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On Law and Reason

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to try to convince a Pol Pot that Pol Pot is not accessible for reasons. But one must possess reasons which rational persons would accept. Circumstances may force one not to spell out these reasons but one must be prepared to proffer them, given the opportunity.

5.5 The Question of Existence of the Law. Legal Realism

5.5.1 Introductory Remarks. Axel Hägerström's Philosophical Starting Points

The theory presented in section 5.4 supra is a synthesis of natural-law and positivist approach to the relation between the law and morality. However, theory of valid law must also include another kind of considerations, concerning the mode of existence of valid law. The questions such a theory must answer were formulated mostly within the tradition of Legal Realism. Recent philosophy of law tends to ignore the heritage of Legal Realism. As I will argue, disagreement with Legal Realism is justifiable. To ignore it is, however, another thing. Legal Realists, especially in Scandinavia, argued on a very high level, certainly deserving a serious attention.

As stated above, Legal Positivism accepts the natural-law assumption that valid law is binding but rejects any analytic connection between law and morals. Legal Realism is even more sceptical, since it also rejects any possibility of scientific establishment of the binding force or validity of the law.

From the beginning of the 20th century, Legal Realism presented itself in many countries, especially in the United States and Scandinavia. Let me deal with one line of its evolution, the Scandinavian, from Hägerström to Olivecrona, Strömberg and Alf Ross.

The founder of the so-called Uppsala School, *Axel Hägerström*, built up his theory around the following theses concerning *reality*. All knowledge concerns something real.

Cf. Hägerström 1929, 116. Hägerström thus rejected Kant's distinction between the thing in itself and the thing as it appears to us, cf. id. 114 ff. and Hägerström 1908, 73 ff.

Metaphysics in general consists of mere strings of words, about whose character the metaphysician knows nothing; Hägerström 1929, 136. Metaphysical statements are self-contradictory; Hägerström 1964, 42; cf. Bjarup 1980, 152–3. The conclusion: *preterea censeo metaphysicam esse delendam*; Hägerström 1929, 111 and 158. And: "materialism is actually the only possible world-view", Hägerström 1964, 299; cf. Bjarup 1980, 153.

Only one reality exists and it includes objects located in time and space. A human being is thus real, since he exists during a certain time, and always occupies some position in space. Mental processes exist because they are indirectly related to time and space: they are experienced by people existing in time and space.

According to a well justified interpretation of Hägerström, he also accepted existence of the *content* of thoughts, since the thoughts are experienced by people existing in time and space. In this manner, even an imaginary concept like "drake" exists. Some concepts are, moreover, useful for describing things extant in time and space (cf. Marc-Wogau 1968, 113 ff.).

Time and space are objective. What cannot be placed in time and space does not exist. The reason why some concepts cannot be thus placed is their self-contradictory character. According to Hägerström, value concepts like "good", "beautiful" etc. are self-contradictory, if one interprets them in an objectivist manner. They apparently tell something about the objects (e.g., "this picture is beautiful") but in fact they do not do it at all, and merely express feelings (such as "I am expressing my admiration of this picture"). Moreover, value statements lack truth values, since they "describe" something outside of time and space. The value "existing" in an object, e.g., goodness "existing" in it, does not exist in any definite sense at all. Suppose that a person, A, gave bread to a poor man, B, and this was a good action. It is meaningless to inquire where the goodness does exist, it A's hand, in the bread, in B's mouth etc. Neither can values exist in a particular world, outside time and space, since no such world can exist. The expression "the world outside time and space" is self-contradictory.

This was the foundation of Hägerström's criticism of the lawyers' belief in valid law, rights etc. Among other things, he refuted the popular view that positive law expresses the will of the state. The state is, according to Hägerström, merely a product of imagination, not capable of having a will (cf. Hägerström 1953, 17 ff.).

Hägerström's ideas gained influence among the lawyers due to their reception by Vilhelm Lundstedt and Karl Olivecrona.

5.5.2 *Karl Olivecrona On Independent Imperatives and Their Functions*

According to *Karl Olivecrona*, both Natural Law and Legal Positivism are *voluntarist* theories, since they assume that the law is an expression of will (cf. Olivecrona 1971, 79 ff.). But one cannot identify the person whose will the law is supposed to express. A command expresses the will of a person who utters it. It presupposes that a definite individual tells another one to do something. A legal norm, on the other hand, can be issued in the name of an institution, e.g., the parliament, and addressed to an open class of persons, for example taxpayers. "(I)t is impossible to define law as the content of the will of any particular person or persons. Those who for the moment are in power (as kings, presidents, members of the government or of parliament) have many other things to do than going about *willing* what is said in the laws. They do not even *know* more than a certain limited part of the law, often quite a small part" (Olivecrona 1939, 24).

But an utterance or an endorsement of a legal norm causes the fact that some people think of someone's command, corresponding to it. A legal norm thus

expresses a so-called *independent imperative* (an independent command). Its meaning is such that one understands it as if it were a command (Olivecrona 1939, 42 ff. and 1971, 128 ff.).

In Olivecrona's opinion, the law has no binding force. It merely causes feelings of being bound. The belief in "binding force" is merely an expression of respect for the law. But the respect for the law has important social functions.

"Rights" and "duties" are, according to Olivecrona, mere words, lacking reference, not describing any facts. However, Olivecrona permitted the use of concepts such as "valid law", "rights", "duties" etc. in general commerce, administration of justice and legislation, and emphasised that the concepts have socially beneficial functions. A belief in rights has thus a directive function, it affects human conduct. It also has an informative function, although the information provided by phrases like "A is the owner of this house" is *vague*.

"The statement that A is the owner of this house tells me nothing about the actual relationship between A and the house. It does not say that A is living in the house, that he takes care of it, or draws an income from it… The owner may, indeed, be ignorant of the existence of the house… Nevertheless, it seems that I receive some information through the statement… I know that, *in the usual course of things*, a person to whom the ownership of a house is correctly ascribed exercises some control over it. Therefore I assume that this is the case here, too, unless I know something to the contrary… I cannot conclude what kind of control A is exercising; only a vague idea of control is associated with the phrase that A is the owner of the house… The statement will (also)… be useful because it shows with whom one has to make contact if some legal transaction with regard to the house is contemplated. Whether the statement itself will be sufficient as a prerequisite for entering into an agreement is another question; in many cases something more will be needed" (Olivecrona 1971, 194–5).

In legislation, a belief in rights has, finally, a connecting function. "Since a right, according to the law, can often be acquired in several different ways and a great many rules can refer to the situation where a person is in the possession of a right, the supposed right becomes a link between two sets of rules: the rules about the acquisition of the right and the rules referring to the existence of the right." This function is very important. "Its significance can hardly be overrated; how a legal system could be constructed without the connecting function of 'rights' is difficult to understand" (Olivecrona 1971, 199).

This theory created an unbridgeable gap between ordinary beliefs of the lawyers and legal philosophy. A lawyer was thereby encouraged to use such concepts as "valid law" and "rights", because this was deemed to be socially beneficial. As a legal philosopher, meanwhile, he maintained that their use was objectionable. This gap may easily cause professional frustration, leading to a retardation of legal dogmatics. "A right man cannot be a man and feel himself a trickster or a charlatan" (Llewellyn 1960, 4).

Paradoxically, Olivecrona provided a masterly analysis of the use of these concepts within the framework of the legal system. Among other things, his analysis of informative function of a right (see above) comes close to some insights which

inspired the next generation of philosophers to abandon Legal Realism. For example, *Ingemar Hedenius defended* the concept of a right by pointing out the following link between ownership and reality: If A has a factual disposition over the property, then there is a *prima-facie* assumption that he is the owner; whoever says the opposite, has the burden of argument (cf. Hedenius 1975, 37 ff.). One may compare this with Olivecrona's insight: if A is recognised as the owner, then there is an assumption that he has a factual disposition; whoever wants to justify the opposite view, must use additional data.

