an easy task, particularly if the opponent in the dialog has an interest in maintaining the existing commitments, and thus the commitment to the positive law will most likely remain as it was. However, theoretically every commitment, including the commitment to the positive law, can be undone.

5. The nature of soft law

Soft law is like efficacy because it comes in degrees: a rule of soft law may have less binding force than a rule of hard law. It is therefore tempting to identify soft law with law that has less efficacy than hard law. Yet, this temptation is misguided, because efficacy is an external notion of validity, while the claim that a particular rule is a binding legal rule, even if it is not very hard, is still an internal legal claim.

Can soft law then be interpreted in terms of source-validity or binding force? To some extent, since typical soft law has not been made in a legally valid manner. However, this is only a negative characterization, which gives us no clue what soft law may be.

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[26] There is no room to elaborate the following point, but it nevertheless deserves mentioning. Even where the body of valid laws is assumed to be fixed, the number of exceptions, and exceptions to exceptions, to these rules may still be open. This means that, even if the set of binding rules is closed, legal reasoning may still be open.

[27] A dialog also stops when both parties are committed to the negation of the main thesis, or if the parties stop adducing arguments.

Binding force is an all-or-nothing matter: a rule is either legally binding, or it is not; there is no in-between. And yet, for the characterization of soft law we need a notion that allows for degrees. There must be the possibility for a legal rule to be more or less soft. This eliminates the possibility of a satisfactory characterization of soft law in terms of binding force.[28]

Neither one of the three notions of validity we distinguished above can be used to define soft law, and yet all three of them are useful to better understand the nature of soft law. Running ahead of the argument in the following subsections, I want to put forward the hypothesis that soft law is law that can less easily be used in legal arguments than hard law. Or more precisely, a legal rule is the softer the less easy it is to use in legal arguments, with as lower boundary the place where a rule stops to be binding law.

The idea of a rule being more or less easy to use in legal arguments is quite vague as it presently stands, but in the following subsections it will be substantiated by using the tools that were introduced in the sections above about reason-based logic and the dialogical approach to legal reasoning. A theory about the usability of rules in legal arguments can easily grow into a general treatise on legal argumentation, but this is not the place to present such a treatise. Therefore, the following account will necessarily remain superficial, focusing on the logical aspects of rules, and not on the substantial reasons for or against applying a rule.[29]

5.1 Two sides of soft law

The idea of soft law is typically associated with rules which somehow play a role in legal argumentation, but which were not validly made, either because they were made by a body that lacked the relevant competence, or because a body with the relevant competence did not follow the appropriate procedure. If a rule was not validly made, this is a contributory reason why this rule cannot easily be used in a legal argument, but it is not possible to argue backwards: if a rule cannot easily be used, this may have many different reasons, and it is not justified to assume that there must be something wrong with the way the rule was created. So, although the notion of soft law is connected to the notion of source-validity, this connection is one-way only.

Soft law in the narrow sense has two sides. The one side is that it was not validly created; the other side is that it cannot easily be used in legal arguments. It is also possible to work with a broader notion of soft law. This broader notion only focuses on the usability of soft law in legal argumentation and ignores the aspect of source-validity. Soft law in the narrow sense can then be defined as rules which cannot easily be used in legal arguments - and which are therefore soft law in the broad sense - for the reason that they were not validly made.

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[28] Westerman, in this volume, seems to overlook the possibility that soft law comes in degrees, and is nevertheless fully binding. In that case, the required graduation of soft law can only be bought at the cost of allowing degrees of binding force. In the present author's opinion, not all reasons as to why a legal rule is soft lend themselves to support the claim that the rule is less binding. However, in the end the matter is mostly semantic: it is possible – although not elegant – to use a notion of graded binding force to play the logical role of the graded notion of softness in this contribution.

[29] The contributions of Bódig, Brus, Mackor, Van Klink and Lembcke, Yugank and Westerman pay more attention to these substantive reasons. Most of what these authors write is highly compatible with the more abstract and logical account of the present contribution.

