



DOI: <https://doi.org/10.15688/lc.jvolsu.2018.1.27>

UDC 340.132

LBC 67.0

CRITICAL SUBSTANTIVE VALIDITY TESTING OF LEGAL NORMS. ON PRESENTATION OF STARTING POINTS AND METHOD TOOLS ¹ (Part I)

Elisabeth Eneroth

Malmö University, Malmö, Sweden

Abstract. The purpose of this article is presentation of starting points and method tools for critical substantive validity testing of legal norms. The research problem in question is partly in what way the substantive validity of legal norms are determined, assessed and tested, partly the possible connection between the substantive validity of a norm and its efficiency in application in the legal practices in concrete cases. This is dealt with by presentation of starting points and method tools for critical substantive validity testing of legal norms. They are the result of independent, explorative research on my part. They have a general design. They are intended for use by a legal scholar within legal science. This is one way of performing a critical-practical-legal philosophy within legal science and by a legal scholar. They create the preconditions for and open the door for future research and provide the basis for deepened discussions in legal science. This article is divided into two parts. The purpose of the first part of this article is presentation of legal starting points for critical substantive validity testing of legal norms. The first part is titled “Critical substantive validity testing of legal norms. On presentation of starting points and method tools (I)”. The purpose of the second part of this article is presentation of legal scientific starting points and method tools for critical substantive validity testing of legal norms. The second part is titled “Critical substantive validity testing of legal norms. On presentation of starting points and method tools (II)”.

Key words: legal criteria of validity, legal validity, formal validity, substantive validity, critical-practical-legal philosophy, legal starting points.

УДК 340.132

ББК 67.0

КРИТИЧЕСКАЯ ПРОВЕРКА СУЩНОСТНОЙ ДЕЙСТВИТЕЛЬНОСТИ ПРАВОВЫХ НОРМ. ПРЕДСТАВЛЕНИЕ ИСХОДНЫХ ПОЛОЖЕНИЙ И МЕТОДОВ ¹ (Часть I)

Элизабет Энерот

Университет Мальмё, г. Мальмё, Швеция

Аннотация. Целью данной статьи является представление исходных положений и методики для критической проверки сущностной действительности правовых норм. Исследовательская проблема, о которой идет речь, отчасти зависит от того, каким образом определяется, оценивается и проверяется сущностная действительность правовых норм, отчасти – от возможной связи между сущностной действительностью

нормы и эффективностью ее применения в конкретных случаях. Речь идет о представлении исходных положений и методики для критической проверки сущностной действительности правовых норм, которые являются результатом авторских независимых исследований. Они объединены общим предназначением: использование правоведами в рамках юриспруденции, что, в свою очередь, является одним из способов использования критико-практико-правовой философии в юриспруденции ученым-юристом. Указанные исходные положения и методика создают предпосылки и открывают двери для будущих исследований и служат основой для углубленных дискуссий. Эта статья разделена на две части. Целью первой части этой статьи является представление исходных правовых положений для критической проверки сущностной действительности правовых норм. Первая часть называется «Критическая проверка сущностной действительности правовых норм. Представление исходных положений и методов (I)». Цель второй части этой статьи – представить научно-правовые исходные положения и методику для критической проверки наличия сущностной действительности правовых норм. Вторая часть называется «Критическая проверка сущностной действительности правовых норм. Представление исходных положений и методов (II)».

Ключевые слова: правовые критерии действительности, правовая действительность нормы, формальная действительность, сущностная действительность, критико-практико-правовая философия, правовые исходные положения.

1. Introduction

1.1. Point of Departure

The purpose of this article is presentation of starting points and method tools for *critical substantive validity testing of legal norms* within a certain legal order with point of departure in my earlier research on legal validity and young persons at homes for care or residence (or institutions)². This article is divided into two parts. The purpose of the first part is presentation of legal starting points for critical substantive validity testing of legal norms within a certain legal order. The purpose of the second part is presentation of legal scientific starting points and method tools for critical substantive validity testing of legal norms within a certain legal order. In the following, the first part of this article follows.

