Validity

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Validity: The Reputation of Rules

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Abstract If we want to know whether a particular legal construct (rule, contract) is valid, we are interested in ascertaining its relevance. We want to know whether a certain rule can be trusted to have the effect it claims to have. This question in itself rests on the background assumption and collective agreement that in general such legal constructs do matter and make a difference. This article investigates the conditions under which such collective agreement can wax or wane. To that end, the validity of rules is compared with the reputation of persons. Personal reputation is not only dependent on one's pedigree and upbringing but is also informed by present conduct and company, as well as by anticipated future performance. The same applies to the legal order, which is equally informed by considerations concerning past, present, and future. It is explained how these considerations move in circles of interaction and can be self-reinforcing, as well as self-defeating.

1 Introduction

Over recent decades, we have witnessed the emergence of so-called soft law. The term is ambiguous and seems to have two distinct meanings, depending on the context in which it is used.

At the international level, "soft" often means "not yet hard": soft law consists in solemn declarations and principles that are not or hardly enforceable. At the domestic level, however, soft law does not necessarily exhibit these features. There, "soft law" serves as an umbrella term for the products of various forms of regulation: self-regulatory codes, regulation drawn up by supervisory boards, standardization norms drawn up by technical experts, guidelines, and "best practices." This kind of soft law is not only enforced but is also often linked to "hard" law if it is generated in response to formal legislation. This is especially the case in forms of legislation such

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as "goal-legislation"[1] or "principles-based regulation."[2] In these forms of legislation, the formal legislator confines itself to imposing some desirable policy goals (good labor conditions, sustainability, etc.) and obliges norm addressees to make and to enforce rules in order to achieve these goals. The products of these activities may be called "soft," but they are connected to hard law.

However, even in domestic law, where soft law seems to be "harder" than in international soft law, doubts may arise as to the validity of these rules, standards, and guidelines. Officials, as well as norm addressees, are not sure whether they should regard such rules as binding rules or just "best practices," whether these rules impose obligations or just offer advice. Norm addressees are often in the dark as to what kind of sanctions they can expect. What to make, for instance, of the rules that are accompanied by the demand to "comply or explain"? Are they just suggestions or more than that? In the legal landscape in which a sharp division is made between valid and invalid rules, soft law emerges in a twilight zone and therefore urges us to reconsider our notion of validity. What is validity? What is its function? Is it a necessarily dichotomous concept? Or should we allow for the possibility that validity can come in degrees?

In order to answer these questions, I do not confine myself to the perspective of the practicing lawyer who just wants to know whether a particular contract or will is valid. In order to understand the particular position of soft law, I want to explore under what conditions such validity examinations make sense. In what circumstances is an investigation of validity important? This article is therefore not intended to investigate the conditions for validity but rather seeks to explore under what conditions such investigations of validity usually make sense at all. Only then can we get a glimpse of the twilight zone of soft law.

2 Validity as Reputation

Despite the abundance of literature on legal validity, relatively little attention is paid to the question why we should bother to find out whether a testament, a contract, or a rule is valid.[3] What is the function of validity? Why would it be useful to demarcate the valid from the invalid? The answers to those questions are usually taken for granted because most authors adopt the point of view of the judge, and for her the most important and obvious function of assessing the validity of a contract or rule is to know whether and to what extent such a contract or rule should be seen as a relevant or even overriding reason for decision making.

[1] I analyzed this form of legislation more extensively in Westerman (2007a, b). The phenomenon is the subject of my new book *Outsourcing the Law: A Philosophical Perspective on Regulation* which will be published by Elgar Publishers.

[2] Black (2008).

[3] An exception to this neglect are the contributions of Mackor and Paulo in this volume.

But for other actors, a—rather obvious—function of validity is that it helps them to know whether a certain particular contract, rule, or testament *can be trusted to have the effect that it claims to have*. The heir who wants to know whether his father's will is valid is essentially in the same position as the grocer who examines the 1000 euro bill of his customer in order to see whether it is a real bill or a counterfeit one. Can he trust this bill to have the effect that it claims to have: in other words, can he really buy something with this bill?

In informal settings, such questions are determined by reference to the *personal reputation* of those who procured such documents. As is shown by Goyal in this volume, informal markets in India are to a large extent regulated by intermediaries. The validity and value of the parchis (promissory notes) handled by such intermediaries are guaranteed on the basis of the latter's determination of the reputation of the trader who issued them.

In this article, I will argue that validity is the functional equivalent of reputation. Whereas informal systems rely on the reputations of persons as indications of the extent to which these persons can be trusted, in a formal system people rely on the reputation of legal constructs, categories, and rules. We call this kind of impersonal reputation "validity." Just as reputation informs us of whether a person really *is* what he pretends to be, validity informs us of whether the contract, rule, or will is what it claims to be. It is to be noted, however, that by "reputation," I do not refer to "good reputation." In just the same way, a valid rule may be an unfair or immoral rule. But even if it is an unfair rule, we might expect a valid rule to have the effect it claims to have. Just as we can expect people who enjoy the reputation of a villain will act like a villain.