5.5.3 Tore Strömberg's Conventionalism

Tore Strömberg has elaborated a theory of law, based on Olivecrona's ideas but also including some original points.

Strömberg has pointed out that the most important legal orders are connected with states, each having its own territory. The existence of a nation is based on a common belief that, e.g., a part of the earth's surface is Swedish, and the people there living, mostly are Suedes. Strömberg has concluded that the concept of Swedish legal order, valid Swedish law, is *conventional*. If one tries to verify, e.g., the proposition that the Real Property Act of 1970 is a valid Swedish statute, one finds ultimately no ground for this proposition but the common belief that so is the case. Strömberg has called this belief a social convention (cf. Strömberg 1980, 39 ff.).

The causes of the convention are complex. Strömberg has emphasised a historically given ideology of power and authority, expressed in the constitution, on which other laws are based.

Legal rules are thus regarded as valid at a certain territory. According to Strömberg, the belief in their "binding force" is metaphysical, not corresponding to anything extant, yet it constitutes a condition for efficacy of the law, its capability to direct the conduct of people.

The content of legal rules according to Strömberg partly corresponds to the facts, that is, human actions and situations, partly does not. The non-real part of this content consists of imaginary legal qualities and competences together with the idea of legal validity (cf. Strömberg 1980, 63 ff.).

According to Strömberg, one can present the whole legal order as a system of three kinds rules, i.e., rules of conduct, qualification and competence (cf. section 5.5.3 infra). The legal order includes also individual counterparts of the rules, determined in time and space, that is, individual imperatives of conduct (e.g. an order to pay), qualification acts (e.g. an appointment of a guardian) and competence acts (e.g. drawing an authorisation). A legal duty, quality or competence can be created only by a person who in his turn has a competence to do it. All legal competence is thus ultimately based on the assumed validity of the constitution. In this connection, Strömberg has accepted Alf Ross's idea (cf. section 5.5.4 infra), inspired by Kelsen, that the meaning of all rules of a national legal order constitutes a totality of interrelated parts. This totality rests ultimately on a social convention.

Strömberg thus claims that the concept "valid law" does not refer to anything extant. The reason is that valid legal rules would disappear had people not thought about legal rules. However, cannot one say the same about material things? The fact that one now and here sees a forest depends not only on the forest but also on the eyes and the mind of the observer. A bird perhaps notices only particular trees. An insect may see only separate branches, without integrating them into a tree. Without ability to interpret the data provided by one's senses, one would perhaps merely notice colours, noises, smells and other "sense data", not branches, trees or forests. Had people not interpreted the "data" as a forest, the forest would disappear, precisely as valid law. *All* concepts are conventional. Yet, it is absurd to claim that *no* concepts refer to anything extant. One cannot live a normal life nor perform everyday actions, if one regards other people, their houses etc. as one's dreams. Can one live a normal life then, regarding other persons' money, property, citizenship etc. as mere products of imagination?

5.5.4 Alf Ross's Predictionism

Alf Ross was the best known representative of Scandinavian Realism. He studied legal philosophy for Kelsen in Vienna and for Hägerström in Uppsala. Later, he accepted some ideas of the so-called Vienna Circle and the American Legal Realism. He thus showed a great ability to integrate different influences into a coherent theory.

I will discuss only a part of Ross's extensive scientific production, namely his predictionist theory of valid law.

1. Ross expressed the following opinion: The scientific assertion that a certain rule is valid is, according to its real content, a prediction that the rule will form an integral part of justification of future legal decisions (cf. Ross 1958, 44).

More precisely: "the real content of the [scientific - A.P.] assertion 'P (the Bill of Exchange Act, section 28) is valid law of Denmark at the present time' is a prediction to the effect that if a case in which the conditions given in the section are considered to exist is brought before the courts, and if in the meantime there have been no alterations in the circumstances which justify P, the directive to the judge contained in the section will form an integral part of justification of the judgment" (Ross 1966, 55. Translation here and infra according to Aarnio and Peczenik 1986).

In this connection, Ross made the distinction between scientific and unscientific statements about valid law, the former constituting a part of legal dogmatics, the latter uttered, e.g., by judges. The predictionist thesis concerns only the scientific statements.

2. The philosophical background of this theory is, what follows: Scientific propositions must have verifiable consequences concerning physical conduct and mental experiences of the persons who monopolise the use of physical force in the society. This conclusion follows from the following theses, expressed by Ross:

a) A proposition about reality must imply a certain procedure by means of which one can test the truth of the proposition. (Ross 1958, 39 and 1966, 52).
b) Every meaningful proposition must refer to to observational data concerning physical facts or mental experiences (cf. id.).
c) The law consists of rules for the monopolised exercise of physical force (cf. Ross 1958, 34 and 1966, 47).

Thesis a was influenced by Logical Empiricism (cf. Ross 1958, 40 n. 1)., thesis b by Hägerström, and thesis c by Kelsen. (*Re* influence of Kelsen and Hägerström, cf. Ross 1958, X).

3. All this sounds quite simple. However, for reasons explained later on, Ross was also forced to employ more obscure expressions. He claimed that the law is "a supraindividual, social phenomenon in the following sense: Legal patterns of action constitute a common ideology, operative in many persons. Consequently, an interpersonal complex of meaning and motivation is created… Legal norms constitute the abstract, normative content which, used as a scheme of interpretation, makes it possible for one to understand legal phenomena… and to predict law in action within certain limits" (Ross 1966, 41. The English translation, 1958, 29, is not correct).

Ross' theory is, however, open for objections.

1. Concerning the predictivist definition of valid law, one can give counter-examples. One can consider some laws to be valid even though no grounds exist for expecting them to be applied in the courts. In Sweden in 1940 (and in Finland even later) the Criminal Code still contained Ch. 7 on the breaking of the Sabbath. In England it is customarily said that while such obsolete rules are not applied by the courts, they are nevertheless valid (cf., e.g., Makkonen 1965, 65). One can also conceive a contrary situation. During the second world war the courts of a number of countries were compelled to apply rules which were forced on them by the occupying power. After the war, however, it was decreed that these rules were never valid, not even during the period in which they were applied.
2. What is to be predicted and how to predict? According to a "robust" predictivism, "valid law consists of a particular judicial (or other official) action predicted to occur in a particular case. Moreover, the lawyer who is predicting the outcome is to base his prediction not only on any relevant preexisting rules but also on such factors as past instances of judicial behaviour… the ideologies, personalities, and personal values of the judges, and their social backgrounds, and the like" (Summers 1982, 118). Robust predictivism is untenable (cf. Summers 1982, 121 ff.). If the predictions are not based on preexisting rules, they are not easy to make. Neither is it easy to tell what valid law is if the prediction turns out to be an error and the judge decides differently.
3. There also exists a risk of a vicious circle. The real reason for the prediction that the rule will form an integral part of justification of future legal decisions is precisely the fact that it is a *valid* rule. Let us suppose that a statute comes into force

as of January 1, 1989. A legal scholar could then forecast on December 31, 1988 that the statute will be applied by the court during the year 1989. What grounds has he for this prediction? As a rule he does not carry on any detailed sociological investigations concerning the probability of the future implementation of the statute. He is not a "robust" predictivist but a "mild" one. His predictivism "is mild in two respects: the lawyer is not predicting some particular outcome, but a precept that is likely to prevail in the generality of cases, and the lawyer uses only preexisting law as the bases for his predictions" (Summers 1982, 118).

The main basis of the prediction that the statute will be applied, is thus the fact that it was published in the collection of valid statutes. The statute will be applied, since it is valid. How can one simultaneously say that it is valid because it will be applied?