Point of departure is my elaboration of a legal analytical tool for critical substantive validity testing of legal norms within a certain legal order³. It provides a procedure for performance of an internal criticism of the law. The tool consists of five steps: 1) The choice of a legal norm 2) The analysis of the structure of the argument 3) The validity indicator 4) Linguistic rationality 5) The prospect of factual acceptance. It is intended for use (primarily) by a legal scholar in legal philosophy. The legal analytical tool won support in application on the example of homes for care or residence [2, p. 22, pp. 131-160, p. 162].

The legal analytical tool is a conversion of Kaarlo Tuori's critical legal positivism and his conception of legal validity as presented in his main work *Critical Legal Positivism* (2002) into practical use in legal philosophy based on a late modern legal science

approach⁴. This includes deviations from and developments of his legal theoretical framework – which is based on a certain view of modern law as an historical type of law and its legal constructions – on my part. Some other sources were used as supplements to the main work, primarily Jürgen Habermas's writings on his method rational reconstruction and Henrik Zahle's writings on practical-legal philosophy [Cf. 2, p. 23, p. 25, p. 59 with reference to 6, pp. 1-68 and 10, p. 11, pp. 27-30].

1.2. Performance of Research Task

The legal analytical tool is based on certain starting points and method tools. The legal starting points are substantive validity as a relational concept, the two faces of the law, the theoretical structure of the law, the relations between the levels of the law, the structure of the legal actor and the validity criteria and their tasks. The legal scientific starting points are legal philosophy as a branch of legal science and a critical-practical-legal philosophical approach. Finally, the method tools are analysis of the structure of an argument, reconstruction and linguistic (sub)competence [2, p. 31, p. 57, p. 61].

The purpose of the first part of this article is presentation of legal starting points for critical substantive validity testing of legal norms within a certain legal order. The legal starting points have a general design. They are intended for use (primarily) by a legal scholar in legal philosophy as a branch of legal science. The addressee is the legal scientific community. This is one way of performing a critical-practical-legal philosophy within legal science and by a legal scholar.

The performance of the research task involves an extraction, compilation and description of the components of my view of the law and its validity criteria as elaborated and presented in my earlier research, specifically the legal starting points of which the legal analytical tool is composed. The research problem in question is partly in what way the substantive validity of legal norms within a certain legal order are determined, assessed and tested, partly the possible connection between the substantive validity of a norm and its efficiency in application in the legal practices in concrete cases⁵.

The legal starting points are presented in Section 2. They are intended, designed and presented in the text as written instructions to the legal scholar in legal philosophy. The idea is that they can be used jointly or separately – not only by me – but also by other legal scholars within the scope of future research in legal science. The legal starting points are the result of independent, explorative research on my part. They are only drafts. No claims of completeness are made on my part.

1.3. Continued Outline

Section 2 deals with presentation of legal starting points for critical substantive validity testing of legal norms. Section 3 deals with future research.

2. Legal Starting Points

2.1. Substantive Validity as a Relational Concept

The first legal starting point for critical substantive validity testing of legal norms is *substantive validity as a relational concept* [Cf. Sections 1.1-1.2, 2, pp. 31-32]. Point of departure is the legal criteria of validity.

According to Tuori, legal norms within a certain legal order within a state are demarcated through specific *legal criteria of validity*, which determine if the norms are part of the specific legal order or not⁶. He emphasises both a formal and a substantive aspect of legal validity. The validity criteria serve to fulfil two tasks as follows. Firstly, they shall demarcate the surface level of the law. Secondly, they shall account for establishment of legal normativity.

Tuori summarises the validity criteria determining the legal validity of legal norms as follows:

- Formal validity depends on observance of the legally regulated procedure for law enactment and (logical) consistency.

- Substantive validity depends on the opportunity for justifiability in light of the morally- and ethically-laden principles of the sub-surface levels of the law [Cf. 2, p. 17, p. 31.9, p. 276].