There are three possible routes to approach questions of validity, which are very similar to the ways in which we seek to ascertain whether a person can be trusted. The first is an inquiry into the origins of such persons. If confronted with strangers, it is not unusual to start the conversation with a "where are you from?" Knowing someone's pedigree is in most cultures the method *par excellence* of ascertaining someone's reputation. Next thing to know is in whose company the stranger is seen. Does she converse with the "right" people (and if so, how often), or is she mostly seen in the company of notorious swindlers? And finally (but not exclusively), someone's reputation is informed by what expected goods or ills this person might bring to us, information that is for the most part derived from his or her past performance.

The same three routes are accessible to those who want to determine the validity of a legal product Y such as contracts, wills, or rules. The first is by starting at the input side, questioning how document/construct Y originated, what the source of Y is, and whether Y was established in the procedurally right way. Hage calls this in his contribution "source-validity." To officials whose daily business it is to determine the validity of legal products Y in order to know to what extent they should weigh these items as reasons for their decisions, this is the most accessible road to take.

But it is not the only route available. If origins are unclear, or if the criteria for pedigree are doubtful, as is the case in soft law in which the authority of the rule makers is often doubtful (think of experts or professional associations), judges may also be guided by considerations of whether Y is actually referred to and taken

seriously by other participants of a given institutional order. How do other officials weigh these products? How are they dealt with in the relevant academic literature? To what extent are norm addressees actually guided by such rules? This examination considers the "Geltung," the weight that is generally accorded to Y. I will call this throughput-validity; it refers to the company in which Y is seen, i.e. the esteem in which it is held by participants and how Y appears in their decisions and justifications.

Finally, in order to ascertain the validity of Y, one may look at the output side of that legal product. And with output I don't merely refer to the legal consequences to which these products give rise but to the actual factual consequences that arise from according weight to Y. Output-validity is therefore no more than what Kelsen called "efficacy." This route is only partially available to officials such as judges for they—partially—*determine* the extent to which a rule or covenant is efficacious. That is probably why Kelsen thought of output as legally irrelevant.[4] It is not relevant for a legal decision-maker in deciding whether she should consider Y as a weighty reason because such a serious consideration *contributes* to the Y's output. But for those who are *affected* by the decisions of legal experts, efficacy is of the utmost if not overriding importance. For instance, the protocols and procedures of audit committees are often unclear, sometimes even secret, and the way they are developed is mostly unknown to the parties involved. Nevertheless, no institution would declare, for that reason, such protocols and criteria as irrelevant. Failure to comply with these standards may lead to withdrawal of subsidies or official recognition and in any case damage institutional reputation. They are, therefore, taken very seriously as reasons for the internal policy of such institutions, which would rather choose to conform to nonvalid standards than to jeopardize their own reputation by litigation.

Obviously, the terms "input-validity", "throughput-validity", and "output-validity" do not refer to distinct kinds of validity. The terms refer to the distinct *ways* in which a certain item Y can acquire validity. Input-validity refers to the validity, weight, or importance that a certain Y acquires by virtue of the way Y was established. Throughput-validity refers to the weight that is accorded to Y by relevant actors. And output-validity refers to the validity, weight, and relevance that a certain item Y acquires by virtue of its expected consequences. As we shall see, the term "expected" is of utmost importance. We should not forget that validity is reputation. If someone has the reputation of a villain, this does not mean that he actually and unfailingly will act as a villain. I will come back to this in Sect. 3.

The three ways to acquire validity correspond to the routes that are available to us if we want to examine the validity of a certain item. Some of these three routes are taken by officials, others by norm addressees, some by both. It is only by exclusively focusing on the perspective of the judicial decision-maker that validity can be narrowed down to input-validity. But even within such a judge-oriented perspective,

[4]Kelsen (1945), p. 119. Hage, too, in his contribution to this book regards efficacy as a concern of (external) sociologists of law. I hesitate to draw strict boundaries between internal and external here; the non-official participants of a legal order are also interested in efficacy.

the exclusive focus on input-validity does not do justice to the complexities of soft law, which often invite consideration of throughput-validity as well, as we have seen. And even output considerations may influence their decision making, as in the case of a court that anticipates further legislation and will incline in a certain direction even if the rules that cover such a decision are not yet valid.

It is important to note that each of these routes of examination allows for *gradual* answers. Although it is possible to give a yes/no answer to the question whether Y should be considered as being enacted by the formal legislature, such dichotomous answers are not always available. Certification procedures may be more or less correctly established, new and alternative rule-making bodies may be considered as more or less respectable sources. The same applies to throughput considerations. There may be more or fewer actors who recognize the type of Y as weighty and important, and also the degree of esteem in which they are held may differ. If Y is embedded in a so-called best practice, it may even enjoy greater respect than a formal rule. Finally, output-validity can also surface in degrees. In a Chinese context, for instance, documents certifying ownership of houses are not completely worthless. But they enjoy less output-validity than in the Netherlands.