4. The risk of a vicious circle explains also why Ross wrote about "a supraindividual, common ideology". The following quotation is crucial: "When the basis for the validity of the law is sought in the decisions of the courts, the chain of reasoning may appear to be working in a circle. For it may be adduced that the qualification of judge is not merely a factual quality but can only be assigned by reference to valid law, in particular to the rules of public law governing the organisation of courts and the appointment of judges. Before I can ascertain whether a certain rule of private law is valid law, therefore, I have to establish what is valid law in these other respects. And what is the criterion for this? The answer to this problem is, in principle, that one simultaneously verifies the legal system as a whole, as a meaningful complex of the rules of private and public law. One can understand the pattern of behaviour of persons who exercise force, as a result of an ideology that, at the same time, explains *that* they act as 'judges', and *why* they act as judges. There is no Archimedes's point for the verification, no part of the law which is verified before any other part" (Ross 1966, 49. Cf. Ross 1958, 36 where the reference to "ideology" is omitted).

The theory of valid law as a part of "supraindividual ideology" cannot be an empirical hypothesis fitting Ross's verificationist philosophy of science. It implies that many decisions will be *understandable*, if one explains them on the basis of the law *as a whole*. A sociologist influenced by Logical Empiricism and Hägerström has no means to verify what is and what is not "understandable as a whole". This holistic language, necessary for jurists, is far too vague for him (cf. Aarnio and Peczenik 1986 *passim*).

Ross failed to make legal dogmatics scientific in the assumed sense. His predictionism, devised for this purpose, is pointless.

5.5.5 Some Critical Remarks On Legal Realism

Olivecrona and Strömberg consistently accepted Hägerström's thesis that valid law merely was a product of imagination, but they paid a high price for it: one could not

scientifically study valid law. Ross, too, assumed this thesis and, consequently, proposed a new definition of valid law. This, however, made his theory open for both counter-examples and philosophical doubts.

The reason for all these troubles lies in Hägerström's view that value statements, including the lawyers' statements about valid law, are self-contradictory, unless regarded as pure expression of feelings. But I have claimed in sections 2.2–2.4 supra that value statements have both practical meaning, related to feelings etc., and theoretical meaning, related to good-making facts. It is difficult to understand why these two meaning components must contradict each other.

> *If* any contradiction exists there, it is not worse than many other contradictions, inherent in the commonsense picture of the world, indispensable for a normal life. We all assume, e. g., that our knowledge is true. Otherwise it would not be a knowledge. At the same time, however, we recognise that we can be wrong; what we think we know may be false. Generations of philosophers have tried to resolve this apparent contradiction, but few claimed that we have no knowledge at all. We all also assume that our will is free. I want x but I could have preferred non-x. Yet, at the same time, we recognise causal influence upon our will. This contradiction is by no means easier to avoid. Yet very few people conceive themselves as either entirely lacking free will, or as entirely free beings.

Legal Realism shows a sceptical attitude towards many concepts used in the everyday life. The ultimate basis for this form of scepticism is another concept, the concept of *reality*, composed of facts extant in time and space. From this concept, the Legal Realists derive their criticism of fundamental concepts of law. But what makes the concept of reality better than the legal concepts? There are many views of reality, each corresponding to a different ontological or metaphysical system. The validity of any metaphysics is relative. A metaphysics presupposes a background theory which defines the concept "real" (cf. Quine 1969, 53 ff.) and states what to regard as individual objects, their parts, their kinds etc. (cf. Goodman 1978, 7 ff.). There may be many metaphysical systems, "all such systems being wholly comprehensive and mutually incompatible, but all equally valid descriptions of one's reality" (Castaneda 1980, 19).

If one studies Legal Realism looking for advice how to define valid law, the result is fatal. Either one accepts a predictionist definition or one concludes that no definition is possible. The predictionist definition, apparently very precise, promises to create a high degree of fixity of the law. But the promise is an illusion. At the theoretical level, one is forced to use obscure terms such as "supraindividual common ideology". At the practical level, one must accept as valid law whatever the courts are likely to say. It may easily happen that judges, especially if regarding the law as something philosophically suspicious, would create a lesser degree of fixity than the traditional doctrine of the sources of the law would make possible. The second choice, not to define the valid law at all, would be obviously worthless for the purpose of creating fixity of law. It would, instead, create a gap between ordinary beliefs of the lawyers and legal philosophy. A lawyer, even if encouraged to use such concepts as "valid law" and "rights", would have no means to submit them to rational scrutiny. A legislator would be encouraged to regard his power as a mere tool for achieving any political goals whatever. All this is obviously incompatible

with the postulate of coherent and rational thinking about practical matters. Neither is it certain at all whether such a situation would promote fixity of the law. By chance or not, the Swedish law-givers usually change the law very rapidly, and did so especially often at the time of the greatest influence of the Realism.

5.5.6 The Three Worlds

To analyse the concept "valid law", I must make some more liberal assumptions concerning reality. I thus assume a certain interpretation of *Karl Popper's* ontology (cf. Popper 1972, 73 ff.). According to his theory, there exist three different "worlds".

1. World 1 is physical. It includes mountains, animals, cars etc., existing in time and space.
2. World 2 includes conscious experiences of people, e.g., a lawyer's thoughts of valid law. Such mental processes exist in time but do not have any spacial dimension in the literal sense of "spacial". One cannot tell how long or how wide a thought is. A mental process has, however, an indirect connection with space, since it exists in consciousness of a person extant in space.
3. World 3 consists of logical contents of thoughts, books, libraries, computer memories etc. It contains concepts, propositions, properties, sets, numbers, problems, solutions etc. They have no time dimension. Neither can one locate them in space. The number "five" is one and the same, everywhere and always. To deny world 3 would be both unproductive and strange. It would thus be difficult to abstain from using such expression as "there *is* an answer to this question", "there *exist* prime numbers greater that one million" and so on. It would be strange to deny that thoughts of different persons can be the same. John and Peter can have the same views of Charlie's book. It does not matter that John's mental experiences *must* differ from Peter's, since the former exist in John's consciousness, the latter in Peter's. Neither does it matter that John reads one copy of the book and Peter another. The book is one and the same, printed in many copies. A computer can automatically elaborate a table of logarithms; one can store it in a library where nobody reads it. Yet it has a content.

> Although Popper invented the terms "world 1", "world 2" and "world 3", the distinction of various levels of existence is old, known, e.g., to some medieval scholars. Among modern philosophers, one must mention Nicolai Hartmann. Not even Hägerström definitively denied existence of problems, concepts, etc.; cf. section 5.5.1 supra.

To avoid misunderstandings, one can distinguish between different senses of such words as "there is", "exists" etc. Physical objects $exist_1$, in physical sense. Mental experiences $exist_2$, in mental sense. Concepts, theories etc. $exist_3$, in ideal sense (cf. Peczenik 1984, 97 ff.).

In this context, one may inquire in which sense do institutional facts, such as chess, money and valid law (cf. section 5.3.3 supra) exist. An institution is a complex of interrelated components, such as people, their consciousness and their

products, some belonging to world 3, e.g., the content of the law. Some properties of the components are independent from the complex, e.g., height, weight, strength etc. of a human being. Other properties are *emergent*, that is, depending on the membership of the component in the complex. Such properties of a person as citizenship or profession are thinkable only in a society. I regard legal validity as an emergent property some norms have because of their membership in a complex system, in which the norms are related to some actions, values and other norms.

5.5.7 Components of Valid Law

I am going to develop the following theses.

Valid law is a complex (a "tuple") of interrelated components. Two kinds of components occupy a central position in this comples: 1) some norms; and 2) some actions (cf. Klami 1980, 12; cf. Peczenik 1984, 97 ff.).

There are also some secondary components, that is, la) legal values, justifying and explaining the norms; and 2a) mental processes, connected with the actions.

