

THE CONCEPT “VALID LAW”

BY

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Yehudi is here,
The little man who isn't there,
The little man upon the stair.
He isn't here again today.
Oh, gee, I wish he'd go away . . .

1. TERMINOLOGY AND METHOD

The verse above, originally cited in a peculiarly mysterious work of science fiction, is apt for our purposes also. The concept "valid law" is used by lawyers. It has been labelled as a metaphysical illusion. Again, it is commonly used.

The term "valid law" is ambiguous. When a person says "the legal order is valid", he may mean that it is valuable and that, consequently, it ought to be accepted.¹ However, when a lawyer says "the legal order is valid", or when he says "this rule is valid law", he may mean something else, namely that the rule or the order of rules in question has a descriptive property called legal validity, and that this property can be discovered in an objective way, without any evaluations.² I will begin by discussing the second, descriptive meaning of the concept. The evaluative, normative problems will be discussed later, in sections 14 and 15.

At the outset, let us state two terminological conventions. First, valid law consists of rules, not of acts, behaviour, etc.³ Second,

¹ "Das Normsystem gilt, weil es wertend akzeptiert wird." See O. Weinberger, *Rechtslogik*, Vienna and New York 1970, p. 213.

² R. Schreiber, *Die Geltung von Rechtsnormen*, Berlin, Heidelberg and New York 1966, pp. 58 ff., has distinguished factual, ideal and constitutional validity. Constitutional and factual validity correspond to different factors in our descriptive idea of "valid law". The evaluative meaning of the concept corresponds to Schreiber's ideal validity.

³ By a rule I mean a normative proposition which says what ought to be done or not done, what is permitted, and so on. I. Hedenius, *Om rätt och moral*, Stockholm 1941, pp. 106 ff., suggests another terminology, i.e. that the term "a legal rule" should be used as a name of factual regularities in the behaviour of authorities, while what I call a rule should be called something else, e.g. a prescription. However, such a terminology would seem to contradict the established use of words in the ordinary language of lawyers.

the terms "valid law" and "law" both denote the same thing. What is characteristic of law is validity. To speak of "invalid law" is nonsense.⁴ The term "law" is a shortening of the term "valid law", exactly as the name Alexander Peczenik is a shortening of the name Alexander H. Peczenik. Accordingly, the title of the present paper could be "The Concept of Law", without the word "valid".

Let us start the discussion by recommending some method of analysing the concept "valid law" in a descriptive sense. The method comprises four operations. *Operation 1* consists in enumerating rules which the lawyers regard as legally valid, or at least in pointing out where the rules can be found. *Operation 2* consists in specifying all the properties that distinguish legally valid rules from invalid, non-legal ones. To list those properties is the same as to establish criteria of legal validity, or to elaborate a lexical, analytical, reportive definition of valid law, i.e. a definition reporting how the term "valid law" is actually used by lawyers.⁵ *Operation 3* and *Operation 4* consist in undertaking various refinements of the definition of valid law. The nature of these refinements will be discussed later.

2. OPERATION 1: ENUMERATION

The question "What rules are legally valid in a given country?" can be answered without any general definition of valid law. At law school and in his job, every competent lawyer has acquired a great deal of detailed information about this question. The

⁴ One can argue that if a legal rule was repealed, it is no longer valid. However, it is no longer legal, either. The history of law is a history of what *was* legal—and valid. Inconsistently, as it would seem, lawyers often speak about once-valid law and obsolete law. Those terms are, however, merely shortenings of "once-valid ex-law" and "obsolete ex-law". However, another terminology has been suggested by Professor Jan Hellner, who was so kind as to read a galley proof of the present paper. Namely, the term "law" can be understood widely as denoting also legislative projects and rules of private organizations, while the term "valid law" can be used in a more restricted way.

⁵ The definition presented below is founded on the common-sense knowledge about the use of words by lawyers. It could perhaps be refined by applying sociological methods, e.g. those discussed by A. Naess, *Interpretation and Preciseness*, Oslo 1953.

information is more bibliographical than theoretical.⁶ "First of all, one has to pay attention to various statutes, *travaux préparatoires*, previous judicial and administrative decisions in similar questions, and different kinds of customs. Legal writing is partially an auxiliary aid that helps one to become orientated in this material, and partially a source of knowledge of independent importance, (accumulated) by the analysis of difficult legal problems which the legal doctrine regards as one of its tasks."⁷

3. OPERATION 2: CRITERIA OF VALIDITY. REALISM

The problem of criteria is much more difficult. What properties are shared by all the legally valid rules and, at the same time, are absent in all the invalid ones?⁸ The question has been answered in different ways by different theories of valid law. Such theories fall into two groups, viz. realistic theories and formalistic theories. It seems that both groups have the same weakness, namely that they are one-sided, partly true and partly false. I will start the discussion with the realistic theories. I will then discuss the formalistic ones and, finally, I will try to unify both kinds of theories into a coherent whole.

Realistic theories start from the following observations. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."⁹ Or more exactly: "the doctrinal assertion that a certain rule is valid ... law is,

⁶ Cf. A. Wedberg, "Logical Analysis of Legal Science", *Theoria* 1951, p. 254. The theory is interesting to a lawyer only when it helps him to find out when the bibliographical information needs to be corrected. The very term "valid law" is seldom used by the legislators; but see the Swedish Penal Code ch. 2, sec. 2, para. 2 ("the law in force at the place of the crime"), and, e.g., *Proposition* (Government bill) 1971 no. 92 in which it is stated that "on the open sea no special statute is valid".

⁷ H. Eek, K. Grönfors, J. Hellner, H. Thornstedt and L. Vahlén, *Juridikens källmaterial*, 5th ed. Stockholm 1967, p. 11 (my translation). On the traditional connection between the definition of valid law and the doctrine of the sources of law, see S. Strömholm, "Till definitionen av begreppet 'rättsregel'", *Sv.J.T.* 1969, pp. 168 ff.

⁸ In such a formulation the question of criteria is to be answered after the question of enumeration. However, there also exists a kind of feed-back: once the criteria are clearly formulated, they can influence the future answers to the question of enumeration.

⁹ O. W. Holmes, "The Path of the Law", 10 *Harvard Law Review* (1897), p. 461.

according to its real content, a prediction that the rule will be applied in future legal decisions."¹

This kind of legal realism can be criticised as unnecessary in practical life and impossible in theory. What is needed in practical life is answers to individual questions like "Is this a valid rule?", or "Is this a court?". If we put aside very untypical exceptions involving a possible application of rules enacted in Rhodesia, Biafra, Bangladesh, Katanga, etc., we can freely assume that any lawyer can answer such questions. Any lawyer can point out a court; he never confuses it with some other organization, e.g. with the Mafia. The same lawyer can equally well point out directly the legally valid rules. He can do it without any theory, solely on a bibliographical basis. Among other things, he does not need the discussed, realistic definition of valid law. On the other hand, what is needed in theory are general statements. What is needed in theory is, first, a general criterion of valid law. The assertion "Valid law has been or is going to be applied by the courts" is general, indeed, but it assumes that we already know what the courts are. Moreover, if our theory were a real, i.e. a general theory, we should be able to formulate a general criterion distinguishing between law courts and "courts" that are organized privately, whether legally or not (arbitration, the Mafia). This is, however, difficult to do. It is difficult to describe the courts completely without mentioning that they act on the basis of valid legal rules. One is tempted to argue in a circle and say "Valid law is valid law because of its relation to the courts, and the courts are courts because of their relation to valid law".

The circle can be avoided, nevertheless. A given rule is legally valid if, and only if, it has been or is going to be applied by the courts. The courts are really courts, if they act according to valid rules of competence. The rules of competence are legally valid if they are connected with the complex of various factors including other legal rules, the courts and other state organs, legal doctrine, etc.² The following points, among others, must be taken into account when describing this complex relation. Most of the rules called legally valid³ are connected with a pe-

¹ A. Ross, *On Law and Justice*, London 1958, p. 44.

² Cf. *ibid.* pp. 34 ff.

³ "Most" does not mean "all". Cf. the remark of Wedberg, *op. cit.*, p. 257, that no reasonably exact definition of "legal system" can be formulated. Cf. also W. E. v. Eyben, "Gældende ret", in *Festskrift til Alf Ross*, Copenhagen 1969, p. 111, and, for a more detailed analysis of general problems

cular complex of interested and disinterested behaviour attitudes, especially with the belief in the authority of certain norms and the habit of obeying them.⁴ They are observed by the vast majority of people. They are addressed to an open class of people, not to a given person or persons called by a name. One can say something about the typical origin of the rules. Most of the valid legal rules are applied in a uniform way by authorities.⁵ Unlike morality, the law is an institutional phenomenon, not an individual one.⁶ Legal rules encourage or discourage a given human behaviour. They often say something like this: "If you wish to gain A, then do B" or "If you do not wish to be subjected to A, then do B."⁷ Legal rules and, in civilized countries, legal rules alone, discourage some behaviours by using such forms of punishment as imprisonment. Unlike the sanctions of morality, the sanction of law is institutionally organized.⁸ It is also of a different nature. With such possible exceptions as arbitration and *leges imperfectae*, one can say generally that the sanction of law lies in physical force, not in mere disapproval. In such a sense, the law is a "coercive order". Force is regarded as the content of legal rules.⁹ The law is connected with the state. According to the content of the modern legal orders, the state has the monopoly of force in a given territory.¹ The state can be defined as an organization of force, built for and dominating within a given territory.² Valid legal rules are quoted and interpreted by the judges who use the established doctrine of sources of law and the traditionally accepted technique of reasoning.³ The required connection between the valid legal rules and the state is formulated

connected with such a typological way of defining legal concepts, S. Jørgensen, "Typologi og Realisme", *Nordisk Gjenklang, Festskrift til C. J. Arnholm*, Oslo 1969.