In this article, substantive validity is characterised as a relational concept. It is defined through a relationship between the object and the audience(s) of the validity claim. This relationship includes two “parties”: a legal norm within a certain legal order and a legal actor in the legal practices. The norm constitutes the object of substantive validity and the actor constitutes the audience. The legal norm gives rise to a substantive validity claim in relation to the audience. The terms for meeting this claim – the substantive validity criteria – depend on the legal actor [Cf. 9, p. 246.2, p. 32].

2.2. The Two Faces of the Law

The second legal starting point for critical substantive validity testing of legal norms is *the two faces of the law* [Cf. Sections 1.1-1.2, 9, p. xi, 2, pp. 32-35]. Point of departure is the law as a legal order.

The law can be approached as set of legal norms, as a *legal order* within a state [Cf. 2, p. 32.9, p. 121]. This is done using the written word as the means of human communication. The norms regulate, inter alia, interpersonal courses of action between the members of society. The legal order within a state can be viewed as an incoherent set of legal norms. It is autonomous, but still open for external influences [2, p. 32].

Already the circumstance that the norms stem from various producers results in fragmentation. Instead of a single legal order, one can speak of several, independent and coexisting legal orders *within* the legal order in a state. Legal norms can appear within the legal order through incorporation or transformation. The different legal orders can mutually affect each other, to a greater or lesser degree. They can interact, compete, supplement each other or overlap [2, pp. 32-33].

The law can also be examined as a set of social practices, as *legal practices* within a state. There is a constant interplay between the two faces of the law, as a legal order and as legal practices. A legal norm within a certain legal order both defines certain social practices as legal and regulates the actions of the legal actors (see further below). The fragmented legal order cannot exist without legal practices, which are responsible for production and reproduction of the legal order [Cf. *ibid.* 9, p. 121].

In my opinion, we can speak of legal practices in three senses: in *sensu largo*, in *sensu medio* and in *sensu stricto* [Cf. 9, pp. 131-133, 2, p. 33]. Next, these practices and their connected actors will be dealt with.

The *legal practices in sensu largo* include all social communication, the theme of which is application, interpretation and amendment of the legal order. Legal practices do, however, only include such social actions that have a communicative aspect and in which application, interpretation or alteration of the legal order is explicitly thematised. Examples of the legal practices in *sensu largo* are *law-making* (when members of society participate) and *decision-making* (supported by the legal order on individuals and falling outside of the legal practices in *sensu medio* and the legal practices in *sensu stricto*, respectively). The connected legal actors to the legal practices in *sensu largo* are the members of society. These actors constitute *the legal community in sensu largo* [Cf. 9, pp. 132-133, p. 161.9, pp. 132-134, 2, pp. 33-34].

The *legal practices in sensu medio* pertain to social practices, which are *in part* specialised on production and reproduction of the legal order within a state. Examples of these practices are *law-making* (when politicians or experts participate) and *decision-making* (supported by the legal order on individuals and falling outside the legal practices in *sensu largo* and the legal practices in *sensu stricto*). The connected legal actors to the legal practices in *sensu medio* are politicians and experts. A *politician* pertains to a person who is involved in politics. An *expert* pertains to a person who has specialised knowledge of his or her specific field of work. These actors constitute *the legal community in sensu medio* [2, pp. 34-35].

The *legal practices in sensu stricto* pertain to social practices, which are specialised on

production and reproduction of the legal order. An example is through interpretation and systematization. Examples of the legal practices in *sensu stricto* are *law-making* (when lawyers participate), *adjudication* and *legal science*. The connected legal actors to the legal practices in *sensu stricto* are lawyers. They conduct legal argumentation. A *lawyer* pertains to a person who is a specially trained expert at law. These actors constitute the *legal community in sensu stricto* [See 9, p. 133, p. 161.9, pp. 133-134, 2, p. 35].