5.2 Applicability

Even if a rule is binding, this is no guarantee that it will play an important role in legal arguments. To play a role, a rule must not only exist, but there must also be reasons for applying it. By far the most important reason for applying a rule is that it is applicable, meaning that a case satisfies the conditions of the rule. If hardly any cases satisfy these conditions, the rule may exist, but then it has little practical relevance.

This possibility of limited relevance seems to be quite uninteresting, but its relevance in the present connection lies in the fact that the applicability of one rule may be determined by other rules which may be more or less easy to use in legal arguments. For example, a rule may create a strict liability for damage caused by persons for whom the liable person has a 'special responsibility'. The existence of such a 'special responsibility' depends on the application of other rules defining it. If these other rules are unwritten, or are for some other reason quite soft, the softness of these other rules translates into the applicability of the rule assigning strict liability, and indirectly also into the softness of that rule.

5.3 Binding force

A rule can only play a role in a rule-applying argument if it is binding. The easier it is to substantiate that a rule is binding, the harder that rule. And, the other way round, the harder it is to show a rule to be binding, the softer that rule.

In a legal dialog there are three possibilities with regard to showing a rule to be binding:

1. The dialog parties may be initially committed to the binding force of the rule.
2. The dialog parties may be initially committed to rules which make it easier to create 'semi-forced commitment' to the rule.
3. Commitment to the rule depends completely on voluntary acceptance.

A rule to which parties are initially committed will normally be quite hard. However, this possibility will seldom occur. Parties are more typically committed to legal sources and their content than to the rules that are based on these sources. For example, dialog parties are committed to legislation as a source of law, and to the presence of a particular rule formulation in the legislation. The translation from the rule formulation to the actual rule, which typically goes under the name 'interpretation', is then still a matter that needs to be settled in a dialog.

The second possibility will be the most frequent one. In legal dialogs, the parties are typically committed to what the sources of law are. The typical reason that pleads for the binding force of a rule is then that the rule stems from a recognized source, which in turn typically boils down to the reason that the rule was validly made. For example, the rule that recommendations of the Commission provide binding rules for interpretation of EU regulations may be included in the initial commitment sets of legal dialog parties. Suppose that two dialog parties voluntarily accept the thesis that a particular recommendation by the Commission entails that some regulation has to be interpreted in a certain way. Given this voluntary acceptance, the parties are forcedly committed to this interpretation of the regulation. Because this forced commitment depends on an earlier voluntary acceptance of the interpretation of the recommendation, we speak of semi-forced acceptance.

In general, the parties in legal dialogs are from the beginning committed to a set of rules that specify what kinds of reasons can be adduced for and against the legal validity of a rule. These rules are the

rules and principles used for identifying legal rules by the officials of a legal system, and other influential participants such as legal scientists. The dialog parties are similarly committed to rules that specify when a rule is not legally binding. Let us call the rules belonging to either one of these two sets the validity rules of a particular legal community. Together these sets of validity rules, to which the dialog parties are from the outset committed, partially determine which facts can be adduced to argue that a particular rule is or is not legally binding in order to obtain semi-forced acceptance.

Moreover, the dialog parties are also initially committed to rules that specify the relative weights of the reasons based upon the two validity sets and to the facts that are generally known to obtain, including the texts of the recognized sources of law. In other words the initial commitments of the dialog parties determine which facts are decisive for the binding force of legal rules, and also to some extent to which of these the parties are committed. It depends on the facts and on the dialog moves made by the parties which legal rules will be assumed to be binding in the dialog.

If the binding force of a rule depends on semi-forced commitment, the degree of softness of the rule depends on how easy it is to substantiate this semi-forced commitment. If a rule was validly made, the rule will typically be hard. If a rule was not validly made, it depends. For rules that were created, the fact that the creation was not valid will typically be a reason why the rule does not bind. However, many legal rules, or – perhaps better – nexus, were never created at all. Think in this connection of rules that indicate when particular terms are applicable (rules of meaning), or rules that give content to evaluative standards such as the standard of good faith. For these rules the fact that they were not validly created is unproblematic because they were not created at all. Therefore, some of these rules will be quite hard, even though they were not created.