⁴ See A. Ross, *Towards a Realistic Jurisprudence*, Copenhagen 1946, pp. 89-90.

⁵ Cf. the discussion of the sociological criteria of validity by Strömholm, *op. cit.*, p. 191. On the last point see also Hedenius, *op. cit.*, p. 89.

⁶ Cf. Ross, *On Law and Justice*, p. 62.

⁷ Cf. N. Bobbio, "The Promotion of Action in Modern State", *Reason, Law and Justice* (G. Hughes ed.), New York 1969, pp. 189 ff. However, this technique of encouraging and discouraging is not something peculiar to the law. Any private organization, e.g. an economic one, can use it as well.

⁸ See further Ross, *On Law and Justice*, p. 62.

⁹ This is a part of Kelsen's theory, developed further by N. Bobbio, "Law and Force", *The Monist*, vol. 49, no. 3, 1965, pp. 321 ff.

¹ See Ross, *On Law and Justice*, p. 34.

² K. Olivecrona, *Law as Fact*, Copenhagen and Oxford 1939, pp. 171 ff.

³ Cf. Strömholm, *op. cit.*, p. 194.

precisely by the legal *doctrine* and method.⁴ Legal *doctrine* and method can be further described, as well. Among other things, it can be stressed that legal method is a tool for securing the compromise between the principle of strict interpretation of law and the principle of justice.⁵

Using sociological methods, one can make the above description more and more complex and, finally, formulate a complete answer to the question "When is a given normative order as a whole legally valid?" Such a task is very difficult, however, because of the constant danger of confusing sociological and legal concepts. For example, the description above of valid law assumes that we also can describe the state. Let us assume that it can be done without arguing in a circle, i.e. without mentioning the legally valid rules which decide how the state ought to be organized. Even then, the state in question may or may not be recognized by other states. Let us assume that no other state has recognized it. In such a case, the state in question is no state at all from the point of view of international law, in spite of having all the sociological properties of a state. In this way the well-known circle reappears, only this time located abroad. Law is defined by a state, and a state is a state because of being recognized by law. To avoid this kind of difficulties, one must say clearly that the concept "state" used to define valid law in the sociological, realistic way, is itself a sociological concept, by no means identical with the legal concept of a state. Furthermore, one must say that the sociological definition of valid law is national, not international, in the sense that the validity of a given system of rules is independent from international law.⁶ Such an assumption, natural to a sociologist, is sometimes difficult for a lawyer to accept.⁷

⁴ This point has been used as a definition of valid law by K. Dyekjær-Hansen, "Gældende ret og juridisk metode", *Juristen* 1971, pp. 261 ff.

⁵ A. Peczenik, "Juristic Definition of Law", *Ethics. An International Journal of Social, Political and Legal Philosophy*, vol. 78, no. 4, July 1968, pp. 260 ff.

⁶ Cf. also T. Strömberg, *Inledning till den allmänna rättsläran*, 4th ed. Lund 1970, p. 39.

⁷ See further H. Kelsen, "Die Einheit von Völkerrecht und staatlichem Recht", in *Die Wiener rechtstheoretische Schule*, Frankfurt, Zürich and Salzburg-Munich 1968, pp. 2213 ff. Kelsen discussed the following problem. One can regard international law and a given legal system of a given country as two independent normative orders, or one can try to arrange them in a uniform system. If the second alternative has been chosen, then two possibilities must be discussed. First, international law can be considered as a supreme legal order that gives validity to all the national legal orders. Sec-

Even if all the difficulties were removed, even if the sociological definition of valid law were formulated, some uncertainty would still remain. For example, the very nature of international law may still be unclear, since it has some properties considered as typical of valid law and, at the same time, it lacks some others that are equally typical. Especially, it is applied by the courts but, on the other hand, it has no institutional provisions for sanctions by physical force.⁸ For that reason, many authors admit that the term "(valid) law" is imprecise on this point and that no objective ground exists for deciding whether international law is or is not a "truly" valid legal order.⁹

All the sociological descriptions of valid law, although very instructive, are nevertheless very seldom used to answer a question whether a given single rule is valid.¹ When answering this question, one relies upon the bibliographical knowledge discussed above. The assertion "Valid law has been or is going to be applied by the courts" can be useful even in the last case, not as a general theory but as a supplement to the bibliographical knowledge. For example, it can be used as a rhetorical argument that helps to label a given rule, no longer applied by the courts, as obsolete, i.e. no longer valid.

4. OPERATION 2: CRITERIA OF VALIDITY. FORMALISM

The realistic, sociological definition of valid law discussed above is not accepted by all lawyers. The formalistic definition, competing with it, can be formulated as follows: "Ordinarily a statute is said to be valid when it has been duly promulgated, and its validity continues as long as there is no supervening act of derogation."² In principle, this concept of valid law seems to be

ond, a given national law can be considered as a supreme legal order at a given territory. In such a case international law would inherit its validity at this territory from the national order in question. Kelsen thinks that both possibilities are equally justified.

⁸ Cf. the detailed discussion by T. Gihl, "The Legal Character and Sources of International Law", 1 *Sc.St.L.*, pp. 51 ff. (1957).

⁹ Cf. Ross, *On Law and Justice*, pp. 60 ff.

¹ The first question pertains to the validity in an absolute sense, the second to the validity in a relative sense, see K. Opalek, "The Problem of the Validity of Law", *Archivum Iuridicum Cracoviense*, vol. III, 1970, pp. 8 and 18.

² Máynez in *The 20th Century Legal Philosophy Series III* (1948), p. 461 (quoted after P. O. Ekelöf, "Uttrycket 'gällande rättsregel'. En studie i juridisk terminologi", in *Nordisk Gjenklang*, p. 116).

independent from the practice of courts. A "duly promulgated" statute can be neglected by the courts. According to the realistic definition it is not valid. According to a formalistic definition it is, in principle, valid. This means that the lawyers use two different concepts of valid law, a realistic one and a formalistic one.³

Let us discuss the formalistic definition of valid law in detail. The law is a union of primary and secondary rules. To quote Hart, "... while primary rules are concerned with the actions that individuals must or must not do, the secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined."⁴ A given rule is legally valid if it was created "duly", i.e. according to a higher, legally valid, secondary rule. The higher rule is valid itself, if created according to a still higher rule, and so on.⁵ Normally, legal rules inherit their legal validity from higher legal rules. Within the legal order, validity is justified legally, by the higher legal rules. But the highest legal rules, e.g. constitutional rules, cannot inherit their validity from a still higher legal rule, since by definition no such rules exist. Therefore, according to Kelsen's idea, they must inherit their validity from a peculiar extralegal rule, called a *Grundnorm*. A *Grundnorm* itself is not valid because it was not created in any institutionally prescribed way. It is only presupposed: "nicht selbst gesetzt, sondern nur vorausgesetzt: die Bedingung aller positiven Rechtsnormen".⁶ According to Kelsen, any *Grundnorm* can be presupposed, provided that one condition is satisfied, i.e. that a system of rules founded on it has

³ For that reason, various terminological distinctions have been suggested. Thus B. Ahlander, *Är juridiken en vetenskap?*, Uppsala 1950, p. 69, has distinguished "a statutory rule" (*lagregel*) and "a legal rule" (*rättsregel*). A rule is a statutory rule if some formal criteria are satisfied. The fact that it is applied by the court is without importance in this context. On the other hand, a legal rule must be, by definition, applied by the courts.

⁴ H. L. A. Hart, *The Concept of Law*, Oxford 1961, p. 92.

⁵ This *Stufenbau* of legal order has been discussed in detail by Kelsen. See also A. Merkl, "Justizirrtum und Rechtswahrheit", in *Die Wiener rechtstheoretische Schule*, pp. 195 ff., and my review of the book in *Rechtstheorie*, vol. 1, 1970, no. 2, pp. 207 ff. Apart from these formal requirements, certain lawyers mention some "material" ones; e.g. Professor J. Sundberg has pointed out in the discussion about the present problem that an unpublished statute is not a statute.

⁶ H. Kelsen, "Die philosophischen Grundlagen der Naturrechtslehre und Rechtspositivismus", in *Die Wiener rechtstheoretische Schule*, p. 338.

proved to be an efficacious order of force,⁷ i.e. provided that most of the rules of which the system consists are applied by a given organization of force.

The idea above has been criticized for many reasons. Kelsen himself pointed out many times that there are effective orders of force, not regarded as legally valid. That is why a *Grundnorm* must be chosen more or less freely. Moreover, the famous Rhodesian case *Madzimbamuto v. Lardner-Burke and others* "shows that although the Smith regime was 'totally effective' it was not lawful, but at the same time (a) that only some of its decrees were to be treated as 'laws'. On the other hand (b) the old (British colonial) order was 'totally ineffective', yet it possessed an important controlling influence."⁸ Without discussing the details of the case and without examining theoretical assumptions made by the author of this conclusion, I must say that the conclusion itself is scarcely surprising. For not only effectiveness of rules but also many other factors, discussed above, must be taken into account when deciding whether a normative order is legally valid or not.

Moreover, Kelsen has expressed his idea in peculiar terminology referring to a *Grundnorm*, i.e. to a general rule, higher than the constitution. However, the *Grundnorm* seems to be a fiction and, besides, some scholars regard it as superfluous. Hart, e.g., has argued as follows: "If a constitution specifying the various sources of law is a living reality in the sense that the courts and officials of the system actually identify the law in accordance with the criteria it provides, then the constitution is accepted and actually exists. It seems a needless reduplication to suggest that there is a further rule to the effect that the constitution (or those who 'laid it down') are to be obeyed."⁹ In this context Hart has introduced his famous rule of recognition. The rule of recognition is a customary legal rule, specifying the various sources of law and providing "the criteria by which the validity of other rules of the system is assessed". It differs from other, subordinate legal rules: "... whereas a subordinate rule of a system may be valid and in that sense 'exist' even if it is generally

⁷ H. Kelsen, "Die Selbstbestimmung des Rechts", *loc. cit.*, vol. 2, p. 1452. Consequently, from Kelsen's point of view "besteht zwischen dem Befehl eines Gerichts- oder Steuerorgans und dem Befehl eines Gangsters kein Unterschied. Die Grundnorm kann man, muß aber nicht voraussetzen."