3 Type-Validity

So far I have focused on how the validity of a particular legal product Y, such as a code, a contract, a covenant, or a will, can be examined. But such an examination is only relevant against the background of an institutional order in which types of such products and constructs are *generally* seen as relevant. It is against this background that particular contracts, wills, or rules have a *claim* to validity. As Sandro rightly points out in this volume, the mere fact that a court takes a will into consideration and declares it invalid implies that the will originally had juridical meaning in the sense that it had a claim to legal validity. Left unchallenged, the will, although a counterfeit one, would certainly have brought about legal consequences. This claim to validity is vital. Without it, contracts or wills would be treated as a kind of legal monopoly money that no one would bother to examine seriously. The difference between a policeman who acts in a theater play and an imposter who is clothed in police uniform is just this: no one would for a minute contemplate the possibility that the play actor is a real policeman; he simply does not even claim to be one. The whole matter is expressed eloquently by Carpentier in this volume, who agrees with Sandro in this respect and exclaims: *To put it in a nutshell, in order to be invalid, a norm must be a valid norm in the first place!*

Of course, in this statement, the word "valid" has two rather distinct meanings. The claim to validity is different from actual validity. But it is important to point out that a particular will can only have such a claim against the background belief that in general wills are relevant, inform people's decisions, and have legal as well as factual consequences. A particular will is a *token* of a *type.* Because this type (the *class* of wills) is generally felt to be valid in a legal order, we can sensibly ask

whether this particular will is valid. We should therefore distinguish between token-validity and type-validity. Validity of types should be presupposed and forms the background of our inquiries into the validity of a particular legal construct as a token of that type.[5]

In order to understand type-validity more precisely, we might recall John Searle's account of the way our social reality is construed.[6] Searle notices that most of the words that do not directly refer to brute facts such as "ice" or "stone" or "wind" are the result of attribution. Terms like "boundary," "wedding," "greeting," or "flag" are all the result of what Pufendorf had already called *impositio*, our attribution of a certain *meaning or status* to brute facts.[7] A banknote may consist of a piece of paper, but it is not the sheet of paper that turns it into a banknote. It is by virtue of our *agreement* that the piece of paper *counts as* a banknote that we can use it to buy bread. Likewise, the wall of stones can only function as a boundary if we collectively agree on the fact that this wall of stones *counts as* a boundary.

The basic element of our social reality is therefore agreement on the statement that X counts as a Y in context C. I do not want to repeat Searle's ingenious account here, but we should point to two properties of such count-as rules that are relevant to our present inquiry. The first is that a Y-term is invoked in order to carry out a particular function. If we say "this wall counts as boundary," it is because "boundary" can do what "wall" in itself cannot do: it can tell people what they should do and what they should refrain from. Searle therefore remarks that the statement "this rock counts as a chair" is *not* a basic element of social reality; it can carry out its function even without our agreement with the rule. Y-terms are completely dependent on our collective attribution of a *status* in order to fulfill the function for which they were instituted.

The boundary example also clarifies a second property of Y-terms: the function that is exercised by the Y-term is that it confers deontic powers[8] (rights, obligations, permissions, privileges). It imposes on some of us the obligation to stay clear from the boundary, or it may give others permission to kill once the boundary is transgressed. According to Searle, it is only on the basis of continued collective acceptance of such status ascriptions that the Y-terms can successfully exercise their assigned function:

> Because the physical features specified by the X-term are insufficient to guarantee success in fulfilling the assigned function, there must be continued collective acceptance or recognition

[5]That is why Hart remarks that in the case of a general disregard of the law it is pointless to inquire into the validity of particular rules. See Hart (1997), pp. 103–104.

[6]Searle (1995).

[7]Pufendorf (1934), remarked that so-called "'moral entities' do not arise out of the intrinsic nature of the physical properties of things, but they are superadded, at the will of intelligent entities, to things already existent and physically complete (. . .), and indeed, come into existence only by the determination of their authors." I,I,4.

[8]Searle (1995), Ch IV, p. 100.

of the validity of the assigned function; otherwise the function cannot be successfully performed.[9]

This does not imply that all use of Y-terms presupposes such collective agreement. Of course it is possible to use Y-terms that have no deontic status *for us* and is therefore not dependent on our collective agreement. If we say that this pile of stones is "Hadrian's wall," which in antiquity functioned as a boundary, we may make use of our understanding of the status of the type "boundary," but we clearly do not say that for us it has the status of a boundary; we only describe the fact that among the Romans, these stones enjoyed the status of a boundary that created rights and duties for Romans. We are not then agreeing that X counts as Y but simply describing a historical collective agreement that X counts as Y.[10]

For our purpose, it is important to note that Searle adds to this that we commonly attribute such deontic powers to *types* of X-terms, not to a particular token of an X-term. It should be clear that it is certainly possible to attribute meaning to particular items, but usually we do more than that. We may invent Y-terms on the spot, so to speak, when we draw a line in the sand and tell people they should not transgress this particular line. In fact, such attributions of meaning to particular instances can often be witnessed in children's play when they invent a game and say "this doll is from now on the teacher" or "these marbles are money" but a minute later treat the same doll as their child and the marbles as bullets. But in the social life of adults who are not playing games, this variability and changeability is limited. This is, I think, the result of the fact that "X counts as Y" is only applicable in certain conditions.