Of course, norms, values, actions and mental processes appear not only within valid law but also in other normative orders. In valid law, they have, however, special properties which will be described below.

The "formalist" legal theories emphasise the norms (cf., e.g., section 5.3.1 supra), the so-called "realist" ones emphasise action (cf., e.g., section 5.5.4 supra), but one must pay attention to both components.

These components jointly constitute the *socially established law*. This is an institutional fact, cf. section 5.3.3. supra. But the concept "valid law" is ambiguous and also designates something else, the *interpreted law* (cf. Peczenik 1984, 97 ff.).

The process of interpretation involves mental processes and actions connected in an intricate manner with the socially established law. Its result, the interpreted law, has a modified content, but its structure is the same as the socially established law: it is a complex of norms and actions, together with values and mental processes attached to these.

Since interpretation of law is permeated by moral evaluations, a theory emphasising the relation of legal validity to interpretation, expresses the *moral* view of valid law. The complete analysis of the concept "valid law" must also pay attention to this aspect (cf. section 5.4 supra).

This theory is an attempt to reorganise some results achieved in Polish legal theory, in which one traditionally distinguishes between three "planes" of the law: human behaviour, mental processes and norms (cf. Lande 1959, 913 ff., written 1953/54, and a hint at pp. 149 ff., written 1925). The fourth, axiological, plane is often added, and the planes are understood ontologically, epistemologically and/or methodologically. Cf. Lang, Wróblewski and Zawadzki 1979, 31; cf. Opalek and Wróblewski 1969, 983–995 and Wróblewski 1969, 996–1006. Ziembinski 1980, 76 has reduced the planes to two aspects: formal and real.

Similar views have been formulated in many traditions. Let me give some examples. Radbruch 1950, 123 (the theory first published in 1914) has claimed that "*Recht ist*

die Wirklichkeit, die den Sinn hat, dem Rechtswerte, der Rechtsidee zu dienen": the law is the part of reality whose meaning is to realise the idea or value of the law. Reale 1962, 343 ff. and Recaséns Siches 1959, 159 (cf. Laakso 1980, 291 and 299) interpret the law as composed of fact, value and norm. Hall 1947, 313 and 1973, 54–77 (cf. Laakso 1980, 303) has written about the totality composed of value, fact and idea (form). Sethna 1962, X (cf. Laakso 1980, 306 n. 122) has claimed that the law can be studied historically, philosophically, comparatively, analytically, sociologically and teleologically.

The whole complex is legally valid. Particular norms have also the property of legal validity. Legal validity of the norms is an "emergent" property, that is a property they have because of their membership in the complex.

Let P be a property of a certain component of a system, X. Then P is a resultant property if, and only if, P is a property that the component of X possesses independently from its membership in X. Otherwise P is an emergent property. Cf. Bunge 1977, 97 ff. and 1981, 26 ff. Cf. Oppenheim and Putnam 1958, 15.

Lang 1962, 25 ff. and 59 ff., claims that the law has a complex ontological structure "in a semantical sense": One cannot identify any of its "planes" (that is, behaviour, mental processes and norms, cf. supra) as legal without paying attention to other planes.

The property of legal validity is relative (normative, derivative) in the sense explained in section 5.1.3 supra. The expression "Norm N is legally valid" implies that N ought to be observed. To speak about valid norm, one must thus imagine *two* norms, the valid one and another, determining its validity. As regards *legal* validity, the validity-determining norm may have various character. It can be legal or not. If not, it is not a member of the complex called "valid law" but a member of another complex, such as morality, culture, ideology, language or (rational) discourse. Using a term invented by *Hector-Neri Castaneda*, one may call these additional the entourage of the law.

5.6 Norms as a Component of Valid Law

5.6.1 Introductory Remarks On Legal Norms

The first component of valid law consists of norms. One often distinguishes between a norm-expressive statement and a norm. A norm-expressive statement is a linguistic unit, expressing a norm.

A norm-expressive statement is a complex (a tuple) of the following components:

1. World 1 entities, existing$_1$: an inscription or an utterance in a physical sense, that is, printed characters, voice etc.
2. World 3 entities, existing$_3$: the normative meaning of this inscription or utterance; cf. section 2.2–2.4 supra.

While a norm-expressive statement is a linguistic unit, it is not easy to tell what a *norm* is. *Inter alia*, the following interpretations of the concept are reasonable.

1. A norm is the same as a norm-expressive statement, that is, an inscription or an utterance, having a normative meaning; see above about its mode of existence.
2. A norm is the same as the normative meaning content of an inscription or an utterance. The meaning is a world 3 entity, existing$_3$. One may make a distinction between two modes of such existence:
   a) A norm as a meaning content exists$_3$ (ideally) if at least one inscription or utterance exists$_1$ (physically) which has the normative meaning in question.
   b) A norm as a meaning content exists$_3$ (ideally) in the language, if this language has resources necessary to formulate it (cf. Castaneda 1975, 179 ff.). That is, an inscription or utterance *can* exist (physically) which would have the normative meaning in question.
3. A norm is the same as the normative meaning content of thoughts of an individual. The meaning is a world 3 entity, existing$_3$, if at least one individual experiences corresponding thoughts; these exist$_2$ (mentally).

This view about norms is particularly controversial, as the following argument amply shows: One can ask whether "an expression with which actually nobody's thoughts are being associated, can be said to constitute the reality of the norm. The question is to be answered in the affirmative… because in the case of associating thoughts with this expression these thoughts would be just of the particular (normative, directive) type" (Opalek 1970, 298).

4. A norm is the same as an inscription or an utterance, or a complex of inscriptions and utterances, *strongly* supporting a conclusion which possesses a normative meaning; cf. sections 2.7.5 and 3.2.4 on the concept "strong support". These inscriptions or utterances exist$_1$ (physically). The normative meaning they support exists$_3$ (ideally), that is, as a meaning content.
5. A norm is the same as a complex of human actions or dispositions to act, provided that the theoretical proposition, which states precisely that these actions or dispositions exist, *strongly* supports a conclusion which possesses a normative meaning. These actions are complex entities, including various components, among other things some physical behavior of certain individuals which exists$_1$ (physically). The normative meaning they support exists$_3$ (ideally), that is, as a meaning content.

Among dispositions of this kind, one may mention a disposition to argue that a given way of acting is prescribed, forbidden and so on; a disposition to act according to these prescriptions, permissions, prohibitions, etc.; and a disposition to criticise people violating them; etc.

6) A norm is the same as a combination of a norm-statement and such a complex of human actions or dispositions to act (cf. Sundby 1974, 17).

In this section and in sections 5.6.4–5.6.5 infra, I am going to discuss some classifications of *norms*, but one can say the same about norm-expressive statements.

Norms are either individual, regulating a particular case (e.g., Peter shall Pay John 100 kronor), or general, regulating a set of cases having a given property, e.g., "whoever kills another person should be sentenced to prison".

An individual norm is either conditional, formulating some conditions of its application, or categorical, that is, unconditional.

A general norm, grammatically categorical, can always be translated to a conditional one. One can thus reformulate the moral norm "One ought not to kill people", as follows: "If x is a human being and y another human being, then x ought not to kill y". Most general norms are also conditional in another sense, that is, they admit some exceptions. The last remark is, *inter alia*, applicable to almost all *legal* norms.

When considering *legal* norms, one must make a distinction between (1) a legal norm as the meaning of a certain legal (norm-expressive) statement, e.g. a statutory provision; and (2) a legal norm as a *complete* legal unit, as completely as possible stating (a) what is prescribed, prohibited, permitted etc., and (b) all conditions for the prescription, prohibition etc. One can construct a single complete norm by putting together several legal norm-expressive statements or their parts. Of course, the complete norm also contains (c) the conjunction "if… then" and the normative component, such as "should", "should not" or "may".