⁸ R. W. M. Dias, "Legal Politics: Norms Behind the Grundnorm", *Cambridge Law Journal* 26 (2), November 1968, p. 253.

⁹ Hart, *op. cit.*, p. 246.

disregarded, the rule of recognition exists only as a complex, but normally concordant practice of courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact."¹ In Britain, where the greatest part of the constitution is customary law, one can possibly say that the rule of recognition is a part of the constitution. In many other countries it seems to consist rather in a legal custom to obey a given part of a written constitution. To put it briefly, a subordinate legal rule inherits its validity from a higher legal rule. The highest legal rule, called the rule of recognition, is legal by itself in the sense that it is applied by the courts and officials.²

5. LINGUISTIC RULES OF RECOGNITION

In my opinion, Hart's conception of the rule of recognition is valuable but incomplete. Like Kelsen and unlike Hart, I feel interested in the question "How are we to recognize the legal rule of recognition?" Kelsen's idea of valid law can be schematically expressed as the chain, "normal" legal rules—the constitution—*Grundnorm*. Hart's idea of valid law can be expressed as another chain, "normal" legal rules—the constitution or its part called the rule of recognition. Using a similar mode of presentation, my opinion about the concept "valid law" can be formulated as still another chain, "normal" legal rules—the constitution—linguistic rules of recognition—social facts.

Let us explain this point. It seems that there exists a linguistic custom of speaking about some rules as about legally valid ones. This custom, i.e. the use of words in a given way regarded as correct, can be described in detail. For example, the use of the word "valid law" by the lawyers can be described on the basis of everything they say or write, including the very texts of valid law, e.g. statutes. Such a description can be elaborated by a legal

¹ *Ibid.*, pp. 102, 107.

² This idea of the rule of recognition is attended by some analytical difficulties. See J. Raz, *The Concept of a Legal System*, Oxford 1970, pp. 198 ff., where, among other things, he remarks: "it is not clear on what Hart bases his view that there is only one rule of recognition in every legal system. Why not say that there are various rules of recognition, each addressed to a different kind of officials? Why not say that various rules of recognition prescribe the recognition of various types of law?" (p. 200).

scholar, by a philosopher studying the language of lawyers. Furthermore, whoever uses words contrary to this description runs a risk of being misunderstood by the lawyers. For that reason, our scholar would recommend that in future the words should be used in the way he described. This means that the scholar in question would formulate a linguistic rule that lays down how to use such words as "valid law" in a correct way. A linguistic rule of this kind can be called a linguistic rule of recognition. The content of the main linguistic rule of recognition, accepted instead of the *Grundnorm*, can be presented in two parts. Part I – a descriptive introduction: "The lawyers call a given normative order legally valid if it has some sociological properties, i.e. if some relations between rules and courts, between rules and force, between rules and the juristic method, etc., actually exist; (here must be repeated all that is said in section 3 above about the properties of a valid legal order). The lawyers call the highest rule of such a normative order a valid constitution. Finally, they call a given subordinate rule legally valid if it belongs to such a normative order, regarded as valid law. They say that the subordinate rule in question belongs to this normative order if the rule has some other properties, required by the constitution; (here a doctrine of the sources of law must be presented which agrees with the constitution)." Part II – normative: "You should call such a normative order and such rules, and only them, legally valid."³

Unlike Kelsen, I do not believe that when a lawyer wants to distinguish the legal order from another normative order of force (like the Mafia's "laws"), he must make an arbitrary choice.

³ At this point I must answer a possible logical criticism of the above definition of valid law, as based on linguistic rules of recognition. The criticism is subtle but inadequate. For that reason the next part of the present note can be omitted by readers not interested in analytical paradoxes. The suggested definition of valid law can be criticized as saying nothing but "valid is what is called valid". The definition "valid = called valid" can be further criticized because the term "valid" is here defined by a longer formula including the same term. This looks like a circle. However, the criticism is inadequate because I do not recommend using the formula "valid = called valid". Our definition looks rather like this: *Part 1. Introduction to Definition:* The common use of words by lawyers can be expressed in linguistic rules of recognition. Among other uses, linguistic rules of recognition describe and recommend the following use of the term "valid law". *Part 2. The Definition:* A rule is valid if, and only if, it has the following properties ... (here must be repeated everything about the criteria of establishing the connection of the rule in question with a valid legal order, and about the criteria of legal validity of the order as a whole, see sections 3-11).

The difference between valid law and Mafia orders, and the difference between the state and the Mafia as organizations, can be described sociologically, provided that the following reservations are kept in mind. First, a sociological concept of the state is different from a concept of the state as defined in international law. For example, in order to decide whether Katanga, Biafra, Rhodesia, Bangladesh, Taiwan, the GDR, etc., are or are not states, a sociologist must look for such phenomena as the degree to which the respective governments control their territories, etc., while an expert in international law looks first of all for a formal act of recognition of the states in question by other states. Second, a sociological description of a state and its legal order—*like most other sociological description*—can be effected by using a typological method. A sociologist would know what certainly is and what certainly is not a state and a legal order, but the borderline cases like Biafra would remain unclear. Third, the chief reason of disbelief in a possibility of describing a state and a legal order sociologically lies in the complexity and, above all, in the triviality of the description. The description must, e.g., contain an observation that the police force, unlike the Mafia, is uniformed, that on a police station you can read the words “Police Station”, while there are no openly announced “Mafia Stations”, that the border between USA and Canada is officially and openly delimited, while borders between spheres of influence of various gangs are not, etc. However, none of the above difficulties makes a sociological description of a typical state and law impossible or an arbitrary choice of a *Grundnorm* necessary.

Some further comments are required.

1. Linguistic rules of recognition are phenomena different from Hart's legal rule of recognition. First, by definition they are linguistic, not legal. Second, they have a different sanction. If you violate a legal rule, you can be punished or your legal act would be invalid. If you violate a moral rule, you can be blamed. If you violate a linguistic rule of recognition, i.e. if you *speak* about valid law contrary to the lawyers' use of words, you would be misunderstood, ignored or criticized. The following examples will help to explain this point. *First example.* In the reasons for a decision, a court made a mistake and declared that a given rule was valid in spite of the fact that the constitution and the accepted doctrine of the sources of law had qualified it as invalid. The sanction for the mistake would be legal. The decision would be overruled, provided that some additional conditions had been

satisfied. *Second example.* A professor of law declared that a given rule was valid in spite of the fact that the constitution and the accepted doctrine of the sources of law had qualified it as invalid. The sanction for the mistake would be linguistic. The professor's work would be misunderstood, ignored or criticized as incorrect. *Third example.* In the reasons for a decision, the court in question made the mistake here discussed but the decision was not overruled, and the legal sanction was not applied. In such a case, the lawyers can still apply the linguistic sanction, i.e. to misunderstand, ignore or criticize the strange part of the decision. In short, some ways of using the term "valid law" can violate both legal rules (e.g. Hart's rule of recognition) and a given linguistic rule of recognition. In such a case both legal and linguistic sanctions are possible. Another way of using the term "valid law" can violate a given linguistic rule of recognition, without violating any legal rule. In such a case only a linguistic sanction is possible.

2. Linguistic rules of recognition are not legal rules and cannot be called "legally valid". One can, however, call them "linguistically valid". This would simply mean that they are actually accepted by people as rules on how to speak correctly. It has nothing to do with such concepts as the state, force, the courts, etc., which are connected with legal validity. It seems that the difference should not be obscured by using the term "validity" in both cases. It is better to speak only about validity of law and to say, e.g., that linguistic rules of recognition are "accepted", not "valid" in some special, linguistic sense.

3. Linguistic rules of recognition are accepted by the majority of lawyers. As in the case of other linguistic rules, e.g. the rules of English grammar, the majority deciding what is a correct way of using words is difficult to define. It is a kind of "qualified majority", including some people regarded as experts.

4. When accepting linguistic rules of recognition, the lawyers merely approve of a linguistic convention about what should be called valid law. They are not forced to accept the legally valid rules from a moral point of view. They just call them valid, quite independently of whether they are good or bad.

6. FOUR KINDS OF LINGUISTIC RULES OF RECOGNITION. A COMPARISON WITH SCIENCE

As we have seen, the most important linguistic rules of recognition perform the same function as Kelsen's *Grundnorm*, i.e. decide which normative order is legally valid. They do it by pointing out which norms should be regarded as a legally valid constitution, i.e. as a group of the highest legally valid rules of the system. Once the constitution is known, the "lower" rules, belonging to the second level of the system, are qualified as legally valid on formal grounds, i.e. because they were created according to the constitution. Some other rules are qualified as legally valid because they have been created according to the above-mentioned second-degree legal rules, and so on, and so on, according to Kelsen's theory.