These conditions are loosely called "context" by Searle. We might say, for instance, that in the context of the classroom, "raising your arm" counts as "putting a question" but that in the context of an auction, "raising your arm" counts as "making a bid." In such examples, drawn from social life, the context consists of conditions that usually remain implicit. However, in a legal order, such conditions are often explicitly mentioned. If a piece of paper is signed by witnesses, before a notary, etc., it counts as a will. It is important to note, however, that explicit conditions not only explicate the context, but they also serve to *construct a general category: all* pieces of paper that exhibit the following features and that meet the following conditions count as wills.

Since we commonly attribute meanings to a *class* of X-terms, we don't stop each time when we want to spend a dollar bill to read the text written on the bill in order to assure ourselves of the fact that this is a genuine bill and not a counterfeit one. We act on the background assumption that bills of this *type* are valid, i.e. have a status that is collectively agreed upon. This is why counterfeit bills are possible. In the absence of type-validity, they could not even claim to be a genuine bill, and therefore this claim

[9] Searle (1995), p. 45.

[10] See also Hart (1997), p. 104.

could not be rejected. It could not be decided that they are counterfeit. They would simply be indifferent, meaningless sheets of paper.[11]

So we might say that any examination of the validity of particular tokens presupposes a world in which people agree on the status that is attributed to types and that confers deontic powers. This means that although the examination of a certain item in terms of validity is brought about by our uncertainty as to whether we can trust *a particular item*, such examination only makes sense in a context of *general* trust, the belief that in general the meanings of such items are shared and considered relevant.

This belief that in general people collectively agree on the fact that types X count as types Y is what I called type-validity. It is the belief that there is a collective agreement on the meanings and statuses that are accorded and that others will act on these shared meanings. Therefore, not collective agreement itself is the ultimate building block of social reality, as Searle thinks, *but the belief* that there is such a thing as collective agreement. It might sound strange to characterize type-validity as a belief. Validity is generally presented as a property of a legal construct that can be more or less objectively attributed and not something that is merely "believed" in. But if we say that a will is valid because it is signed before a notary, we can only say so on the basis of the belief that other relevant actors agree on the fact that if such papers are signed before a notary, they count as wills.

4 Collective Agreement and Functionality

In Sect. 3, I described three routes to ascertain the validity of a particular token, such as a contract or a rule. This examination can only be carried out against the background of assumed validity of the type of which this particular item is a token. We should presuppose that in general type X is accorded the meaning and status of type Y. But how do we know whether these assumptions are warranted? How do we know that in general people agree that a certain *type* X counts as *type* Y? How do we know whether our belief in shared meanings is justified? It seems that

[11] I don't think it is necessary to draw distinctions—as Searle does—between actual count-as statements, such as is the case in "this is a cocktail-party" where people are present and actively attribute the meaning of cocktail party in order to let this particular party function as a cocktail party, and count-as statements which are not dependent on such active recognition, as is the case with a dollar bill which—straight from the press—fell between the cracks of a floor which still counts as money despite the fact that no one ever attributed the meaning 'money' to that particular specimen. There are two issues involved here: whether the instant and actual recognition of a party as a cocktail party is necessary for such a cocktail party to fulfill its function (yes) and whether particular cocktail parties can be recognized as such in the absence of a meaning which is attributed to a general type of parties (no). In order to recognize cocktail parties, we are still making use of a general concept 'cocktail parties' which can only sensibly be attached to an X-term (the physical gathering of people) if it meets several conditions. See Searle (1995), pp. 33 and 53.

once again we are confronted with the task of ascertaining the validity of Y, albeit this time we are required to ascertain the validity not of a token Y but of a type Y.

Searle does not deal with this question since he treats the collective agreement by means of which [type] X counts as [type] Y as a starting point for social reality. He does not raise the question how we arrive at such collective agreement or what makes it stronger or weaker. However, we should not have a static view of collective acceptance as something that is there or not there. Collective acceptance can grow or diminish. Consequently, our *belief* in such a collective agreement may also be strengthened or diminished. The question is, therefore, under what conditions does collective agreement grow and under what conditions is such acceptance on the decline?

The analogy of reputation might again prove helpful in answering this question. We saw in Sect. 3 that like the reputation of persons, the validity of a particular item Y is informed by past performance, present company, and expectations of future consequences. A particular item Y can spring from a more or less respectable source, is referred to by more or fewer actors of more or less esteem, and can more or less successfully be enforced. The same applies to the type-validity we should assume to be enjoyed by type Y. [Type] Y's validity is then equally informed by the respectability of its sources, the position it occupies in a network of other [type] Ys, as well as the consequences that might be expected once [type] Y is declared "valid," i.e. presumed to be collectively agreed upon.