2.3. The Theoretical Structure of the Law

The third legal starting point for critical substantive validity testing of legal norms is *the theoretical structure of the law* [Cf. Sections 1.1-1.2, 2, pp. 36-39]. Point of departure is *the structure of the law*.

In this article, *the structure of the law* is used as a summarizing designation of the theoretical structure of the law and the structure of the legal actor. Furthermore, *the theoretical structure of the law* is used as a summarizing designation for the surface level of the law, the legal culture and the deep structure of the law [2, p. 36].

According to Tuori, the law as a legal order can be viewed as a multi-layered phenomenon with (at least) three (vertical) levels: the surface level of the law, the legal culture and the deep structure of the law. The law as a legal order does not only consist of its visible, explicitly formulated surface level. It also includes sub-surface levels, which create both preconditions for and impose limitations on the material at the surface. The positivity of the law also extends to cover the sub-surface levels of the law [Cf. *ibid.* See Section 2.4. 9, p. xi, p. 147, p. 320]. In my opinion, the fragmentation of the legal order also extends to the (vertical) levels of the law. They are divided into smaller parts, which will belong to the specific legal order (cf. a cross section). Each legal order gets “its own” part of each level of the law within the legal order [2, p. 36].

The surface level of the law is analysed within the borders of a nation state. At this level, the legal order becomes apparent as formulated legal norms or fragments of norms. This, in turn, occurs through the written word as the means of communication. With each legal order within the fragmented legal order come specific legal

practices with their connected legal actors. Therefore, a certain type of material will exist at the surface level. This article includes material belonging to the legal practices in sensu medio and the legal practices in sensu stricto with their actor(s) [Cf. Section 2.2. 9, p. 154, p. 185, 2, p. 37].

In this article, the focal point is on the written materials at the surface level of the law as linguistic utterances and their build. The materials at the surface are viewed as *linguistic acts*, giving rise to particular claims of validity, which include a substantive validity claim. This includes both materials presented by the legal practices in sensu medio and the legal practices in sensu stricto. Examples include a legal norm within a certain legal order and preparatory works ⁷.

The surface level of the law is dynamic and characterised by more or less swift changes. The legal actors make their interjections regarding the normative contents of the legal order. The law as a legal order gets its linguistic appearance at the surface level through the doctrine of the sources of law used by the legal actors connected to the legal practices in sensu medio and the legal practices in sensu stricto, respectively. The legal norm within a certain legal order can be said to represent the legislator, in the sense of the politician, in the discussion of the actors about the contents of the legal order at the surface level of the law [Cf. 9, pp. 157-159, p. 161, p. 167, pp. 191-192, p. 251.2, pp. 37-38].

Below the surface level of the law is the middle level of the law. It is also directly connected to the deep structure of the law. The changes that occur at this level are slightly slower than on the turbulent surface level of the law. The middle level consists of *the legal culture*. It is analysed across the borders of nation states [Cf. 2, p. 39.9, p. 185, p. 192]. Below this level of the law is *the deep structure of the law*. This level is comprised of the common core of different legal cultures. The deep structure of the law is connected to the surface level of the law through the legal practices. The changes that occur at this level are even slower than at the middle level of the law. The prevalent state can be described as laggard. This level of the law can be likened to the foundation of the law [9, pp. 183-185, p. 192, 2, p. 39].

2.4. Relations Between the Levels of the Law

The fourth legal starting point for critical substantive validity testing of legal norms is *the relations between the levels of the law* [Cf. Sections 1.1-1.2, 2, pp. 39-44]. Point of departure is the law as a multi-layered phenomenon.

According to Tuori, it is possible to differentiate between a number of relations, existing between the surface level of the law, the legal culture and the deep structure of the law. These relations are sedimentation, constitution, specification, limitation, justification and criticism [Cf. 2, p. 39.9, p. 197, p. 199]. It is the legal practices in sensu medio and the legal practices in sensu stricto, that produce and reproduce the fragmented legal order, which are responsible for mediating the different relations between the levels of the law [Cf. 9, pp. 131-133, p. 199.2, pp. 39-40].