However, even in the case of the "lower", subordinate legal rules, the use of the formal criterion of proper creation must be corrected by some supplementary linguistic rules of recognition. Some of them answer the question when some new norms are to be regarded as legally valid in spite of not being duly promulgated, others answer the opposite question—the question when some properly created rules are obsolete, i.e. invalid, in spite of not being formally derogated. The last kind of linguistic rules of recognition answer some questions of interpretation.⁴

Four kinds of linguistic rules of recognition, mentioned above, are related to one another in different ways in different countries and periods. Their relations to one another determine the relations between traditional sources of law such as legislation, precedent and custom, and *travaux préparatoires*. For example, if linguistic rules of recognition admit a loose, possibly extensive construction of statutes, the courts become powerful and, whether officially recognized or not, precedents become as important as legislation. However, the description of valid law may be still more complex. During a long period, Swedish courts were strongly influenced by legislative projects which had never been enacted. Decisions made by such modern institutions as the Swedish Press Council (*Pressens opinionsnämnd*), although having no official legal validity, may also influence the practice of the courts. Decisions of this kind also exert a direct influence on people's behaviour; from that point of view they can be compared with

⁴ Cf. Ekelöf, "Uttrycket 'gällande rättsregel'" in *Nordisk Gjenklang*, p. 119. However, Ekelöf writes about rules of recognition in Hart's sense.

judicial decisions. Should they be totally disregarded in the discussion of valid law?^{4a} If not, I would suggest another kind of linguistic rules of recognition that would enable us to classify such decisions as legal in a wider meaning. Decisions of the kind referred to should constitute a separate subsystem of valid law, connected with but distinct from the legal system in Kelsen's style. This subsystem would have an "apex" of linguistic rules of recognition of its own. The connection between the two systems would be guaranteed, *inter alia*, by rules for statutory construction which take such "private" decisions and legislative projects into account.

The problem seems to be still more complex in common-law countries. For example, Professor Michael Dias, when discussing this paper, added to the above list of supplementary rules of recognition such factors as legal doctrines, standards and principles.

Finally, some short comments belonging to the comparative methodology of law. A legal system can be compared with a system of scientific propositions, e.g. with physics. In such a case, linguistic rules of recognition would correspond to rules of the scientific language, and legal rules would correspond to scientific laws. The following differences must be noticed, nevertheless. First, legal rules are normative propositions, while the laws of science are descriptive statements. Secondly, linguistic rules of recognition are more complex than rules of the scientific language. According to the rules of the scientific language, one must accept general laws of science if they are generalizations of observational statements about facts; further, one must accept deductive consequences of laws of science. The logic involved is deductive and inductive (resp. hypothetically–deductive). On the other hand, according to linguistic rules of recognition, one must accept the highest norms of a legal order if they satisfy a very complex network of sociological criteria; further, one must accept not only their deductive consequences but also their "dynamic" consequences in Kelsen's sense, and all this with exceptions concerning

^{4a} See a detailed discussion of different forms of "private" rule-making, by Professor Stig Strömholm, "'Public' Rule-Making, and 'Private': The Swedish Experience", 15 *Sc.St.L.* (1971), pp. 219 ff. Strömholm does not seem to be interested in the terminological problem whether such rules should be called valid law (or "legal rules actually in force"), see p. 223. Professor Jan Hellner who was so kind as to read a galley proof of the present paper is ready to go further and call all such rules "legal".

obsolete and original laws, with corrections according to accepted interpretatory directives, etc.

Not only the law itself but also its doctrinal study is more complex than the natural sciences, *inter alia*, because of its connection with rhetoric (Perelman). There is not room to discuss the relation between linguistic rules of recognition and the rules of language used in the doctrinal study of law.

7. THE SYNTHESIS OF REALISM AND FORMALISM

Although the idea of linguistic rules of recognition has been introduced above in connection with the formalistic definition of law, the most important rules of this kind appeal to the sociological, realistic criteria of validity. According to them, a given normative order as a whole is to be called legally valid if, and only if, many sociological, "realistic" requirements—discussed above in section 3—are satisfied. No formalistic criterion can replace those requirements.

On the other hand, the position is more complex in the case of discussion about the validity of a given single rule. Some examples seem to show that, even then, the realistic criterion is more important than the formalistic one. Sometimes a rule applied by the courts is recognized as valid in spite of the fact that it had not been duly created, i.e. created in agreement with a higher legal rule, statutory, customary or of any other kind.⁵ Another rule, duly created and not repealed, can be regarded as obsolete, i.e. invalid, because for a long time it has not been applied by the courts. However, the apparent supremacy of the realistic criterion is not confirmed by other examples. In many countries which were occupied by Germany during the second world war the courts were forced not to apply some local laws. For that reason the laws could not be regarded as valid in the light of the realistic criterion. Yet the doctrine was later elaborated that those laws were valid all the time, *inter alia* for the formal reason that they had never been duly repealed according to the constitution of the occupied country.

Another, more complex example is connected with the question

⁵ See further Raz, *op. cit.*, pp. 105 ff., 188, about so-called original laws.

which laws form a system of law of a given country,⁶ and which are merely foreign rules, invalid in the country in question. Sometimes a court is supposed to apply foreign law. Let us assume, e.g., a Swedish court which adjudicates a case concerning mutual personal duties of an American married couple. According to sec. 1 of the Swedish Act of June 1, 1912, on certain international legal relations concerning legal effects of marriage, the case should be decided in the light of American legal rules. The American legal rules in question seem, for this reason, to have some properties of Swedish valid law. They clearly satisfy the realistic criterion of validity, since they are applied by Swedish courts. Moreover, they can be called valid Swedish law even in accordance with a weak version of the formalistic criterion, since Swedish law did recognize them as binding for Swedish courts in some cases. In spite of all this, Swedish lawyers do not call such foreign rules Swedish valid law. Why? Maybe it is so because they use a stronger formalistic criterion, e.g. the following one. A rule belongs to Swedish valid law if it has been duly created according to higher Swedish laws or at least recognized *ex post facto* by those laws as valid; however, such a rule does not belong to Swedish valid law if it is of foreign origin and if, at the same time, it is to be applied to foreigners only. In the last case the rule in question is regarded as binding Swedish courts in some cases but is not called Swedish valid law.

When confronted with such examples, we must admit that the system of linguistic rules of recognition, accepted by the majority of lawyers, expresses a kind of compromise between the realistic and the formalistic criterion. If a given rule satisfies both criteria, i.e. if it was duly created *and* if it has been applied by the courts, then it should be called legally valid. If a given rule satisfies only one of those criteria, then it should or should not be called valid, according to very complex and not always clear supplementary linguistic rules of recognition, partly provided with legal sanctions by the doctrine of the sources of law, partly customarily accepted in the language of lawyers, and partly occurring, changing and disappearing every day during the long process of linguistic evolution.⁷

⁶ *Ibid.*, pp. 1 ff., 187-202.

⁷ Cf. Eyben, *op. cit.*, p. 111. About further possibilities of reconciling the formalistic and realistic view on legal validity, see A. G. Conte, *Primi argomenti per una critica del normativismo*, Pavia 1968, especially Part II, "Argomenti per una mediazione del decisionismo con il normativismo", pp. 57 ff.

8. LINGUISTIC RULES OF RECOGNITION IN DIFFERENT LEGAL PROFESSIONS

Linguistic rules of recognition are different in the language of judges, attorneys and legal scholars. The answer to the question "What is valid law?" depends on who asks the question.⁸ An attorney is primarily concerned with predicting judicial decisions. Accordingly, linguistic rules of recognition, formulated on grounds of his activity, would often appeal to the future practice of the courts. For example, he will often say that a rule is obsolete if no longer applied by courts, that the proper meaning of legal rules is established by the courts only, etc. Besides, an attorney has no time to apply sociological methods. Accordingly, his predictions are rather informal, based on common sense. Finally, an attorney has no time to ask questions concerning validity of the highest legal norm and validity of the legal order as a whole. At this point, he has an inclination to use bibliographical criteria, to accept the tradition that some texts are sources of law, especially when the tradition is followed by the judges. He has certainly no time to ask questions about the sociological description of the state, the difference between the courts and private organizations, and so on. A judge represents a similar attitude towards that kind of problems. On the other hand, on the questions of obsolescence and the problems of interpretation, his reasoning is more evaluative and less predictive than the attorney's. The partial answer, "Valid rules are applied by the courts", can satisfy an attorney but not a judge of the Supreme Court who wants to know which rules *ought to be* applied by the courts, i.e. ought to be applied, first of all, by himself. The definition, "A rule is valid if I apply it", is not very valuable.⁹ It is true that the judge can avoid the difficulty by quoting some version of the doctrine of *stare decisis*, etc., but then he leaves behind the predictive criterion of validity and uses rather the bibliographical one. A judge makes decisions, he does not predict them. But even he is sometimes involved in predictions, e.g. when he tries to find out

⁸ This chapter is influenced by F. Schmidt, "Construction of Statutes", 1 *Sc.St.L.*, pp. 157 ff. (1957). The idea that the answer to the question "What is valid law?" depends on who asks the question is expressed more clearly in the Swedish version of the paper: F. Schmidt, "Domaren som lagtolkare" (quoted from *Studiematerial i allmän rättslära*, Stockholm 1971, p. 104, first published 1955). See also Arnholm, "Fra rettens grunnproblemer", *T.f.R.* 1954, p. 134.

⁹ Cf. also Strömholm, *op. cit.*, p. 188.

whether his decision is going to be overruled. Finally, a *legal scholar* has more time for philosophical speculations and sociological research. On all the other points he can adopt both the attitude of a judge and that of an attorney.

By the way, it is quite possible that the language of lawyers can also be differentiated from another point of view, e.g. that different linguistic rules of recognition must be formulated for civil law, for penal law, etc., or for statutory law and legal customs, or for the internal law of a given state and for international law, etc. It is even possible that different linguistic rules of recognition are accepted by different political movements.¹

9. INTERPRETATION AND VALIDITY

The last kind of linguistic rules of recognition answers the question what interpretations of law are permitted in a given language of lawyers. A "permitted interpretation" of a given legal rule is an interpretation that agrees with the use of words in the language of lawyers. "Not permitted" means here "contrary to the well-established use of words in the language". Without this kind of linguistic rules of recognition, one could only say what normative texts, i.e. what statutes, are legally valid. With the help of the rules in question one can also establish the possible meaning of the normative text. Of course, such rules are especially complex. In order to establish the use of words in the language of lawyers, one must study statutes, precedents, *travaux préparatoires*, accepted principles of interpretation and statutory construction, etc. Besides, *linguistic* custom, the use of words, is influenced by *legal* custom, moral ideas, general principles of law, doctrine of the sources of law, evaluations of competing interests, and other extra-linguistic factors. Sometimes it is difficult to say when a discussion is linguistic and when it becomes moral. In any case, a lawyer often manages to answer the question what possible interpretations of law are "permitted" in the sense given above.