All three considerations determine the status of [type] Y, and here I refer to status in the double sense of the term: "status" as used by Searle as the status that is attributed to X, which enables it (as a Y) to confer deontic powers, and "status" as in ordinary usage indicating the amount of prestige that is accorded to a certain person in relation to the position of others. The advantage of the latter colloquial usage is that it treats status as a gradual affair. Not as something that is or is not attributed to a certain X but as something that can be enjoyed to a lesser or greater degree. In some cultures, people generally accord a higher status to accreditation than in others or more weight to judicial interference than others, and those differences can only be taken into account if we allow type-validity to come in degrees.

One of the factors that influence the degree of status is the degree in which it is believed that the status will entail real consequences. A simple example might clarify this point. According to Malinowski in his study of the Trobriand Islands, the owners of coconut trees who could not keep watch over their trees that grew in distant spots used to attach a palm leaf to the trunk of the trees, indicating that these had to be considered as "property," which implied that the owner had the right to harvest the coconuts for his own household and that others had the obligation to keep clear of them.[12] The palm leaf allows the owner of the trees to extend his control far beyond his physical capacities in both space and time.[13] It indicates the status of the tree as being the property of the owner and thereby confers rights and obligations. But if the

[12]Malinowski (1926), p. 60.

[13]Searle (1995), pp. 80–81.

owners never show up to harvest the coconuts and therefore never really exercise the rights they had claimed, the palm leaf (as a type) will gradually lose its meaning and turn into a dead letter. No one will bother to examine particular palm leaves.

This sounds pretty straightforward and self-evident, but we run into a problem here. Searle pointed out that the very fact that we ascribe a meaning to X helps X (in the capacity of Y) to perform its function. Without such agreement, X could not perform that function. So if there is any function performed by Y, it is solely by virtue of the status that we imposed on X, which turned the X into a Y. But if we say that our collective agreement is partly *dependent* on whether Y indeed performs its functions (the output that we expect from Y), we reason the other way round. We do not say—like Searle—that collective agreement constitutes the functionality of Y, but we say that the functionality of Y informs how weighty Y is for us. Functionality is then at the basis of our collective agreement instead of the other way round.

Both statements seem to be true simultaneously. It is undeniably the case that piles of stones only confer rights and obligations if we collectively agree on the statement that these stones count as a boundary. At the same time, however, the reverse is also true: the failure of Y to exercise its function may in turn undermine collective acceptance of the status of Y (and consequently our belief in such a collective acceptance). It seems then that we are talking in circles here. And this was probably the reason that Searle did not look beyond the fact of agreement, which he just assumes to be the basic starting point and ultimate building block of social reality. But circularity may be the closest we can come to solving these riddles. Apparently, there *are* circles here. Successful performance of the assigned functions strengthens collective acceptance, but repeated failure to perform the functions for which the status was ascribed tends to undermine collective acceptance. Functionality and acceptance are mutually interdependent: they wax or wane together.[14]

Although there is a mutual dependence between functionality and acceptance, I should not be misunderstood as asserting that the status of Y-terms is continuously dependent on what Kelsen called "efficacy" or "Wirksamkeit." I am not referring to efficacy as such; I stress the importance of *perceived* efficacy. Statuses owe their functionality to the degree in which Y-types are *believed or perceived* to successfully exercise their deontic powers and to make a difference in the world. The status of the palm leaf would also be diminished if the coconut owners were only *believed* to be lax in claiming their due. This is why I prefer the term "output-validity" to "efficacy." "Output-validity" makes clear that validity is *attributed,* in other words, that weight is *accorded* to some item Y by virtue of the expectation of a future output. Those expectations might be informed by the real output that is delivered, but not necessarily and not continuously so.

The example of the Mafia might clarify my point. The Mafia is commonly thought to be based on violence. However, in his fascinating book on the Sicilian Mafia, Diego Gambetta describes how violence plays a more limited role. It is used to create an atmosphere of insecurity and fear, which made the product the Mafia

[14]On mutual interdependence, see Homans (1950), pp. 6–10.

could deliver, protection, all the more necessary and valuable. However, at a certain point in the historical development of the Mafia, a display of aggression and violence was no longer needed. The mere *name* "Mafia" was enough to fulfill its function. As soon as the reputation of an effective protector has firmly taken root, it is no longer necessary to exhibit aggressive behavior. As Gambetta notes, whereas manufacturers still have to produce cars, even though they enjoy a good reputation, matters are different with the Mafia, who merchandise protection. The very status of a powerful protector is then sufficient to generate the protection in itself.[15]

This example strongly supports Searle's view that acceptance generates functionality. It suggests that the status of Y-terms, although dependent on perceived efficacy, need not continually be supported by output. This is why I do not think that coercion is the key to understanding obedience to the law, as Schauer asserts.[16] The key is the *belief* that coercion will eventually be applied in accordance with the status of the Y-term or, more precisely, the belief that there is a collective agreement to attribute a status to X, which entails the duty to apply sanctions. That belief in itself helps Y to perform its assigned function. On the other hand, repeated failure to perform that assigned function (think of Mafiosi, who are deprived of their guns or simply jailed) would diminish such a status: not immediately but in the long run. And such a diminished status would eventually even further reduce functionality, which would further decrease status and so on.