The *relation of sedimentation* concerns the surface level of the law and its contribution to the formation of the legal culture and the deep structure of the law. The linguistic acts of the legal practices appear at the surface level of the law. These linguistic acts contribute, through the relation of sedimentation, to formation and amendment of the sub-surface levels of the law. The surface level of the law thus contributes to the creation of the sub-surface levels of the law. These shall be understood as sedimentations of the linguistic acts at the surface level. They represent common features in the material at the surface level of the law, which have gradually been sedimented into elements that support the surface. Through the relation of sedimentation between the levels of the law, the positivity of the law is extended to cover all the levels of the law [Cf. Section 2.3, 2, p. 40.9, pp. 200-201, p. 203].

The *relation of constitution* concerns the sub-surface levels of the law as a foundation in relation to the surface level of the law in the legal order. These levels constitute the very possibility for the legal practices and, through them, the linguistic acts that appear at the surface level of the law. They provide conceptual, normative and methodological elements, which are preconditions for the production of the linguistic acts at the surface level. These levels can be analysed in terms of their conceptual, normative and methodological

elements [Cf. 2, pp. 40-41.9, p. 192, p. 210]. The elements of the legal culture and the deep structure of the law must be analysed per legal order within the fragmented legal order [2, p. 41].

The legal culture can be analysed in terms of its conceptual, normative and methodological elements. This pertains to legal concepts and general legal principles within a field of law and typical legal argumentation patterns in the legal practices. The deep structure of the law can also be analysed in terms of its conceptual, normative and methodological elements. This, in turn, pertains to the basic legal categories of the type of law, its fundamental normative legal principles and the type of rationality imbuing it [Cf. 2, pp. 41-42.9, pp. 166-167, p. 169, p. 174, p. 177, pp. 185-186, p. 190, p. 192]. The legal culture and the deep structure of the law are upheld by the legal actor(s) connected to the legal practices in *sensu medio* and the legal practices in *sensu stricto*. This, in turn, will govern the appearance and design of the elements in the sub-surface levels of the law [2, p. 42].

The relation of constitution is accompanied by the *relation of specification*. The relation of specification proceeds from the deep structure of the law, to the legal culture and up to the surface level of the law. The legal practices specify the elements of the sub-surface levels of the law. The conceptual, normative and methodological elements which form the deep structure of the law are interpreted and specified in divergent ways in different legal cultures and under different social conditions. The material which exists at the surface level of the law can be viewed as a discursive, specific expression of the sub-surface levels of the law [Cf. 2, pp. 42-43.9, p. 212].

The *relation of limitation* concerns the relationship, that the surface level of the law is supported by the legal culture and the deep structure of the law. The sub-surface levels of the law create the possibility for production of material at the surface level of the law by the legal practices. The sub-surface levels of the law do at the same time impose corresponding limitations for such material. The elements of the sub-surface levels of the law contribute to the limiting effects of the levels in relation to the legal practices and their linguistic acts at the surface level of the law [Cf. 2, p. 43.9, p. 217, p. 246].

The *relation of justification* concerns the relation between morally- and ethically-laden normative legal principles and the material at the surface level of the law. Tuori equates *normative legitimacy* with the substantive validity of legal norms. It denotes moral and ethical acceptability. This, in turn, concerns substantive criteria, which determine if the object, here the legal norm, is acceptable. Normative legitimacy appears in the legal practices as a question regarding the prevailing relation of justification between the levels of the law. It is, viewed from the relations between the levels of the law, identical with justifiability [Cf. 2, p. 43.9, pp. 243-246].