¹ Cf. an opinion that the interpretation of law and the legal order in general must be described from the pluralistic and dynamic point of view, admitting many continually changing alternatives. See F. Schmidt and A. Victorin, "Den svenska AP-fonden. En analys av normen för avgiftsuttaget", in *Nordisk Gjenklang*, p. 288. Cf. also Ekelöf's opinion, *op. cit.*, p. 121, that "any criterion (of validity) for the hard cases cannot be established at all".

But the language is not always precise, and many alternative interpretations are often equally "permitted". In such a case, if a judge wants to make a choice between the permitted interpretations, he has to do it quite arbitrarily or to rely upon some other rules—let us call them rules of decision. Rules of decision help to choose the best interpretation of the law.² They differ from the linguistic rules of recognition, *inter alia* from the point of view of sanction. If you speak about the law contrary to the linguistic rules of recognition, you are not understood, you are ignored, or at best you are dogmatically criticized from the point of view of absolute linguistic correctness. If you speak about the law contrary to the rules of decision, you are criticized from the evaluative, often rhetorical point of view.

There are many kinds of rules of decision. To this category belong some traditional rules of statutory interpretation, some rhetorical arguments, generally accepted moral principles, etc. What is common to all of them is that they are never conclusive, that they can contradict one another and that they can gain in strength when cumulated.³ They are vague, assume evaluations, have an open, not a bound nature.⁴ And, of course, some elements of interpretation of law are quite arbitrary, incapable of being expressed in general rules of any kind, even in the vague rules of decision.⁵

Sometimes it is easy to distinguish between linguistic rules of recognition, concerning interpretation, and rules of decision. For example, on the ground of linguistic rules of recognition a judge can say that a given criminal should be imprisoned for ten years or for life, and on the ground of rules of decision he can choose the proper punishment, e.g. ten years. On the other hand, in many cases it is extremely difficult to say whether a lawyer deals with the question which alternative interpretations are "permitted"

² Cf. F. Schmidt, "Construction of Statutes", pp. 158–61. Schmidt distinguishes two questions which a judge asks when he has to adjudicate a case. The first question is "What is the law?" and the second is "Where do I go for guidance?" To answer the first question means drawing a line between what is permissible and what is not permissible to the judge. To answer the second question is to make the choice between a number of permissible alternatives.

³ Cf. Ch. Perelman, "Self-Evidence and Proof", *Philosophy*, vol. 33, 1958, about this property of rhetorical arguments.

⁴ Terminology by F. Schmidt.

⁵ Here we have crossed a borderline between the construction of statutes according to some, even teleological, principles of interpretation, and the free decisions, not limited by anything.

or rather makes a choice between the "permitted" alternatives. In such cases the difference between linguistic rules of recognition and rules of decision becomes unclear. The concept "valid law" is not precise.

10. CUSTOM

The description above of valid law, although primarily orientated toward statutory law, can be adapted to legal custom as well. Moreover, it can elucidate some traditional controversies concerning custom. Let us consider, e.g., the old controversy between a judge-orientated lawyer and a people-orientated lawyer.

A *judge-orientated lawyer* is a rather modern phenomenon, although his predecessors can be found in the *Digests* I.3.34 (*Ulpianus*, on the office of Proconsul): "Where anyone is found to be confident as to the custom of a city or province, I am of opinion that a question which ought to be asked first of all is this: Has the custom ever been confirmed by a judicial sentence delivered after objections were heard?" Consequently, it is a judicial decision that creates a legal duty to follow a given custom, i.e. to do what people used to do up to now. That is a judicial (or administrative) decision that should be called "customary law". Before the decision was made, no customary law existed but only customs as such. The word "custom" is a name for certain actual regularities in human behaviour. Regular behaviour in itself does not create any duty. The duty is created by the decision of authorities that the custom should be followed.⁶

A *people-orientated lawyer*, too, can find arguments in the *Digests* I.3.32.1 (*Julianus*): "Indeed, inasmuch as statutes themselves are binding for no other reason than because they are accepted by

⁶ Such a position seems to be very popular in jurisprudence. "Today we recognize that the so-called custom is a custom of judicial decision, not a custom of popular action", R. Pound, "Common Law and Legislation", 21 *Harvard Law Review*, p. 406 (1908). Cf. also T. Strömberg, *op. cit.*, pp. 51 ff., and I. Agge, *Huvudpunkter av den allmänna rättsläran*, Stockholm 1969, pp. 57 ff. The term "legal custom", also used in this connection, can from this point of view refer to a custom which is recommended by courts as a pattern for further behaviour. Accordingly, one could say that the courts make a selection between various social customs. What they select is a legal custom. After making such a choice, the courts transform legal custom into customary law. This terminology, although clear, is, however, seldom used consistently. In English and American literature the term "legal custom" seems to be used as a synonym for "customary law".

the judgment of the people, so anything whatever which the people show their approval of, even where there is no written rule, ought properly to be equally binding on all; what difference does it make whether the people declare their will by their votes, or by positive acts and conduct?" The judge (or the official) in question does not believe in his freedom to make customary law. He has not believed that he himself creates a legal duty to follow some custom. He feels he is bound by legal custom already existing among the people before his decision. There is no reason to say that while a statute is valid before it has been applied by the court in particular cases, the custom can never be legal unless a court has declared its legal nature.⁷ Accordingly, customary law is the same as legal custom, i.e. some regularities in human behaviour, which constitute a binding, valid pattern for future behaviour. Such a pattern of behaviour is a kind of legal rule.

It seems that this controversy between a judge-orientated lawyer and a people-orientated lawyer is merely the result of an unfortunate misunderstanding. For the answer to the question who is right and who is wrong cannot be formulated in absolute terms. The answer depends on the content of a legal order and ultimately on the content of linguistic rules of recognition.⁸ Both the legal order and linguistic rules of recognition can be statute-orientated or judge-orientated, or people-orientated, or even jurisprudence-orientated, and so on. Let us quote some simple examples.

Example 1. Statute-Orientated Legal Order. In a given language of lawyers a given normative order is called legally valid. Linguistic rules of recognition can be formulated which say that it should be called so. The order contains a written constitution. The constitution says what procedure is required to create a valid statute. A given statute states precisely what conditions must be satisfied in order to make a given custom a part of customary law. Judges have a duty to declare that a custom is legally binding if those conditions are fulfilled. The conditions can be described in many ways. For example, the statute can say that a custom is legally binding if judges feel bound by it, i.e. if there exists so-called *opinio necessitatis*. Or the statute can say that a custom is a legally binding pattern of behaviour only if it has been quoted in special publications, e.g. "Trade Terms". The

⁷ Cf. Hart, *op. cit.*, p. 46.

⁸ This relativistic conclusion quite agrees with Kelsen's theory, see *Reine Rechtslehre*, Vienna 1960, pp. 232, 234.

statute can specify some additional criteria as well, e.g. it can say that in order to be legally binding a custom must be immemorial, continually followed, peaceably exercised, certain and reasonable. Another problem is that such criteria are, as a rule, so vague that they can simply conceal the judge's freedom to call legally valid, legally binding, any custom he wishes.⁹ Sometimes, however, the criteria are formulated more clearly. For example, instead of such terms as "immemorial" precise requirements can be stated, e.g. that the custom must be at least ten or 40 years old.¹

In such a statute-orientated legal order a statute-orientated legal language seems to be most natural. Accordingly, it is natural to say that a custom is legally binding if, and only if, it has all the properties required by the statutes. It is the statutes, not the courts, that make a custom legally binding, i.e. that transform it into customary law. Such a natural way of speaking would probably be recommended by linguistic rules of recognition. In a statute-orientated legal order, statute-orientated linguistic rules of recognition are to be expected. Consequently, it is rather natural to say in such a legal order that a judge applies a "ready" law and by no means creates new legal rules, even customary ones. Even in such a legal order, however, another terminology is also conceivable. For example, one can say that a judge and only a judge makes law and, consequently, that the judges, and only the judges, make the custom legally binding by the very act of declaring that it is legally binding.² The courts are under a duty to declare a given custom legally binding; their refusal to do it would be a violation of the law. But, all the same, it is the act of declaration which finally gives the custom legal validity. Such a terminology, although logically possible, is nevertheless impractical, since in the statute-orientated legal order the factual influence of the custom upon both the courts and the people is exactly the same before and after such a declaration of the court.

⁹ About the criteria in question cf. Sir C. K. Allen, *Law in the Making*, 6th ed. Oxford 1958, pp. 126 ff. Critical comment by Ross, *On Law and Justice*, p. 97. Incidentally, the criteria are normally formulated in legal doctrine rather than in statutes. Legal systems are seldom purely statute-orientated.

¹ See historical examples by H. F. Jolowicz, *Roman Foundations of Modern Law*, Oxford 1957, pp. 24-5.

² See further K. Olivecrona, *Rättsordningen*, Lund 1966, p. 140, on the connection of the problem discussed with general, "theoretical" dogmas, i.e., let us say, linguistic conventions concerning the use of some abstract jurisprudential terms.