5 Sources and Status

There is mutual dependence not only between collective agreement and output-validity but also between collective agreement and input-validity. Lawyers will hardly be surprised to learn that origins and procedural correctness determine the status of the Y-term. In fact, this is how they usually and predominantly determine the validity of a certain token Y. And this applies not only to particular rules or contracts but also to types Y: all rules that pass the Council of State are to be accorded the status of formal law. One may even think that not only tokens, not only types, but also the way in which these types are connected to each other and form a *system* is judged by its input-validity. The ways in which a legal order is instituted, the kind of procedures that were followed elevate the status of such an order. All kinds of conditions may apply in order to assess the degree of input-validity. It is not only formal and procedural conditions that may be believed to be relevant but also moral ones. In such cases, a certain legal order is only declared to be valid if it is established by democratic means or when it is issued by the deity. All these conditions may apply and serve to differentiate the legal from the non-legal and the illegal, and the legitimate from the illegitimate. These are all initial conditions to be

[15]Gambetta (1993), p. 44.

[16]Schauer (2015).

met by some type X to count as type Y or to connections between types Y. It is hardly remarkable to observe then that the degree of input-validity (the degree in which these conditions are believed to be met) enhances the collective agreement that type X counts as type Y.

More surprisingly, however, the reverse also obtains. The more status Y enjoys, the more there is the need to show that it meets the initial conditions. Again, the Mafia example, for all its simplicity, serves as a fine example, for as soon as the status of "Mafioso" has met with such support, that is, has become functional in itself, independent of any further display of aggression, it becomes *all the more important* to be able to show that someone counts as a "genuine" Mafioso. To that end, a set of formal conditions is devised by means of which a genuine (valid) Mafioso can be identified. The Mafioso is converted into a type, and any token Mafioso could from now on be compared to the type in order to see whether he is a "valid" Mafioso. Gambetta tells us that various mechanisms were invented in order to "accredit" someone as belonging to the "real brand": initiation rituals, testimonies of witnesses,[17] as well as the organization of different families whose main business is to exclude counterfeit Mafioso from business.[18]

If we apply these insights to the law, they suggest that criteria for input-validity (the initiation rituals, the correct procedures, the pedigree) are deemed more important to the degree in which the status of Y is secure. The more secure the reputation of the Y-term (whether Mafiosi, wills, or contracts), the more important it becomes to tell the genuine Y from the counterfeit one.

It is tempting to hypothesize that the contemporary and typically legal focus on input-validity as the only form of validity suggests that the status that is generally accorded to legal products in our legal culture is rather secure. In countries and cultures where there is a general distrust or indifference toward legal products, questions of pedigree and procedural correctness may play a far more limited role. In fact, this is in line with what I noted at the beginning of this article that there should be a certain amount of type-validity in order to make the examination of the validity of particular legal products relevant. We can now add to this that presumably the *degree* of type-validity determines the *degree* in which input-validity is deemed relevant.

We have seen that the status of a Y-term both determines and is determined by output-validity: the degree in which Y is expected to have effects. We also saw that the status of a Y-term determines and is determined by input-validity, i.e. the degree in which that item is believed to meet the conditions for type X to count as type Y. What about throughput-validity? What role is played by the perception of [type] Y's status as being considered as weighty and relevant by significant others? In fact, throughput-validity is nothing else than the very status that is actually enjoyed by a Y-term by relevant actors. It is the intersubjective and collective agreement itself that

[17]Even fathers wanted to be convinced that their sons had turned into real Mafiosos after emigration to the US and required (independent) testimonies of a neutral third party. Gambetta (1993), Ch. 5.

[18]See Gambetta (1993), Ch. 6.

is taken as a starting point for the determination of the status of Y. The more we believe that there is collective agreement, the more collective agreement there will be, and the more collective agreement there is, the stronger our belief will be that there is such collective agreement. We have come here indeed full circle. But here again, the circularity of the argument need not detain us from following the argument to its logical conclusion. If all my colleagues take the standardized protocols of the audit committee very seriously, I will most likely follow their judgement, if only in order not to jeopardize my reputation with my colleagues. And this will further enhance the status and concomitant deontic powers of such protocols. There is nothing mysterious in this kind of circularity.