The third possibility is that parties in a dialog voluntarily agree on the binding force of a rule. Suppose that in a legal dialog one party claims the validity of the rule that forcing somebody to give away an amulet in a computer game counts as theft for the purpose of criminal law and that the opponent voluntarily accepts this claim. Then this counts-as rule can be considered as binding for the purpose of this dialog. In a dialog between two parties with opposite interests this possibility will not be very relevant. However, if the legal debate is construed as a trialogue, in which both opposing parties are in a dialog with a neutral judge, this possibility becomes much more realistic.

The likelihood that parties in a legal dialog will voluntarily accept the binding force of some rule is nothing other than the efficacy of that rule. The likelihood that a party will accept a rule cannot be adduced as a reason why that party should accept the binding force of that rule, and therefore efficacy does not have an important role in legal dialogs.[30] However, efficacy is very important for the hard- or softness of a rule, since a rule with high efficacy is typically a relatively hard rule.

5.4 Substantive and formal reasons for binding force

There are both substantive and formal reasons why a particular rule should (not) count as valid law.[31] The substantive (material) reasons are the most difficult to list, because they depend on substantive theories about the desirable content of law.

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[30] However, parties may be committed to the rule of recognition that a reason why a rule is binding is that this rule is broadly accepted as such. This broad acceptance is efficacy and efficacy may therefore play some role in legal dialogs as a reason for binding force. Then we are talking about semi-forced commitment.

[31] This is elaborated as the difference between formal and material validity in the contribution of Sandro to the present volume.

The fact that a particular rule is broadly accepted as legally valid is a formal reason why this rule is legally valid. There are three variants of this first formal reason. A rule may be recognized as a legally valid rule because it stems from an official source of law. (Source-)valid legislation is typically considered to be such a source of law. The fact that a particular rule is based on the correct interpretation of such a legislative text tends to be a very strong reason why this rule counts as valid law. Legal certainty plays an important role in this connection,[32] but also the idea of political obligation. Something similar holds for rules created by international organizations, such as the EU. The second variant is that a rule has a long history of being used, which may be seen as a reason to continue to use it. In this case we speak of customary law. This reason is closely related to legal certainty. The third variant is that a rule is broadly accepted because it is seen as reasonable. This reason borders on substantive reasons for counting a rule as valid law. Moreover, if rules have a long tradition of use, this is a sign that this rule is considered to be reasonable. Variants two and three therefore overlap.

A second formal reason why a rule should be counted as binding is that legal subjects reasonably expect that this rule should hold. It is both necessary and desirable that legal subjects may know what the law is that applies to them and therefore the fact that they expected a rule to apply is a reason to consider the rule as valid law. Publicly announced codes of corporate conduct belong to this category, as do published administrative policies and recommendations by the European Commission.

This second reason is closely related to the formal conditions for the existence of law that were listed by Fuller.[33] These conditions are that the law:

1. consists of rules;
2. is accessible to the public;
3. does not work retrospectively;
4. is understandable;
5. is consistent;
6. does not require the impossible;
7. does not change too frequently;
8. is applied in adjudication.

If one or more of these conditions are not fully met, this is a reason why the law in question should not be considered as binding. Because the failure to meet the requirements comes in degrees, the corresponding reasons against the legal validity of the laws have a varying strength.

A third formal reason why a rule should be counted as binding is that the rule is a member of the legal system. This idea can of course be traced back to the work of Kelsen and Hart, and is elaborated in the contribution of Carpentier to this volume.

5.5 Exceptions and strength of reasons

The more exceptions there are to a rule, the softer the rule is. There are two factors that determine how many exceptions a rule is amenable to. The first factor is how many different kinds of facts count as exceptions to the rule. For instance, if a rule potentially conflicts with many other rules,

[32] See the contributions of Sandro and Mackor to the present volume.