The provision "Whoever kills another person should be sentenced for *murder* to ten years in prison or to life imprisonment" (Ch. 3 Sec. 1 of Swedish Penal Code) thus does not express a complete norm in this sense. The complete norm is even more complex than "Whoever intentionally kills another person should be sentenced by the competent court for *murder* to ten years in prison or to life imprisonment, provided that he did not act in self-defence, under influence of insanity or under circumstances showing that the act is to be regarded as less grave" etc.

This is one of many possible views of a complete legal norm. The question is controversial. For instance, a complete legal norm is said to involve a pattern of behaviour or not, to involve a sanction (or even a complete chain of sanctions) or not; etc. Cf. Peczenik 1968b *passim*. See also Alchourrón and Bulygin 1971, 59.

5.6.2 Internal Validity of Legal Norms

Of course, not all norms are legal. Some other norms characterise morality, etiquette, fashion, various games, legal or illegal practices and organisations etc. The legal norms differ from other ones through their membership in the *legal system*. This relation between the concepts "legal norm" and "legal system" affects the theory of legal *validity*.

One must thus make a distinction between *internal* validity of particular norms and *external* validity of the system as a whole.

When stating that a certain norm is legally valid, one implies that it belongs to the valid legal system. This it may do because of its origin or content.

1. The doctrine of the sources of the law determines the relation between legal validity of particular norms of the socially established (*prima-facie*) law and their *origin*. This is a clear criterion of internal validity, highly fulfilling the demand of fixity of the law. The following points are important in this context.
   a. First of all, such a norm is legally valid, if it was created in the legally correct manner, stipulated by higher legal norms (cf. Kelsen's theory, section 5.3.1 supra). The legal system thus constitutes a "dynamic" hierarchy of norms. The constitution tells us, for instance, how to enact statutes, statutes tell us how to make judicial decisions and contracts, etc.
   b. However, this idea merely constitutes the main theory to be completed with auxiliary theories explaining some deviations. Though some procedural norms on the higher level are decisive for legal validity of a "lower" norm, others are not. Legal validity of a rule depends also on its agreement with a number of other, non-procedural, rules of higher standing which place certain demands on the content of the rule in question. The distinction between higher rules thus affecting and not affecting validity of the lower ones seems to depend on a complex network of criteria (cf. Merkl 1968, 195 ff., Kelsen 1960, 271 ff. and Paulson 1980, 172 ff.) These, however, are seldom complete, vary from one legal system to another, and one can always reinterpret them.
   c. Moreover, a norm can acquire or lose its validity because of circumstances about which the established higher norms are silent. One sometimes recognises validity of the so-called original laws (cf. Raz 1970, 60 ff. and 180)., enacted in an unconstitutional manner. This happened, e.g., with the Swedish Press Freedom Act of 1812. On the other hand, a rule created in a legally correct way can lose its validity by *desuetudo*, cf. section 1.2.7 supra.
   d. Finally, some norms, originating from precedents, legislative history, juristic literature etc., although not binding, are acceptable premises of legal reasoning and posses a kind of authority. Cf. section 6.2 infra about must-, should, and may-sources of the law.
2. As regards the *content*-oriented test of validity, what matters is the relation of the law to *morality*. Some norms, mainly principles, are thus legally valid if constituting conclusions of a set of premises including both correctly created legal norms and moral norms. This is obvious as regards the all-things-considered (interpreted) law, but it applies also to some *prima-facie* legal norms. In other words, needs a content-oriented test in order to establish their *prima-facie* legal validity (cf. Dworkin's theory, section 5.9 infra). Since the moral premises are not so fixed as the legal ones, one may doubt whether the content-oriented test of validity is acceptable. Yet, its advantages weigh more than the decreased fixity. Admitting contentually identifiable principles as a part of valid law, one greatly increases the set of premises supporting a legal conclusion. In this way, one increases coherence of legal reasoning.

Robert S. Summers (1985, 76 ff.) has made the distinction between the following types of validity-tests: (a) source-oriented (which I would rather call "origin-

oriented"), (b) content-oriented, (c) process-oriented, (d) acceptance-oriented and (e) effectiveness-oriented. As regards the "process-oriented" test, one may claim that valid law must possess some qualities, necessary to make the *process* of their application *morally* justifiable. "Thus… a statute may not be counted as law because not sufficiently intelligible to be administered in a law-like manner, or… because improperly retroactive" (Summers 1985, 76). Since insufficient intelligibility and retroactivity are properties of the *content* of the law, these examples of the "process-oriented" test of law seem to be a special case of the content-oriented test b.

One may also claim that legal validity in some cases requires that the putative law passes a test of actual acceptance and effectiveness. This is, however, a matter of social facts, not the content of norms. See section 5.7 infra.

5.6.3 External Validity of Legal System. Criteria Concerning the Content of Norms

On the other hand, one needs criteria of external validity when stating that the constitution is legally valid, the doctrine of the sources of the law should be followed, and the normative system as a whole is a socially established (*prima-facie*) valid law. In this section, I pay attention only to criteria concerning the *content* of the norms, not, e.g., their social results.

Valid law has usually the following content.

a. It constitutes a "dynamic" hierarchy of norms in which higher norms determine the proper method of creating lower norms (cf. section 5.3.1 supra).

The same circumstances that decide about internal validity of particular norms are thus relevant for external validity of the legal order as a totality. (A moral system has another structure. Validity of its norms depends solely on their content, not origin).

b. Valid law includes not only norms of conduct but also constitutive rules which enable us to speak about institutional facts, such as contracts, promises, marriage, citizenship etc. (cf. section 5.6.5 infra).
c. Valid law includes some norms claiming that the legal order possesses authority to regulate any type of behaviour (cf. Raz 1979, 116 ff.) and constitutes the supreme system of norms in the society (cf. Raz 1979, 118). Supremacy means that legal norm override all other norms, incompatible with the law.

Moral norms, too, claim overridingness, cf. section 2.5.2 supra about prescriptivity in Hare's sense. This is one of the reasons why the relation between the law and morality is difficult to describe.

Valid law includes also some norms claiming that the legal order has the sole right to authorise physical exercise of force in its territory (cf., e.g., Ross 1958, 34; Olivecrona 1971, 271). The *sole* right excludes illegal exercise of force. On the

other hand, the Mafia also claims the right to authorise force but has nothing against the law doing the same.

When emphasising the relation of legal validity to the origin and content of legal norms, we express the *formalist* view of law (in the broad sense of "formalist"). This does not mean, however, that a formalist definition of valid law is sufficient. Factual efficacy of the legal system is also essential for its validity.

5.6.4 Regulative Norms

As stated above, valid law includes not only norms of conduct but also constitutive rules which enable us to speak about institutional facts. Let me discuss this distinction in a more elaborated way, starting from the norms of conduct.

Norms of conduct are a species of *regulative* norms. A regulative norm qualifies (1) an action or (2) a state of affairs as prescribed, permitted or prohibited. As regards states of affairs, cf. Peczenik 1967, 129 ff.; 1968, 117 ff. and 1969, 46 ff. (1970, 27 ff., 9 ff. and 60 ff). Cf. Olivecrona 1971, 219 ff.

In the first case, it is a norm of conduct, e.g. "Whoever finds a thing should without unreasonable delay report it to the police" (Sec. 1 of the Swedish Lost Property Act). In the second case, it is a goal norm, stipulating the prescribed, permitted or prohibited state of affairs, not the action that causes it.

Some moral norms are thus goal norms, e.g. "Everybody ought to have a guarantee of a decent standard of living". Regulative *legal* norms are, however, almost always norms of conduct. One can thus regard the important provision "Social aid ought to guarantee everybody a decent standard of living" (Sec. 6 Par. 2 item 1 of the Swedish Social Service Act) as a part of the legal norm "The social welfare committee should grant aid, guaranteeing everybody a decent standard of living".