It is clear that throughput-validity, the degree of collective agreement, is dependent on both input- and output-validity. But again, collective agreement need not necessarily and continuously be supported by input- and output-validity. The situation may arise that collective acceptance of the Y-term in itself is secure enough to survive even when no sanctions materialize at all. In that situation, throughput-validity, i.e. the intersubjective and collective agreement on the status of a certain type Y-term is self-sustaining. One attributes a certain status to Y because others do so. References by the courts and academics, being practiced by relevant actors or preached by policy makers, may all add up to the status of Y-terms, which will then be relatively autonomous and independent from input and output. And because all others do so and everybody orients themselves to such Y-terms, they grow more closely connected to other Y-terms and in this way form a network of meanings that can also sustain each other. It is no longer necessary that each [type] Y is supported by input or output considerations. Unsupported elements may be supported by other, better equipped elements of the network. A legal order is born.

I think, but of course more empirical evidence should be adduced, that this latter possibility has materialized in our present-day legal order, which is pervaded by various soft law arrangements. Type-validity (the belief in collective acceptance of types) is so strong that the mere semblance of legality is enough to endow soft law arrangements with (token)-validity. If a certain university curriculum counts as an "accredited curriculum," there is apparently no need to either examine the input-validity or the output-validity of that status. That the accreditation is carried out by an organization without legal mandate or which lacks the sanctions to respond to noncompliance does not make any difference: the status itself ("accredited" curriculum) *carries its own reward*. Regulatory practices in which supervisory boards "advise" the norm addressees to invest in labor conditions by following a detailed set of instructions, for instance, may lack a legal basis and may be unaccompanied by sanctions. Yet norm addressees tremble at the prospect of their visits and go to all lengths to comply with their wishes, even if such actions are contrary to their own better judgement.[19] The very fact that these norm addressees take this "advice" so seriously might induce other actors to attach to them a certain weight as reasons for their judgement. The courts generally attach importance to the views and social

[19]Timmer (2011).

practices that exist in a certain field. References in jurisprudential and academic literature will strengthen the reputation of the advice even further, which will presumably also affect the reputation of the rule makers, in this case the supervisory board. From now on, such advice is seen as relevant and weighty reasons for both norm addressees and judges. The best practices of the norm addressees who adopt these rules as their own will be propagated; more institutions will voluntarily adopt these best practices in order to enhance their own reputation, which will give even more support for officials who use them as reasons for their decisions. After some time, the "advice" has evolved into something that approximates binding law.

6 The Fragility of Validity

So far then I have asserted that an examination of the validity of particular legal constructs such as wills, contracts, or rules is dependent on the background belief that in general such contracts matter and make a difference. Type-validity is nothing more than the belief that there is collective agreement by virtue of which [types of] X count as [types of] Y. Collective agreement can wax or wane, dependent on whether these types meet a set of explicit and shared entrance conditions (input-validity), whether and to what extent they are supported by others—the collective acceptance itself or throughput-validity—and, finally, on their outcome, i.e. the real effects that these Y-terms are believed to exercise. On the basis of these three routes, the reputation (i.e., the validity) of legal constructs in general (as well as their interconnections in a legal order) can be established and determined.

I hypothesized that input-validity, throughput-validity, and output-validity are mutually dependent and reinforce each other. In this way, one might say that trust breeds trust.[20] If I am correct in these hypotheses, which need to be substantiated by further empirical evidence, this is good news for countries that struggle with an apparently weak legal order, i.e. an institutional setting that rests on limited type-validity.[21] The circles of interaction between input, throughput, and output do not presuppose a first mover. It is not imperative that legal orders be instituted by a display of violence or coercion. One may as well begin at the other end, by making sure that entrance conditions are made explicit and shared. Or one might try to generate more throughput-validity. We should not look for the golden key toward a more secure or stable legal order. It may arise out of modest beginnings and expand by virtue of its sheer self-reinforcing dynamism.

However, there also seem to be limits to this self-sustaining and self-reinforcing nature of institutional orders. We should not forget that the whole network of mutually reinforcing considerations is ultimately built on reputation. This may be strong and stable, but once doubt creeps in, it may undermine the whole network of

[20]Feld and Frey (2002).

[21]The so-called failed states; see Acemoglu and Robinson (2012).

mutual dependencies in the same self-reinforcing way, and the collective agreement may vanish just as quickly as it emerged. Doubts concerning the status of the Y-term cause it to function less adequately, which would further undermine throughput-validity. Consequently, the loss of throughput-validity would render input-validity less relevant. This inevitably affects the status of other Y-terms that are linked to it. A negative spiral sets in, not unlike a crash of the financial market.

I do not know at what stage such negative spirals can be expected. The emergence of soft law and the status it has acquired testifies to a considerable amount of type-validity. But how long can the perception of efficacy survive if no real sanctions are administered? The question is particularly relevant for international soft law. How long can human rights retain their status if they remain solemn but impotent declarations that cannot deliver a real outcome that effectively improves the lives of the world's inhabitants?