Example 2. Custom-Orientated Legal Order. In a given language of lawyers a given normative order is called legally valid. Linguistic rules of recognition can be formulated which say that it should be called so. The normative order in question does not contain any written constitution. Instead, given customs exist which serve as a set of the highest legal rules of the system. One such custom answers the question who is entitled to enact statutes, another custom decides who is to be called a judge, still another determines the content of judicial decisions, and so on. Custom is generally followed and regarded by the judges as binding. In such a custom-orientated legal order a custom-orientated legal language seems to be the most natural. Accordingly, it is natural to say that a custom is legally binding by itself and a judge or an authority only discovers, describes and applies customary rules. Such a natural way of speaking would probably be recommended by linguistic rules of recognition. In a custom-orientated legal order, custom-orientated linguistic rules of recognition are to be expected. However, another terminology is also conceivable. For example, one can say that the judges, and only they, transform, by means of the court's declaration, the custom into valid customary law. This would further mean that, before such a declaration, the custom was only felt as binding but was not *legally* binding. Or, in other words, people believed that they ought to follow the custom but, in fact, they had no legal duty to do so. Such a terminology, although logically possible, is not practical, however, since in a custom-orientated legal order the factual influence of rules that are "merely believed to be binding" is exactly the same as the influence of rules that are "actually binding".

Example 3. Judge-Orientated Legal Order. In a given language of lawyers a given normative order is called legally valid. Linguistic rules of recognition can be formulated which say that it should be called so. The order contains a written constitution or a set of customary rules that serve as a constitution. In accordance with the constitution, the statutes are enacted. But the custom, the constitution and the statutes are, as a rule, unclear. Moreover, even a well-established custom concerning important legal problems is very often disregarded by judges. Nobody can foresee judicial decisions on the basis of custom and statutes only. In such a judge-orientated legal order a judge-orientated legal language seems to be the most natural. Accordingly, it is natural to say that a custom is legal if, and only if, a court has decided so.

Such a natural way of speaking would probably be recommended by linguistic rules of recognition. In a judge-orientated legal order, judge-orientated linguistic rules of recognition are to be expected. However, another terminology is also conceivable. Even in such a legal system one can say that any well-established custom that concerns matters regulated by the law is automatically legally binding, even before any judicial decision has been made. And with a suicidal consistency one can say that a judge is bound by such a custom even if he ignores it altogether. In this case one would say that the judge violates law. Such a conclusion would, however, be of little help to an attorney and his client.

Of course, the examples above are primitive. The picture becomes much more complex when we take into account the function of legal writing, cultural tradition, the problem of obsolescence of statutes, i.e. their *desuetudo* on the ground of the contrary custom, etc. But even the primitive examples are sufficient to formulate the following conclusions.

1. In a given legal order, it may be natural to say that the custom is valid law quite independently of statutes and the practice of the courts. In another legal order, it may be natural to say that the validity of the custom depends on judicial decisions, based on statutes or quite free.

2. In a given language of lawyers a set of linguistic rules of recognition can be established, deciding which of the above terminologies is linguistically proper. The sanction of violating such rules would be linguistic, i.e. the risk of being misunderstood by the lawyers.

3. Sometimes, such linguistic rules of recognition can be legally valid also. This means that a given terminology, already proper from the linguistic point of view, was additionally recommended by statutes or by other kinds of law. For example, so-called legal definitions and legal explanations can be formulated by the statutes.

4. Generally speaking, any assertion about what makes a custom legally binding must inevitably assume a given legal order and a given content of linguistic rules of recognition. It is an important conclusion because not only legal orders but also linguistic rules of recognition are different in different states, periods, branches of law, etc.³

³ The linguistic rules of recognition, expressing the use of words by lawyers, can change quickly and radically. Otherwise, how could one explain that almost the same judicial activity was commonly called "application of

It may be that all the conclusions above can be formulated even without our definition of valid law as based on linguistic rules of recognition. However, this definition makes the conclusions easier both to discover and to formulate. The reason is that by assuming the linguistic rules of recognition we have said clearly that the very concept "valid law", and all the other juristic concepts connected with it, must be related to a given language. The language continually changes in time and space. The analysis of "valid law" can be quite different in different versions of a legal terminology and in different possible versions of the juristic language. Analytical conclusions that seem quite natural in judge-orientated language can be very strange in custom-orientated language, and so on. In such a way our conception of valid law protects us from any kind of philosophical dogmatism. But, of course, modern legal systems are very seldom custom-orientated. For that reason all the discussion about customary law seems to be a little out of date.

11. PRECEDENT, TRAVAUX PRÉPARATOIRES

The same kind of discussion can be repeated in the case of precedent and *travaux préparatoires*. As there is not room for such discussion, I will confine myself to one problem concerning *travaux préparatoires*, i.e. official explanations of what is meant by the statute. Such explanations can be understood in three ways. First, one can say that a judge is quite free to pay or not to pay attention to them. Second, one can say that the language of lawyers includes some linguistic rules of recognition that ask the judges to pay attention to *travaux préparatoires*. By violating such linguistic rules of recognition a judge would understand the statute in a way contrary to what is accepted as proper in the language of lawyers. Finally, one can repeat all this and in addition say that judges have a duty to understand the statutes properly, i.e. according to linguistic rules of recognition which ask judges to pay attention to *travaux préparatoires*. This being the case, *travaux préparatoires* would be a kind of secondary "source of law".

law by the courts" in England in 1850 and quite generally called "law-making" in American realistic jurisprudence in 1930? But cf. also Olivecrona, *ibid.* See also further fluctuations of terminology, discussed by Jolowicz, *op. cit.*, pp. 21-35.

The point is again the same, i.e. that the answer to the question "What is valid law?" can never be absolute and must depend on the content of a legal order as well as on changing legal language.⁴

12. OPERATION 3. HOW TO MAKE THE DEFINITION OF VALIDITY SHORT

A critic of our conception of valid law might say that the criteria of validity, discussed above, are extremely complex. Must the definition of valid law be so long, complex and inelegant? It seems that the only way to achieve elegance is to ignore some of the lawyers' intuitions about what is important for the concept "valid law".⁵ A *reportive* definition of valid law can be extensionally reportive or intensionally reportive. An intensionally reportive definition must quote everything that the lawyers regard as essential for the meaning of the term "valid law". The definition—or description—quoted above is intensionally reportive. Consequently, it is long, intricate, imprecise, but very realistic. On the other hand, an extensionally reportive definition of "valid law" quotes only some selected properties, common to all the rules that are usually called legally valid. It is not important whether those properties are commonly regarded as the most relevant or not. What is important is that all the rules regarded as legally valid, and only such rules, have those properties. I do not know how short and elegant a perfect extensionally reportive definition of "valid law" can be. However, some definitions can be quoted that are *almost* extensionally reportive, since they cover

⁴ According to some authors, *travaux préparatoires* have the discussed character of "secondary sources of law", see F. Schmidt, "Construction of Statutes", pp. 165 ff.; see further S. Strömholm, "Legislative Material and Construction of Statutes. Notes on the Continental Approach", 10 *Sc.St.L.* (1966), pp. 175 ff. Other scholars try to justify this opinion by a general "realistic" assumption that *travaux préparatoires* are sources of law because they influence the factual process of decision-making, not because they ought to influence it normatively. Cf., e.g., Agge, *op. cit.*, p. 45. However, the last assumption is open to criticism. There are very many things, indeed, which in fact influence the decision-making, e.g. prejudice in favour of political friends, and even the physical condition of the judge in question, his family relations, etc. Are all of those factors "secondary sources of law"?

⁵ Cf. L. Petrażycki, *Wstęp do nauki prawa i moralności* (An Introduction to the Science of Law and Morals), Warsaw 1959 (a translation from the Russian edition of 1908), pp. 25 ff., 72 ff.

the great majority of rules called legally valid. Such definitions can be very short indeed. For example, the following definition has been formulated: "Valid and legal norms are those norms to which the juristic method is continually applied."⁶ This definition seems to point out nearly the same rules which are normally called valid. It is almost as well adapted to the normal answer of the Question of Enumeration as the intensionally reportive definition is. At the same time, it does not mention such factors as the state, force, the institutional nature of law, human attitudes, etc. It is for that reason that it can be so short.

At this point, the following principle of jurisprudential relativity can be formulated. There is only one proper intensionally reportive definition of "valid law". There are many almost equivalent, extensionally reportive or nearly reportive definitions of "valid law". For example, valid law can be defined as protected by organized force dominating a given territory, as a normative order applied in the courts, as a normative order that is valid in view of a given doctrine of sources of law, etc. There is only one objective criterion of choice between different extensionally reportive or nearly reportive definitions of valid law, namely the answer to the question, "What definition is useful for some theoretical or practical purposes?" To criticize an extensionally reportive definition of valid law from another point of view, e.g. to reject it as artificial, not reporting what the lawyers think is most essential for validity, etc., is like criticizing a fish because it cannot fly.⁷

The view above on how to define "valid law" can be called *moderately relativist*, as opposed to the absolutist attitude ("there

⁶ Peczenik, "Juristic Definition of Law", *Ethics*, vol. 78, no. 4, July 1968, p. 260.

⁷ S. Jørgensen, *Ret og Samfund*, Copenhagen 1970, at the end of the chapter "Retsbegrebet" (The Concept of Law), has formulated the conclusions that no single concept of law can be useful for all scientific purposes. Law is at the same time a system of rules, prophecies of what the authorities will do, imperatives directed to the authorities and to the citizens, and so on, and so on. The law is all these things at the same time. All the definitions of law "are in fact a selection of a single relation which, by an inadequate generalizing is used as a formulation of what the law as a whole consists in". No such definition is universally useful, i.e. useful for all the legal professions. I agree with most of the above observations except that the simple definitions of law are an unjustified (*uberettiget*) generalizing. If one clearly says that such a definition is only extensionally, not intensionally, reportive, if one says that it can be only 99%, not 100% reportive even from the extensional point of view, if one says that any such definition has a limited sphere of application, then one can use the definition without any philosophical or scientific risk.

is only one proper way to define valid law"), to the radically relativistic credo ("you can define valid law as you will, since the concept is conventional"), and to the sceptical view that the term "valid law" is a nonsense.