A legal norm in the legal order can be said to fulfil the requirement of substantive justifiability if it does not contradict any principle in the sub-surface levels of the law. If the legal norm does not fulfil the requirement of substantive justifiability, it is, in other words, illegitimate. The substantive validity of a legal norm is measured using morally- and ethically-laden legal principles, which have been sedimented into the legal culture and the deep structure of the law; ultimately by such elements of the normative deep structure as human rights principles and the principle of democracy. These principles of justification sedimented into the deep structure of the law constitute the ultimate yardsticks for assessment of the legal validity of legal norms [Cf. 2, pp. 43-44.9, pp. 245-246, p. 263, p. 276].

The *relation of criticism* is another relation existing between the levels of the law [Cf. 2, p. 39.9, p. 197, p. 199]. Justification and criticism are, in this article, viewed as two sides of the same assessment. If there is no deep justification of the legal norm in the sub-surface levels of the law, then there is room for criticism. The relation of justification prevailing between the levels of the law thus provides the preconditions for the prevailing relation of criticism between the levels of the law. The relation of criticism is (like the other relations between the levels of the law) mediated in the legal practices in *sensu medio* and the legal practices in *sensu stricto* and by their legal actor(s) [2, p. 121].

2.5 The Structure of the Legal Actor

The fifth legal starting point for critical substantive validity testing of legal norms is *the*

structure of the legal actor [Cf. Sections 1.1-1.2, 2, pp. 44-52]. Point of departure is a certain view of legal norms and substantive validity.

In this article, a norm within a certain legal order is viewed as a linguistic act, which gives rise to specific validity claims, including a substantive validity claim. Furthermore, substantive validity is characterised as a relational concept. This relationship includes two “parties”: a legal norm within a certain legal order and a legal actor in the legal practices. The norm in question gives rise to a substantive validity claim in relation to the audience. It is, however, the legislator who makes the validity claim, not the legal norm itself. Furthermore, the actual recipient of the validity claim is the actor in a certain guise. Therefore, the structure of the legal actor will be dealt with next [Cf. Section 2.1, 5, p. 309, 9, pp. 246-247, pp. 251-252, 2, pp. 44-45. Sec. 5, pp. 305-309].

The levels of the law, i.e., the surface level of the law, the legal culture and the deep structure of the law, have their structural counterparts in the structure of the legal actor as a subject and the knowledge that the actor has of the levels [Cf. 2, p. 45.9, pp. 194-195]. In this article, the structure of the law is used as a summarizing designation for the theoretical structure of the law and the structure of the legal actor. In addition, *subject structure* is used as a summarizing designation for the different guises of the actor per level in the law. Finally, *knowledge structure* is used as a summarizing designation for the legal actor’s knowledge of the law per level in the law [Cf. Section 2.2.2, p. 45].

The (vertical) levels of the law work as a unit within the legal practices. The same holds true for the legal actor connected to these practices. The actor partly acts in all guises, partly uses his or her knowledge of each respective level of the law in the production of linguistic acts which are then presented at the surface level of the law. The actor contributes through his or her linguistic act to the production, reproduction and modification of the surface level of the law, the legal culture and the deep structure of the law [Cf. *ibid.* 9, pp. 196-197].

Formal validity is determined at the surface level of the law. This assessment is made in the legal practices in *sensu medio* and in the legal practices in *sensu stricto*, respectively, and by the

legal actor(s) in a certain guise. The surface level has its structural counterpart in the structure of the legal actor. The surface has its structural counterpart in the actor, with his or individual traits. Here, *the legal actor in original guise*, i.e., as a politician, a lawyer or an expert, becomes apparent [9, p. 195, p. 276.2, p. 45].

The actor’s subject structure has its structural counterpart in the knowledge structure. The legal actor’s knowledge of the surface level of the law within the legal order is of a discursive character. When the actor uses his or her discursive knowledge of the surface level of the law, this occurs in the original guise, i.e., as a politician, a lawyer or an expert [Cf. *ibid.* 2, p. 46].