The dilemma is devilish. If we remain true to Searle's picture of the construction of social reality, we might with some reason cherish the expectation that these Y-terms—by the very fact that they are mentioned in declarations and treaties—acquire meaning by themselves and therefore will give rise to enforceable rights and obligations. They will then gradually acquire a moderate degree of type-validity against which at least *claims* to human rights can sensibly be put forward. We have seen that this hope is not totally groundless. But as we have also seen, acceptance is informed by input, throughput, and output. In all three aspects, the position of human rights is unstable. Their origins are doubtful; they are often mentioned in academic circles but more often disregarded by officials. This means that if these declarations remain dead letters, they may breed a kind of—justified—skepticism that might also spread to those parts of international law that enjoy a more formal status. Not only soft but also "hard" law may be perceived as impotent and futile, more symbol than status.

The same applies, to a lesser extent, to domestic soft law. There is a moment at which everybody will suddenly see that the emperor does not wear any clothes. Domestic soft law might be attributed status, as long as it is still linked by some thin thread to formal hard law, but it remains to be seen how long it would survive after it has been severed from that navel cord and whether throughput-validity in itself can keep the baby alive. Of course, and unlike international soft law, domestic soft law may be revived by threat of real enforcement and sanctions. By strengthening output-validity, the circulation between input-, throughput-, and output-validity could once more be set in motion. Or it may profit from a process of formalization in which conditions are made explicit, which refer to a set of procedural constraints that should be met. It seems to be a risky strategy to rely on throughput-validity alone. Soft law and hard law are not separate entities but are intertwined in the network of a legal order. Just as soft law acquires status from its marriage to hard law, hard law may lose its status from its marriage to soft law as well. If people get used to the fact that law may have spurious origins and uncertain outcomes, they may also tend to be less impressed by hard law.

One might object: is the demise of soft (and hard) law really such a disaster? If a certain legal system is iniquitous or cruel, the diminished reputation of that legal system can even be welcomed. This objection is justified. No one in his right mind would deplore a diminished reputation of the Mafia, and the same would probably apply to many legal systems all around the world. Yet I would like to point to one important function of legal orders, which probably deserves to be maintained, even if they figure in wicked or morally despicable political regimes. In order to see that important function, it is worthwhile to recall to mind once more the examples provided by Goyal in his contribution, which pertain to the regulation of informal markets. As we have seen, type-validity of a formal institutional order is the functional equivalent of personal reputation in such informal settings. But although functionally equivalent, there are some advantages attached to a formal institutional order, which cannot be disregarded too easily. In such a formal order, conditions are made explicit and more or less fixed and stable. This means that reputation is enjoyed by types rather than by tokens. And this in turn ensures that these types can acquire a shared meaning and status that stretches far beyond the confined local contexts of informal settings. Formal legal orders, even morally wicked ones, enable the coordination between people who are far apart in both time and place. The reputation of such legal orders is therefore not something that may be jeopardized without risking the reduction of coordination.

7 Conclusion

The very question whether a certain legal construct is valid or invalid presupposes a world in which types of such constructs are generally regarded as relevant reasons for decision making. We only want to know whether a particular document counts as a valid contract in a world in which contracts generally matter and make a difference. But when do they generally matter? Only if we believe that there is collective agreement on the fact that contracts matter, i.e. generate legal and factual consequences, or, more broadly speaking, if there is a belief in a viable legal order. Such a belief, however, is not something that is either there or not there. It can wax or wane.

But under what conditions do such beliefs grow or diminish? The question is important, not only in order to understand the emergence of soft law in the Western world but also in order to understand when and why legal orders lose relevance and credibility, such as is the case in many "failed states." In fact, such "failed" law is exactly the reverse of soft law. Whereas in Western Europe many soft law arrangements are seen as relevant even if they are not valid law, the failed state can issue and codify laws following strict legal procedures, but these extremely "hard" laws are nevertheless seen as irrelevant and do not figure as reasons for decision making.[22]

[22]Or, if they figure at all, they are used as means to increase the private income of officials.

In order to understand these remarkable phenomena, empirical research is called for. To that end, I have formulated a couple of hypotheses, together forming a theoretical framework for further research, that would enable us to understand the conditions under which a belief in a legal order is strengthened or, instead, jeopardized. The basic assumption underlying these hypotheses is an analogy: it is the assumption that the type-validity of legal systems can be understood in just the same way as the reputation of persons. Validity, just like reputation, is informed by input (pedigree, procedures, sources), by throughput (the esteem in which it is held by significant others), and by output (the degree of actual performance). Input, throughput, and output considerations together inform the extent to which a legal order is deemed credible. Interestingly, these three types of considerations are mutually dependent and interact with each other to the degree that we can even speak of self-reinforcing mechanisms. In this manner, disbelief generates disbelief and trust breeds trust. Reputations—both of persons and of legal systems—are just as rapidly gained as they are lost. In cases where the reputation of the legal order is strong, the emergence of soft law can be explained. The network of legal concepts in which a soft law arrangement is embedded is then so strong and stable that unsupported (soft law) elements are supported by better supported elements. Soft law is then parasitic on the validity accorded to hard law. But in situations where the reputation of the legal order is weak, soft law cannot survive at all and hard law also struggles to be regarded as relevant. In such cases, questions of trust will most likely be resolved by reverting to personal reputation, more limited in scope, time, and place.

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