The conclusion that regulative legal norms are almost always norms of conduct follows from two premises, (1) the definition of a legal norm as a complete legal unit (see above) and (2) the fact that the law seldom formulates goals without stating precisely who should see to it that they are fulfilled. If one provision stipulates the goal and another decides who should fulfil it, the provisions jointly constitute a single legal norm; this is a norm of conduct, not a goal norm.

A norm of conduct can prescribe punishment or another sanction for a person who violates another norm. One can thus make a distinction between a sanctioned and a sanctioning norm. One may call the latter a sanction norm. The norm "One ought not to kill people" is thus sanctioned by the provision of Ch. 3 Sec. 1 of Swedish Penal Code, "Whoever kills another person should be sentenced for *murder* to ten years in prison or to life imprisonment". An additional sanction norm stipulates nearly always legal consequences of violating the first sanction norm. Ch. 20 Sec. 1 of Swedish Penal Code thus contains a sanction for abuse of public power, including an act of a judge violating the provision of Ch. 3 Sec. 1.

The chain of sanctions ends here. If the judge is not sentenced for the abuse of power, the same provision of Ch. 20 Sec. 1 provides the legal support for punishment

of the other one who neglected to sentence him, and so on *ad infinitum*. The chain of sanctions can also end in other manners. I have no space to discuss this problem.

5.6.5 Constitutive Norms

Constitutive norms (cf. Searle 1969, 50 ff.), on the other hand, enable us to speak about institutional facts, such as organisations, the state, valid law, duties, rights, money, calender, contracts, promises, marriage, citizenship, various games etc. A chess move, e.g., is precisely what chess rules make a chess move. A constitutive norm is thus a condition of existence of an institutional fact. It may be a necessary, a sufficient or a necessary and sufficient condition (cf. Conte 1981, 14 ff.). It may also be a weaker condition. For instance, it may be a component of an alternative set of conditions; if none of the alternatives is fulfilled, the institutional fact in question does not take place.

Social groups, knowledge, science, culture, literature, life styles, religions, churches etc. are also institutional facts in some sense. Science is thus a complex of some people (researchers), types of action (research) and propositions (results of research). Some norms decide that one must perform research in a certain way. Only if they are observed, the result of research is scientific.

Legal *qualification norms* are a special case of constitutive norms, giving some actions, persons, states of affairs, things, complexes etc. a certain legal quality. They make an action a theft, two people a married couple, a person a Swedish citizen, a thing a pawn, a complex of actions a trial etc. Such a quality is institutional. A Swedish citizen is the person the norms make a Swedish citizen. Without such norms, nobody would be a Swedish citizen. (Cf. Strömberg 1980, 80 ff.; Sundby 1974, 77 ff.; Eckhoff and Sundby 1976, 84 ff.).

In some cases, an institutional fact occurs if (1) a certain constitutive norm is valid and (2) a certain event takes place. For example, one is born as a Swedish citizen; cf. Sec. 1 of the Swedish Citizenship Act. In other cases, an institutional fact occurs if the following conditions are fulfilled: (1) a certain constitutive norm is valid and (2) a certain action is performed. An alien who reached the age of eighteen can thus receive Swedish citizenship; the case is to be decided by the National Immigration and Naturalisation Board; cf. Sec. 6 of the same statute. Such as action is a performative act. It can be physical, e.g. moving a chess pawn, or linguistic, e.g. to grant a person citizenship. In the latter case, one utters a performative statement (cf. Austin 1962, 1 ff. and Olivecrona 1971, 217 ff.). Performative acts thus create institutional facts.

Legal *competence* is an ability to bring about intended legal effects. The law thus gives the National Immigration and Naturalisation Board capacity to convert an alien to a Swedish citizen. Cf. Ross 1968, 130: “Competence is the legally established ability to create legal norms (or legal effects) through and in accordance with enunciations to this effect. Competence is a special case of power. Power exists when a person is able to bring about, through his acts, desired legal effects”.

The quality of being a Swedish citizen is institutional. The ability to create it is institutional, as well, not physical. A legal competence norm thus gives a person an ability to bring about an intended institutional quality. Such a norm is a qualification norm, or a part of it, expressed in a special manner. (However, Strömberg 1980, 86 ff. regards competence norms as a third kind of norms, besides norms of conduct and qualification).

Let me give an example. The norm "If the National Immigration and Naturalisation Board performs the action H, the alien A becomes a Swedish citizen" is a qualification norm. The norm "The Board can perform the action H and thus convert the alien A to a Swedish citizen" is, on the other hand, a competence norm. These norms differ from each other solely as regards their form. Their legal content is the same.

But the competence terminology is not applicable to qualification norms which make the institutional effect dependent on an event (instead of an action, see above). One is thus born as a Swedish citizen, without any legal competence involved in the process.

One must also remember that competence is a kind of a right (cf. sections 2.3.4 and 2.4.6 supra). Since a norm which creates a competence is a qualification norm, it is plausible to regard norms which create other rights as qualification norms, too, or at least as complexes of norms, each containing at least one qualification norm. Plausibility varies, however, depending on what kind of rights the norm in question creates.

A norm which creates A's liberty to do H is a kind of a norm of conduct rather than a qualification norm.

A norm which creates A's claim against B is a different matter. A claim-norm does not directly regulate a claim-holders conduct. Instead, it is related to another person's conduct. If a person, A, has a claim that another person, B, does H, then B has a duty to do H. The reverse implication is more complex. Sometimes a duty exists without a corresponding claim. But if a person, B, has a duty to do H, *and* a "claim-making" relation between B and another person, A, exists, then A has a *prima-facie* claim that B does H. I have mentioned two kinds of these relations, (1) the explicit or implicit content of the norm establishing both A's duty and B's claim; and (2) the fact that this norm is justifiable by B's claim. Nothing prevents regarding a claim-norm as a qualification norms, which qualifies A as a claim-holder.

Not only permissibility, claims and competences but also more complex entities, such as ownership, are called rights. These composed rights can be analysed as complexes of permissibility, claims and competences. One can certainly call such a complex right-norm a qualification norm.

The question whether a certain right-norm is a single norm or a complex of norm has a highly speculative flavour, and will be omitted here.

One can ask the question whether constitutive norms can be reduced ("translated") to norms of conduct. In this context, I will discuss two different attempts to make such a reduction.

1. One can regard constitutive norms as stipulative definitions and these as a kind of norms of conduct, thus stipulating that *one should assume* that a certain action

or event creates an institutional fact, e.g., converts a person to a Swedish citizen. But *what* should one actually assume? What does it mean that one is a Swedish citizen? Some advocates of the Uppsala school would say that it only means that others regard him as a Swedish citizen. Whoever talks about citizenship thus means that someone else thinks about citizenship. But in such a case, the other person thinks that a third one thinks that a fourth thinks… about what? At the end, one must either label the thoughts as "empty" (cf. section 5.5.2 supra) or state precisely the facts the last person in the chain thinks about. If one assumes that the thoughts are empty, one shows a radical scepticism concerning the ordinary language. If one assumes that they are not empty, one needs constitutive norms to characterise the phenomenon the thoughts concern. One wished to "reduce" constitutive norms to norms of conduct, yet they came back.

2. Let me now discuss another attempt at reducing constitutive norms to norms of conduct. What does it mean that A is an owner of a property? "Ownership" is an "intermediate" concept. Its meaning is related to two clusters of norms, the first determining conditions of becoming an owner, the second prescribing legal consequences of being an owner (cf. Ross 1958, 190 ff.). If A bought the property or if he inherited it or if he received it as a gift, then he owns the property. If he owns the property then he may use it and he can sell it and he can start a legal action against a person interfering with his use of it. Cannot one state the same through formulating a number of norms of conduct? One can, e.g., say what follows: If A bought this property or if he inherited it or if he received it as a gift, then he is permitted to use it and he can sell it and he can start a legal action against a person interfering with his use of it. One may hope to thus obtain a norm whose structure is "If conditions v_1–v_n are fulfilled, then x should (may, can etc.) do H". For that reason, *Ross* interpreted "ownership" as a mere tool of presentation, summarising "factual conditions" (to buy, to inherit, etc.) and normative consequences.