13. OPERATION 4. HOW TO MAKE THE DEFINITION OF VALIDITY DIFFERENT

There may be circumstances where a given theoretical or practical task, like building a legal theory, improving the legal language, writing clearer statutes, and so on, would be accomplished in the most efficient way by using a definition of "valid law" that is not even extensionally reportive. Such a *stipulative* definition of "valid law" may be similar to what the lawyers call valid law but may also be quite different. For example, according to Leon Petrażycki, any rule should be called legal (he did not use the term "valid"), if it is emotionally accepted by a human being and, at the same time, if it expresses both a duty and a right. Accordingly, Petrażycki wrote about gangsters' law, children's law, etc., without paying any attention to the language of lawyers. I do not see any reason why such stipulative definitions should be forbidden. However, they must be clearly distinguished from the two kinds of reportive definitions discussed above.

14. "BINDING FORCE" OF LAW

Up to now, we have been concerned with descriptive problems, e.g. how to find out which rules are legally valid, how to define what is common to such rules and how to make the definition short, elegant and scientifically useful. The term "valid" has been understood as referring to some descriptive properties. We have said, e.g., that a valid legal order consists of rules which are applied by the courts, or in some way connected with force, with some human attitudes, etc. What we have *not* said was that valid law is good, valuable, that it ought to be applied by the courts, etc. Our criteria of validity have been kept apart from any assumptions about values. However, not all lawyers,

not to speak of philosophers, would approve of such a way of going about the analysis of "valid law". They would argue that what has been done consists solely in discussing the questions "When is a rule valid?" or "What *criteria*, what symptoms show that it is valid?", instead of asking another question: "What does the very term 'valid law' *mean*?" They would argue that the criteria are nothing else than tools that help us to find out what is valid, and do not reveal the very idea of validity which is said to be evaluative, normative, not descriptive. According to such a view, to say that a legal order is valid means the same as to say "The legal order is valuable", or "The legal order ought to be obeyed", or at least "The legal order has a binding force that compels people to do what is asked", and so on.

To this we can answer that the term "valid law" is ambiguous. It has a descriptive meaning, discussed above,⁸ or a normative meaning. We have finished the discussion about the first. Let us say something about the second, starting from the idea that valid law has a "binding force".

The "binding force" of valid law is often considered to be something different from all the facts connected with legal order. The "binding force" is said to be different from the practice of courts, from using force against people violating the law, and from all the other facts including the very belief in "binding force". Such a "binding force of law" cannot be found in reality.⁹ The belief in "binding force" can be explained by the obvious connection of a legal order with such concepts as "obligation", "duty", "the Ought", etc. However, the connection lies in the fact that legal rules *say* what ought to be, not in the fiction that they bind people in some extra-linguistic way. The assertion "A legal order has binding force" can simply mean "A legal order *says* what ought to be done". The reasons why that simple fact is often hidden behind vague words are partly historical, i.e. the fact that many legal concepts "have their roots in traditional ideas of mystical forces and bonds",¹ and partly sociological, i.e. a peculiar depersonalization of common views on legal order. That process of depersonalization can be explained as follows. People feel compelled to observe the law. Such a situation, connected with the normative content of the legal order and with the fear of sanc-

⁸ The discussed criteria seem to express everything that is interesting in the descriptive meaning of "valid law", cf. Ekelöf, *op. cit.*, p. 112.

⁹ Cf. Olivecrona, *Law as Fact*, pp. 16 ff.

¹ See further Olivecrona, *Rättsordningen*, pp. 128 ff.

tions, can exist even if nobody—literally nobody, including members of parliament, ministers, judges, policemen, and other officials—accepted the rules in question. For a member of parliament may vote for the rule in question because he is afraid of a colleague, who is afraid of another colleague, who is afraid of the first one. And judges, policemen, etc., in their turn can be afraid of somebody, until the circle is closed. This kind of vision is of course limited to very totalitarian states. However, even in a democracy, only very naïve scholars would say that every one who participates in legislation and application of law does only what he likes best. Even in a democracy, particular persons are orientated towards the others, and so on. The balance is much subtler, the psychological motivations are scarcely limited to fear of sanctions, the process of depersonalization is less extreme, but it still exists. That is why people speak of a "binding force". If you cannot find human beings whose free will is expressed in legal rules, if at the same time everybody feels compelled to follow the rules, surely it is easy to make a transcendental binding force responsible. But in fact, no such force exists. What exists is merely the text of legal rules which say what ought to be done. People read the words and imagine that something or somebody stands behind them. People regard the texts as imperatives, in spite of the fact that no "imperator" can be found. In such a way legal rules function as "independent imperatives" in Olivecrona's sense.

15. JUSTIFICATION OF POSITIVE LAW BY NATURAL LAW AND HUMAN RIGHTS

After avoiding the blind alley leading to "binding force", let us concentrate our attention on such frankly normative questions as "Why ought we to obey law?" or "Why is a given legal order valuable?" To answer these questions is the same as to *justify* a legal order.

Such a justification can be done in many ways. One can ask, e.g., what higher values make a given legal order valuable, i.e. "valid" in a normative sense. Such higher values can be looked for in the authority of a legislator, in the sovereignty of a people, etc.² One can also ask what higher norms logically entail the

² Cf. further Weinberger, *op. cit.*, p. 213.

principle "You ought to obey valid law". More liberally, one can ask what higher norms remain in such a connection with the principle "You ought to obey valid law" that the principle must be accepted as just, right or reasonable, if those higher norms are accepted as just, right or reasonable.³ One can also use certain rhetorical arguments, to be discussed later.

In any case, higher norms that justify the principle "You ought to obey valid law" cannot be legally valid themselves, since this would be a logical circle. They belong rather to the realm of morals, Natural Law and Human Rights.⁴ This remark leads us to one of the classical problems of legal philosophy. Does a Natural Law exist? Is it possible to discover an order of rules, expressing human nature as such? Can Natural Law, or Human Rights, be described in a way accepted by the majority of human beings? Does Natural Law justify validity of positive law, i.e. statutes, legal custom, precedents, etc.? Without discussing all these controversial questions, I think that the analysis of "Natural Law" and "Human Rights" should follow the same pattern as the analysis of "valid (positive) law". We must start from the linguistic fact that people call something Natural Law and Human Rights. We must try to describe this linguistic fact, starting from the question of enumeration and the question of criteria. We must try to find linguistic rules of recognition for Natural Law and Human Rights.

1. *Question of Enumeration.* Wide international agreement has been achieved about what is and what is not a Human Right. The General Assembly of the UN adopted the Universal Declaration of Human Rights (1948). Later (1950) the Convention for the Protection of Human Rights and Fundamental Freedoms was signed by the members of the Council of Europe. The international agreement is a product of a long tradition of similar national documents, beginning with Magna Carta, the Declara-

³ On the nature of the connection see A. Peczenik, "Principles of Law. The Search for Legal Theory", *Rechtstheorie*, 1971, vol. 1, especially pp. 28 ff.

⁴ Kelsen's alternative, cf., e.g., "Vom Geltungsgrund des Rechts", in *Die Wiener rechtstheoretische Schule*, pp. 1417 ff., i.e. to justify the said principles by *Grundnorm* does not seem to be acceptable, see my review of the book, *op. cit.*, pp. 206-13, especially p. 209. According to Kelsen's view, the only limit for a free choice of *Grundnorm* is efficacy of the legal order depending on it. But efficacy is not a single, supreme value, justifying the law, cf. A. Verdross, "Die systematische Verknüpfung von Recht und Moral", in *Die Wiener rechtstheoretische Schule*, pp. 518 ff., Verdross, "Die Erneuerung der materialen Rechtsphilosophie", *loc. cit.*, pp. 738 ff., and Verdross, *Statisches und dynamisches Naturrecht*, Freiburg 1971, pp. 58, 94.

ral Law if it expresses common wants and desires of Man or if it enforces some basic interests of humanity, etc. It can be said that everybody desires to preserve his life, to avoid harm, to be free, be able to rely upon the help of others. Correspondingly, the following rules can be formulated. Everybody *ought to* respect the life and freedom of others, to help others and to forbear from injuring people. Such rules can be regarded as basic principles of Primary Natural Law (and Social Morality). Principles are not logical consequences of wants, desires and interests. The connection between them is of another nature. Principles, or rather acts of obeying them, are means for accomplishing the purpose to satisfy wants, desires and interests.

The list of basic principles of Primary Natural Law can be long or short. In extreme versions of "minimum content" of Natural Law only one principle seems to be necessary, viz. "People should help the society to survive".⁸ In any case, on the grounds of such principles there can be elaborated the Secondary Natural Law that asks people to do what in a given social situation is best for accomplishing the tasks stated in those principles.⁹ Secondary Natural Law continually adapts to changing social facts. In the prenuclear era the primary natural task of securing the "good neighbour" relation between nations could sometimes be accomplished through a just war. Consequently, Secondary Natural Law had admitted *bellum iustum*. In the nuclear era nothing good can be caused by war. Consequently, the doctrine of *bellum iustum* has been rejected.¹ In such a way a detailed order of Natural Law or Human Rights can be elaborated, an order that can change, adapt to any prevailing requirements and, at the same time, always protect the same basic wants, interests and desires of mankind.

Before discussing the connection between Natural Law, Human Rights and the concept "valid (positive) law", let us formulate some additional comments.

1. In the analysis of positive law the question of enumeration is primary and the question of criteria secondary. Any lawyer can say which rules belong and which do not belong to a given

⁸ See further Hart, *op. cit.*, pp. 189 ff.

⁹ Verdross, *Statisches und dynamisches Naturrecht*, pp. 97 ff., founded such a construction of Primary and Secondary Natural Law on Victor Kraft's social morality. For more about "die Wertung und Begründung des Norminhalts auf der Basis des Zweckhintergrunds der Normanwendung", see Weinberger, *op. cit.*, pp. 222 ff.