Substantive validity is determined in the sub-surface levels of the law. This assessment is made in the legal practices in *sensu medio* and the legal practices in *sensu stricto*, respectively, and by the legal actor(s) in a certain guise. The legal culture has its structural counterpart in the structure of the actor. The middle level of the law corresponds to *legal communities*. A community consists of representatives of a certain group. In the legal community, the individual traits of the legal actor lose their significance. Here, the actor appears as a *representative of his or her legal community*, i.e., as the politician, the lawyer or the expert [9, p. 161, p. 165, p. 192, p. 195, p. 276, 2, pp. 46-47].

The legal actor’s subject structure has its structural counterpart in the knowledge structure. The actor’s knowledge of the legal culture is of a practical character. The legal actor’s practical knowledge of the legal culture can, however, be transformed into a discursive form. The actor’s practical knowledge of the normative element of the legal culture gains significance when he or she shall answer the legislator’s substantive validity claim in a legal norm within a certain legal order [9, p. 163, 2, p. 47].

The legal norm in question regulates (in this case) the legislator’s suggested ways of human interaction between members of society. The legal actor’s answer to the substantive validity claim presupposes practical reasoning regarding the correct course of action. His or her reasoning moves back and forth between an interpretation of the norm in question and the actual conditions. The practical reasoning results in a *supposition about the correct course of action*. This is the actor’s *partial answer*

to the legislator's substantive validity claim in the norm. It shows the legal actor's practical knowledge of general legal principles within a field of law. When the actor uses his or her practical knowledge of the normative element of the legal culture, this is done as a representative of a certain legal community [Cf. 2, pp. 46-47. 2, p. 48].

The deep structure of the law has its structural counterpart in the structure of the legal actor. Here, the actual recipient of the legislator's substantive validity claim in the legal norm within a certain legal order appears. Now, the earlier traits of the legal actor are shed, i.e., the actor in his or her original guise and as a representative of a certain legal community, respectively. The politician, the lawyer and the expert becomes apparent as a typical member of society in his or her legal capacity: as a *legal subject* in society [Cf. 9, p. 185, p. 195, p. 247.2, p. 50].

The legal actor's subject structure has its structural counterpart in the knowledge structure. The actor's knowledge of the deep structure of the law is of a practical character. The legal actor's practical knowledge of the deep structure can, however, be transformed into a discursive form. The actor's practical knowledge of the normative element of the deep structure gains significance when he or she shall answer the legislator's substantive validity claim in a legal norm within a certain legal order [9, p. 184, 2, pp. 50-51].

The legal actor's answer to the substantive validity claim presupposes *continued* practical reasoning regarding the correct course of action. His or her reasoning moves back and forth between an interpretation of the legal norm in question and the actual conditions. The practical reasoning results in a *fundamental supposition about the correct course of action*. It shows the legal actor's practical knowledge of the fundamental legal principles in the deep structure of the law. When the actor uses his or her practical knowledge of the normative element of the deep structure, this is done as a legal subject in society [Cf. 2, p. 50. 2, p. 51].

A fundamental supposition shows the actor's practical knowledge of the normative element of the deep structure of the law. The legal actor can accept the correctness of the suggested course of action in the legal norm because of a (pragmatically-,) ethically- and/

or morally-laden fundamental supposition. The actor can reject the correctness of the suggested course of action in the legal norm because of a pragmatically-, ethically- and/or morally-laden fundamental supposition. This is the legal actor's *actual* answer to the legislator's substantive validity claim in the norm. It can therefore be used as a *yardstick for justification*, with which partly the moral and/or ethical intersubjective acceptability, partly the substantive validity of the norm are assessed [Cf. 9, p. 275.2, p. 5, pp. 109-110].

2.6. The Validity Criteria and Their Tasks

The sixth legal starting point for critical substantive validity testing of legal norms is *the validity criteria and their tasks* [Cf. Sections 1.1-1.2, Section 2.1. 2, pp. 52-55]. Point of departure is the validity criteria and the surface level of the law.