As regards norms of competence, here interpreted as a kind of qualification norms, Ross wrote the following: "Norms of competence are logically reducible to norms of conduct in this way: norms of competence make it obligatory to act according to the norms of conduct which have been created according to the procedure laid down in them" (Ross 1968, 118).

To be sure, Ross and other "reductionists" recognised the fact that even if one could translate the whole legal order to norms of conduct, in which no such words as "ownership" occurred, such a translation would exceed all bounds. Constitutive norms, introducing such concepts as "ownership", are thus useful tools of presentation, enabling one to formulate the law in a much more concise manner. Yet, they insisted that the translation is possible, albeit inconvenient (cf., e.g., Ziembinski 1970, 30).

A more important objection is, however, this. The translation makes it impossible for one to grasp the *point* of constitutive norms. The institutions they create, such as ownership, have a more extensive meaning, not reducible to the norms of conduct.

a. Ownership does not merely imply that the owner is permitted to use the property but also that he can sell it. This means that he is competent to see to it that the buyer becomes the owner of the property. Moreover, the buyer is competent to sell to another buyer and so on *ad infinitum*. Regardless of how long one continues the analysis, one cannot get rid of the concept of ownership.

Certainly, one can avoid this kind of infinite regress by means of a stipulative definition which disregards the consequences of ownership and identifies the concept with "factual conditions": The owner is then understood as the person who has bought, inherited etc. the thing. Yet, the situation is almost equally difficult, as regards the conditions of ownership. The person A became the owner of the property by buying it. To buy is to obtain the property from its former owner etc. To be sure, the legal order as a whole contains rules for cutting off this kind of regress. The first owner of the discussed chain has gained his position through occupation, acquisition in good faith, etc. (cf. Strömberg 1980, 112–113; cf. Wedberg 1951, 246 ff.). One can thus attempt to define "ownership" by recourse to the norms regulating the conditions of acquiring the original ownership. But again, occupation would not have created the first ownership, had the first owner known that somebody else owned the property; in this way the concept of ownership-by-occupation presupposes that nobody was the owner at the moment of occupation (cf. Eckhoff 1969, 63 ff.). Again, one cannot eliminate either ownership or the constitutive norms creating it.

b. Various ideas concerning ownership etc. are a part of a well established picture of the world, endorsed by many people. Such concepts as "owner", "citizen", "marriage" etc. are thus necessary not only when one describes the wording of the laws but also when one participates in a moral and political debate concerning the right interpretation of them. Among other things, the list of conditions and the list of consequences of ownership is vague and can be discussed in a reasonable manner. One can, e.g., claim that it is wrong to expose an owner of a real estate to a prolonged threat of expropriation combined with a building ban (cf. the famous case Sporrong and Lönnroth vs. Sweden, Publications of the European Court of Human Rights, Ser. A, Vol. 52). Such a discussion would be very difficult if the constitutive norms about ownership had disappeared.

Similar remarks apply to citizenship. The institutional quality of being a Swedish citizen, created by a constitutive norm, constitutes a condition for application of several other norms, both regulative and constitutive. For example, the provision "Only a Swedish citizen may be a judge…" (Ch. 11 Sec. 9 par. 3 of the Swedish Constitution, *Regeringsformen*) is a part of a qualification norm. Many other norms state precisely what a judge must, may or can do, cf. Ch. 4 Sec. 11 of the Constitution. Now, one can try to replace the institutional terms "Swedish citizen" and "judge" with a complicated description of conditions of becoming a Swedish citizen and a judge. Such a description must contain an information that the person

in question was born of Swedish parents or naturalised in Sweden. One must also say that the parents themselves were born of Swedish parents etc., perhaps back to the Viking period.

Many people, however, have a disposition to discuss the question whether an alien resident of Sweden should in some respects be placed on an equality with Swedish citizens. The debate is possible because they have well grounded views on the role of citizenship in various contexts, such as the right to vote in general elections, to execute the judicial power etc. But one would not grasp the point of the discussion if various intricate descriptions suddenly replaced the constitutive norms stipulating the sense of such words as "citizen".

One may say the same about many other examples of legal qualification. No cluster of norms of conduct is a complete translation of constitutive norms stipulating who is a Swedish citizen, a judge, a husband or a wife, an owner of a real estate and suchlike. A cluster of norms containing a constitutive norm is the same as a number of norms of conduct together with an irreducible and controversial rest. This rest decides that constitutive norms are not merely efficient means to concisely formulate norms of conduct, but a logically distinct category of norms, indispensable in a moral, political and legal debate.

To be sure, the institutional concepts, such as "citizenship" or "ownership", are related to value judgments and, *via* their practical meaning, to one's feelings. Yet, these value judgments also have a theoretical meaning; *see* sections 2.2–2.4 supra.

One may also follow the Uppsala school and search for the origin of such ideas as "ownership" in ancient magic, metaphysics of the *suum* etc. But the origin is one thing and the present situation another.

When participating in such a debate, one must weigh and balance various *principles*, cf. section 2.4 supra. Such institutional facts as valid law, marriage, citizenship or ownership are conditions of applicability of some (not all!) principles. The principles are, however, not directly applicable to intricate descriptions, at any price avoiding such words as "ownership", "marriage" etc. Institutional facts, constitutive norms (*inter alia*, legal qualification norms) and moral principles thus hang together.

The following example elucidates the connection:

a. A constitutive norm stipulates some conditions of becoming an owner.
b. To be an owner is an institutional fact.
c. A principle stipulates that ownership ought to be protected.
d. Weighing and balancing of this principle and some others, concerning such values as equality and freedom, justifies introduction and interpretation of several norms of conduct.

If one attempts at reducing constitutive norms to norms of conduct, one must thus either cut off the link between the law and moral debate or reformulate many moral principles in a new way, no longer connected with institutional facts. Such a reform program is gigantic and it is not clear what its purpose would be.

5.7 More About External Validity of Legal System. Action as a Component of Valid Law

In section 5.6.3 supra, I discussed some "formal criteria" of external validity of a system of socially established (*prima-facie*) law, that is criteria concerning the content of the norm. Some criteria concern, however, other things. Not only norms but also some actions are components of valid law.

The system of valid law thus possesses a high degree of effectiveness. Efficacy is a matter of correspondence between legal norms and actions.

An action in itself is a complex of interrelated components, such as a) behaviour and b) intention; one acts to fulfil a goal.

In connection with valid law, one must consider the following kinds of action, (1) intentional creation of norms, e.g. legislation; and (2) another social practice, supporting the conclusion that some norms are valid law.

All social norms have a connection with some action. The action creating *legal* norms is, however, nearly always particularly complex. One may emphasise this complexity when proposing a definition of valid law.

As regards an intentionally created norm, one may make a distinction between the actions which create a norm and those which give it efficacy.

a. Acts of norm-creation. These are intricate complexes, including actions of many human beings. An act of legislation is thus a complex of various actions performed, e.g., by some parliament members. These act on the basis of knowledge of other complex actions, performed by members of the legislation committee, the responsible minister, the institutions giving opinions about the draft etc.
b. Actions determining efficacy are even more complex. A normative system is valid law if the most important norms of conduct belonging to it are almost always observed, and if other norms of this system are by and large observed.