¹ See Verdross, *op. cit.*, p. 111.

order of positive, valid law. The general criteria of legal validity must be chosen in such a way that their application leads to calling valid the same, or nearly the same, rules that have been called so in the ordinary language of lawyers. Nearly the same can be said about Human Rights. People can more easily agree what list of Human Rights is to be accepted than what general criteria decide the contents of the list.² On the other hand, in the analysis of Natural Law the question of criteria can be primary and the question of enumeration secondary. It is not true that any lawyer can decide what is and what is not a part of Natural Law. Different lawyers would quote different examples. At the same time, any lawyer (and not only a lawyer) would approve of some general criteria, e.g. he would accept the idea that it is natural to protect human life, liberty, etc.

2. At the moment, the doctrine of Natural Law is extremely controversial. Whether the situation will change depends on sociology. Everybody would accept the rules of Natural Law if sociology demonstrated that obeying them was the best way to protect human life and liberty.

3. This leads us to the most important point in all the discussion about Natural Law. The doctrine of natural law is very often connected with various metaphysical assumptions, e.g. with the idea of objective values. The assumptions help to justify Natural Law in a more rigorous way. I do not believe in any assumptions of this kind. However, let us try to explain the point. Let us imagine a philosopher who believes that not only things but also values exist in some way objectively, independently of human feelings. He believes, further, that human life, liberty etc., are valuable in such an objective sense. For him, the value of human life is something more than the fact that people want to live. He believes, finally, that principles, rules and norms can be firmly justified by such objective values. For such a philosopher, the rules of Natural Law assume a "deeper" philosophical justification. However, another person can approve of many Natural Law rules even without such metaphysical assumptions.³

² This was the position even before the Declaration of Human Rights had been formally enacted, cf. J. Maritain, *L'Homme et L'État*, Paris 1965, pp. 67 ff.

³ Very often the philosophers and jurisprudential writers believe the opposite, cf. Opalek, *op. cit.*, p. 9. This is true of some versions of Natural Law. Other versions are, however, very clearly antimetaphysical. See, e.g., I. Jenkins, *From Natural to Legal to Human Rights*, A report to the Plenary Meeting of AMINTAPHIL, 1970, who has written that the modern doctrine

He can simply confess that he has been rhetorically persuaded. He can say that when he sees that Natural Law protects his life, he feels somehow good about Natural Law. Even then one is free to write about Natural Law, e.g. to try to find out which rules must be obeyed in order to protect human life. Indeed, such a study can even be done quite hypothetically, without one's being persuaded at all. Such a weak version of Natural Law can be not only non-metaphysical but even value-free. What is normative, evaluative, non-descriptive, etc., in a sociological hypothesis that by obeying the rule "Thou shalt not kill" people increase their chance to survive? What is evaluative in an additional hypothesis that the chance of survival further increases if the rule is slightly corrected by some common exceptions concerning, e.g., killing in self-defence?

4. The decision whether to accept the terminology of Natural Law, Human Rights, etc., depends rather on practical considerations. Different languages can be used in different circumstances. "For example, the human rights framework clearly is oriented to the ideal of a responsible human individual . . . An opportunity framework would share this concern, though focusing more on the condition of possible activity. A needs framework is oriented more to the conditions of need-satisfaction that are required in the modern world."⁴

Now we are able to formulate conclusions about the relation between Natural Law and Human Rights, on the one hand, and positive valid law, on the other.

1. One can describe and define positive valid law without saying anything about Natural Law and Human Rights. One can also describe and define Human Rights and Natural Law without quoting positive valid law.

2. Positive valid law can be justified by Natural Law or by Human Rights. Traditionally, such a justification assumes, first, that Natural Law and Human Rights are regarded as something valuable and, secondly, that positive valid law becomes valuable by virtue of its connection with Natural Law and Human Rights, e.g. by virtue of the fact that it protects Human Rights and agrees with the principles of Natural Law.

3. However, the justification can be also weaker and more rea-

of human rights "marks a return to that of Natural Rights but without the metaphysic foundations of the latter".

⁴ A. Edel, *Some Reflections on the Concept of Human Rights*. A report to the Plenary Meeting of AMINTAPHIL, 1970.

listic. Without assuming anything about objective values, one can try to prove first, that Natural Law and Human Rights help to satisfy some common desires, interests and wants, and, secondly, that positive valid law agrees with Natural Law and protects Human Rights. All that is said here is purely descriptive. However, this descriptive statement can influence the audience in favour of positive valid law.⁵ Let us call it a rhetorical justification of positive valid law by Natural Law and Human Rights.⁶

4. Neither kind of justification is necessary for a lawyer, who can identify and apply positive valid law in any case. The traditional justification is interesting for some philosophers; the rhetorical justification can also be interesting for a politician. The interest is, however, rather weak, because Natural Law is controversial.

5. If such a justification is accomplished, then one can try to change the language of lawyers by some stipulative definitions. For example, it may be interesting to make a distinction between positive law in general, justified or not justified by Natural Law, and a "reasonable and moral" positive law, justified in such a way.⁷

6. The main weakness of such a justification is not its connection with metaphysical assumptions, since the connection can be replaced by rhetoric, but the difficulty of proving that any system of Natural Law is really necessary for the survival of society, human freedom, etc., or at least helps to protect freedom and increases the chance of survival. The difficulty is of a sociological, not a philosophical nature.

Finally, what are we to call our position in the question of justification of valid law by Natural Law, Human Rights, etc.? I think that it should be called (let us use the same name once again) moderately relativist. Unlike ethical absolutists, we do not believe that Natural Law expresses certain objective values. Unlike radical relativists, we do not reject *all* kinds of studies about Natural Law as metaphysical nonsense.

⁵ Such a justification would be rejected by Kelsen but accepted by Verdross. This shows that different authors understand the word "to justify" in different ways. I cannot find any objective criterion for deciding which interpretation of the word is better.

⁶ Rhetoric is understood here in Perelman's sense, see, e.g., Ch. Perelman and L. Olbrechts-Tyteca, *The New Rhetoric. A Treatise on Argumentation*, Notre Dame—London 1969.

⁷ A. Verdross, "Zur Klärung des Rechtsbegriffes", in *Die Wiener rechtstheoretische Schule*, pp. 509 ff.

16. IS "VALID LAW" A CONVENTIONAL CONCEPT?

At the end of our discussion we must try to defend the concept "valid law" against a very serious kind of criticism. Let us start with some quotations:

1. "If no human beings were of the opinion that the legal rules in question are legal rules, no ground would exist for the assertion that they are legal rules. It is people's attitude (a social convention) that decides which rules are legal rules. Even if everybody was of the opinion that the Earth is flat, it would be round, but if everybody was agreed that rent laws are 'obsolete', they would become obsolete and would cease to be 'valid'."⁸

2. "Matters stand differently in the case of validity from what they do in the case of pattern of behaviour. The latter consists of a genuine notion with its full clarity. Let us discuss, e.g., the following prescription of traffic law: 'A person riding a cycle shall keep both feet on the pedals and at least one hand on the handle-bars.' It is easy to evoke in one's consciousness the picture of a cycling person. On the other hand, when one thinks about legal validity, the only thought that exists in the consciousness as the meaning of the word is that the word means something, but one has no idea about this something."⁹

Let us comment on both the above quotations.

1. Not only the concept "valid law" but also many other concepts of the social sciences are of a conventional nature. If no human being believed that the Swedish words "en hund" mean a dog, the words would not mean a dog. If no Italian believed himself to be an Italian, the Italians would disappear as a nation.

2. Not only the concept "valid law" but also many other concepts of social sciences are theoretical constructs that neither denote nor are psychologically connected with pictures of physical things. For example, such basic concepts of sociology as "an attitude", "an organization", etc., can scarcely be thought about as referring to a thing or a visual picture of a thing.

Can the term "valid law" be compared with such theoretical terms, used in science? If so, it should be connected in some way with the empirical reality described in observational terms, i.e. with human behaviours, with the products of human activity,

⁸ T. Strömberg, *op. cit.*, p. 48 (my translation). See also *ibid.*, pp. 37-38.

⁹ *Ibid.*, p. 49.

and with psychological processes (if the last phenomena can be described empirically). The connection can be very complex and it is by no means required that the term "valid law" itself should denote anything that can be heard, seen, etc. Without discussing this problem, I wish to express the belief that the concept "valid law" has many marks of a meaningful, theoretical concept of science.¹ What really matters is the fact that a general method may be elaborated for pointing out which rules are legally valid and which are not,² and that this method is capable of being described in empirically meaningful terms, e.g. according to the following pattern: if you discover some facts F_1-F_n , then a rule is legally valid, while if you discover other facts G_1-G_m , then the rule in question is not legally valid. There are many facts that must be taken into account and they are complexly related. This difficulty is, however, not serious enough to expel the concept "valid law" from the language of lawyers. It is true that even the best terminology cannot liberate a lawyer from the necessity of making decisions. "The mechanical aspects of a legal system are meaningless without purpose."³ But also, conversely, "the purposes or ends of law are impotent without form, order, rule, mechanisms"⁴ and, let us add, without a conceptual apparatus, including even theoretical concepts like "valid law".

¹ See further A. Peczenik, "Empirical Foundation of Legal Dogmatics", *Logique et Analyse* 45, 1969, pp. 32-64. A very interesting study has been written in Polish: L. Nowak, "Pojęcie obowiązywania prawa jako teoretyczne pojęcie prawoznawstwa", *Studia Metodologiczne* 3, pp. 45-65.

² This seems to be one of the main points of the quoted paper by Wedberg.

³ T. Cowan, "A Postulate Set for Experimental Jurisprudence", *Philosophy of Science* 1951, no. 1, p. 15.

⁴ *Ibid.*