[33] Fuller 1963, Chapter 2. See also the contribution of Van Klink and Lembcke to this volume.

there will be many opportunities for making an exception to the former rule. The same holds if a rule is over-inclusive in the sense that it is applicable to many cases that fall outside the purpose of the rule. The second factor is how often potential reasons for making an exception actually occur. For instance, if a rule potentially conflicts with some other rule, which would prevail over it, there may be many opportunities for making an exception. However, if the latter rule is seldom applicable, the opportunities for exceptions will seldom be realized, and the former rule may be very hard.

If a rule is applied to a case, this will 'only' generate a reason for the conclusion of the rule. This reason may still have to be balanced against other reasons, and if this balancing leads to the conclusion that the other reasons outweigh the reason based on the rule, the conclusion of the rule is not attached to the case. The more often this happens, the softer the rule is.

Also in this connection, two factors play a role. The first, least important, factor is how strong the reason based on the rule is in comparison to the reasons against the rule conclusion. The weaker the reason, the softer the rule. However, it seldom happens that a reason that results from rule application needs to be balanced against other reasons, because the application of the rule excludes the existence of most other reasons. The greater the number of considerations that were taken into account in creating the rule, the greater the number of potential reasons that will be excluded if the rule is applied, and the harder the rule is.

For this latter reason, created rules will typically be harder than nexus which were not created or based on decision-making at all. Created rules, in particular if they were validly created, typically exclude most if not all of the opposing reasons; reasons based on nexus that were not created, or that were not created validly, typically do not exclude many opposing reasons and it depends on their strength whether they will outweigh these opposing reasons. Therefore validly created rules are typically harder than nexus that were not created at all.

6. Conclusion

The purpose of this contribution was to shed light on the phenomenon of legal validity by means of soft law, and the other way round. A summary of the main findings may be helpful to see the connections between validity and soft law.

Soft law plays a role in legal argumentation and understanding soft law therefore means understanding this role. There are two notions of legal validity that also play a role in legal argumentation. Source-validity concerns legal sources, and the claim that something is source-valid involves that this something was made by an agent that has the relevant competence, and in accordance with the relevant procedure. Validity in the sense of binding force concerns nexus, including legal rules, and boils down to the specific mode of existence of these nexus, which is that they attach consequences to fact situations, or that they can be used in arguments supporting those consequences. It turned out that soft law is binding, but not necessarily validly created law.

The hard- or softness of legal nexus depends on the usability of this nexus in legal argumentation. They are a matter of degree, and only if law becomes too soft, does it lose its binding force, meaning that it loses its relevance in legal argumentation. Binding force is not a matter of degree, and therefore soft law cannot be characterized as law with limited binding force. It is possible that a legal rule, or – more generally – a legal nexus, is binding, though it may nevertheless be quite hard to use in legal argumentation. In such a case a legally valid nexus is quite soft.

There is also a kind of validity, efficacy, which comes in degrees. However, the claim that a rule or some other nexus is valid in the sense of efficacious is an external legal claim, used in sociology of

law or in legal theory, but not often in legal argumentation. Therefore it is not possible to identify soft law with a low degree of efficacy. However, it was argued that low efficacy may be a way in which a rule is hard to use in legal argumentation and therefore soft.

In general, four kinds of formal grounds were found that can be used to argue why a particular nexus cannot be used in legal argumentation. The nexus may be seldom applicable, it may be invalid, it may be subject to many exceptions, and the reasons it generates may be relatively weak. These four grounds could be identified easily after the move was made from a rule-based logic for legal argumentation to a reason-based logic, and from a monological view of legal reasoning to a dialogical, or - more generally - a procedural view of it.

It turns out that the softness of some kinds of law does not impact the validity of that law in either one of the three senses of validity. However, all three kinds of validity turned out to be relevant for how hard or soft a legal nexus is, with a central role for validity as binding force.

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