> Efficacy is most important when one discusses validity of the legal order as a whole, but one cannot disregard it even when determining validity of particular norms. Some efficacious norms are valid though not correctly created (cf. section 5.3.1 supra) while others, correctly enacted and not derogated are invalid because the courts do not apply them (cf. section 1.2.7 supra about *desuetudo*).

Efficacy means two things. First of all, if we consider a given territory we shall find that in this territory the majority of legal norms are observed by far more people and in a far greater number of situations than the norms of non-legal organisations. The legal system is "omnivorous"; it controls the society as a whole, in all of its aspects, at least indirectly (by sanctioning all societal norms); it creates a basic frame for everything that takes place in the society. Ordinary people must frequently apply legal norms to perform everyday actions like buying, selling, paying apartment rents, doing office work, applying for a bank credit, paying taxes, marrying, etc. (cf. Finnis 1980, 268 ff.).

Secondly, this type of efficacy of legal norms is supported by another one, that is by an effective, legally authorised force, exercised by means of complex actions of judges, prosecutors, police, execution officers etc. In brief, some people, possessing official positions, apply legal norms, *inter alia* sanction norms, to affect actions of others. The legal system thus governs the work of the paramount force-exercising organisation in a given territory (cf. Olivecrona, e.g., 1971, 271 ff.).

Efficacy is often, though not always, a result of acceptance (cf. Summers 1985, 76). In general, the law causes people to develop special attitudes toward it, *inter alia* to recognise its authority, legitimacy, binding force and so on (cf. Ross 1946, 89–90 and Olivecrona 1971, 70–71). Ultimately, efficacy presupposes coordinated conscious experiences of various individuals. In other words, there must exist an "supraindividual common ideology" in Ross's sense (cf. section 5.5.4 supra).

However, one cannot be certain whether efficacy is enough to make a distinction between valid law and other normative orders, *inter alia* governing practice of such illegal organisations as the Mafia or the international terrorist network. One needs perhaps some additional criteria. These have various character. The common denominator is a relatively *public* character of the law and a relatively high degree of its *institutionalisation* (cf. Ross 1958, 62). One may mention, e.g., open and public activity of the law-applying persons. Moreover, the boundary between states is thus openly delimited, legal norms are published, various public agencies carry signs indicating what they are, trials are public, members of the military and police force wear uniforms, and so on. The judiciary, the police etc. are engaged full-time in compelling people to observe the legal system. The law is taught in a systematical manner and frequently interpreted by professionals (the lawyers), using established, noticeably technical and advanced methods and doctrines; etc., etc. (cf. Peczenik 1968c, 260 ff).

When emphasising the relation of legal validity to efficacy, institutionalisation etc., we express the so-called *realist* view of law. This does not mean, however, that a "realist" definition of valid law is sufficient. The content of the system of legal norms is also essential for its validity; cf. section 5.6 supra.

5.8 Facts and Values in the Law

5.8.1 More About External Validity of Legal System: Law-Making Facts

In sections 5.6 and 5.7 supra, I have discussed components of valid law and their usual properties. At present, I will derive some general conclusions.

There exists an established list of criteria of external validity which determine the fact that a normative system as a whole is a system of socially established (*prima-facie*) valid law. In other words, a "value-free" analysis of the legal language, thus not affected by the feelings of the person who performs it, shows

that one may proffer some facts as meaningful reasons for the conclusion that a normative system is valid law. Allowing the word "fact" to refer to any possible combination of "simple" facts, regardless its complexity, one may thus claim that the following thesis is a plausible explications of an analytic relations:

(1.1) There exists at least one consistent description of a (law-making) fact, such that the following holds good: if this fact takes place, then the normative system S is *prima-facie* valid law.

Let now the symbols $F_1LAW(S)$–$F_nLAW(S)$ stand for all facts which are included in the complete list of established criteria of law. This list of law-making facts contains, *inter alia*, the fact that a legal system has a hierarchical structure, that is consists of various levels in *Kelsen's* sense, or of primary and secondary rules in *Hart's* sense. Moreover, it contains not only rules of conduct but also constitutive rules. It claims supremacy, completeness and monopoly of force. It must possess a certain degree of efficacy, etc.

Now, one may claim that the following theses are plausible explications of analytic relations between practical statements and, on the other hand, good- and ought-making facts:

(1.2) If at least one *established* law-making fact {($F_1LAW(S)$ or $F_2LAW(S)$ or, … or $F_nLAW(S)$} takes place, then the normative system S is *prima-facie* valid law, in the *weak* sense of "*prima-facie*"

and

(1.3 If at least one law-making fact {($F_1LAW(S)$ or $F_2LAW(S)$ or, … or $F_nLAW(S)$} takes place, then it is reasonable that the normative system S is *prima-facie* valid law, in the *strong* sense of "*prima-facie*".

The *weak* sense of *prima-facie* implies in this context that it is not linguistically strange to consider these facts as criteria of law. The *strong* sense of *prima-facie* implies more, that is, that the *culture* in question *compels* one to consider them within the act of weighing which determines what is the all-things-considered law.

The thesis 1.3 admits, *inter alia*, a reasonable interpretation implying that if F is a fact which the language does not make strange to consider in an act of weighing concerning the question whether S is, *all things considered*, valid law, then the hypothesis is reasonable that all normal people within the corresponding culture take for granted, at least implicitly, that F should be thus considered.

The following theses are also plausible explications of an analytic relations concerning the established list of the criteria of law:

(2.1) There exists at least one consistent description of a (law-making) fact, such that the following holds good: if this fact takes place, then it is reasonable that the normative system S is, all things considered, valid law

and

(2.2) If all the *established* law-making facts {$F_1LAW(S)$ and $F_2LAW(S)$ and, … and $F_nLAW(S)$} take place, then it is reasonable that the normative system S is, all things considered, valid law.

More precisely, one may state that the following facts, *inter alia*, constitute such criteria of law.

1. Some facts concern the content of the norms.
   F_1) A legal system consists of several levels; a certain norm is valid if it was created in accordance with a norm of a higher level.
   F_2) A legal system includes not only norms of conduct but also constitutive rules which enable us to speak about institutional facts, such as contracts, promises, marriage, citizenship etc.
   F_3) A legal system includes some norms claiming, what follows: the law is the supreme system of norms in the society; it has the sole right to authorise exercise of physical force in its territory; it has authority to regulate any type of behaviour.
2. Other facts concern various kinds of action.
   F_4) A legal system includes certain norms intentionally created by a complex of various actions jointly constituting the legislation process.
   F_5) A legal system is efficacious in the following sense. The most important norms of conduct belonging to it are always or nearly always observed in the practice of ordinary people, performing everyday actions like buying, paying taxes, marrying, etc.; other norms of conduct included in this system are by and large thus observed; most of them are at least not systematically violated.
   F_6) A legal system is also efficacious another sense. Some important norms of conduct belonging to it are always or nearly always observed in the practice of officials, thus applying them to affect actions of others. Some of the officials, e.g. judges, prosecutors, police, execution officers etc., participate in the exercise of a legally authorised force.
   F_7) The law is often published and applied openly; it is also frequently interpreted by professional lawyers, using established and noticeably advanced methods and doctrines.

5.8.2 Ought-Making Facts As Law-Making Facts

Moreover, it is plausible to assume that a system of valid law may not be too immoral, since it is morally better for a society to allow an individual to decide all cases according to his moral judgment than to establish a normative order that *too often* leads to morally wrong decisions. The extreme immorality of such "law" as some parts of Hitler's or Pol Pot's legislation makes it impossible for a lawyer to use the legal method in order to reduce injustice of legal practice. In a normal situation, a person who applies the socially established law may weigh and balance its literal content against other *prima-facie* moral reasons. But when a provision of the socially established "law" is extremely immoral, there is a gap in the interpreted, all-things-considered law (cf. section 5.4.6 supra). Weighing and balancing does not lead to any correct result at all, because no norm-statement is conceivable which