The first task of the validity criteria is to *demarcate the surface level of the law*. At the surface level of the law, the law as a legal order becomes apparent as a set of legal norms within a state. The limits of the law as a legal order can be delineated through relatively clear formal validity criteria. However, these limits become more unclear the further one ventures into the sub-surface levels of the law. This relationship brings to the fore the relation of limitation between the levels of the law. The legal culture and the deep structure of the law create opportunities for the practices' production of material at the surface level as well as corresponding limitations for such material [Cf. 2, p. 53.9, p. 193, p. 217, pp. 279-280].

The second task of the validity criteria is to account for *establishment of legal normativity*. The fundamental legal principles in the deep structure of the law constitute the ultimate yardsticks for assessment of the legal validity of legal norms. They account for establishment of legal normativity within the legal community in *sensu medio* and the legal community in *sensu stricto* through their conformity to the general normative deep structure of society and their sedimentation into the practical consciousness of the members of society. The obligation to obey the law, (here), the legal norm, is the corollary to this normativity [9, p. 263, p. 280, 2, pp. 53-54].

The relationship between the normative deep structure of the law and the general normative deep structure of society is viewed in the following way in this article. The law as a legal order is created by members of society. The general normative deep structure of society, (here) in the sense of fundamental ethical values and moral principles, enter through the surface level of the law and reach the deep structure of the law through the legal practices' mediation of the relation of sedimentation between the levels of the law within the legal order [2, p. 54].

The assessment of fulfilment of the second task of the validity criteria occurs as follows. Critical substantive validity testing of a legal norm within a certain legal order, which regulates an interpersonal course of action (or actions), is performed. The legislator's linguistic act at the surface level of the law, i.e., the legal norm, is the object of validity testing. The legal actor as a legal subject constitutes the actual recipient of the legislator's substantive validity claim in the norm [2, pp. 54-55].

Of what does the critical *substantive* validity testing of the legal norm consist? The legislator's substantive validity claim in the norm specifies the general validity claim of *normative correctness*, which is characteristic of this type of linguistic acts in general. The legislator has a right to his or her linguistic act, i.e., the legal norm, in the given normative context. This is because the norm in question can be justified in light of the morally- and ethically- laden principles of the sub-surface levels of the law (cf. the substantive validity criteria). This relationship can, however, be questioned in the legal practices in *sensu medio* and the legal practices in *sensu stricto* and by their actor(s) [Cf. Section 2.1, 5, pp. 306-307, 9, pp. 251-252, p. 276.2, p. 55].

Of what does the *critical* substantive validity testing of the legal norm consist? It regards the fulfilment of the second task of the validity criteria. The legal actor uses his or her knowledge of the levels of the law to compose his or her answer to the legislator's substantive validity claim in the legal norm. The actor's answer, in turn, consists of an interjection on the surface level of the law, a supposition and a fundamental supposition about the correct course of action [Ibid.].

In such a way, the relation of justification is mediated between the levels of the law. The

legal actor's fundamental supposition is his or her actual answer to the legislator's substantive validity claim in the norm. It shows his or her practical knowledge of the normative element of the deep structure of the law, which he or she has used to compose the fundamental supposition. This can therefore be used to assess the fulfilment of the second task of the validity criteria and the performance of an internal criticism of the law by the legal scholar [Cf. Section 2.4. 2, p. 55].

The relation of criticism is also expressed in the actor's fundamental supposition about the correct course of action. This shows his or her practical knowledge of the normative element of the deep structure. It can therefore be used as a *yardstick for criticism*, with which partly the fundamental legal principles in the deep structure of the law and their accounting for establishment of legal normativity are evaluated, partly the prospect of factual acceptance of the legal norm is assessed [Cf. Sections 2.4-2.5. 2, p. 39, p. 121].

3. Future Research

The first part of this article has an inherent potential for development. It has been written based on a constructive ambition. My gaze has been directed at the future throughout in the following way. My intention has been to create the preconditions for and open the door for future research in legal science regarding the law and its validity criteria.

The research problem in question was partly in what way the substantive validity of legal norms within a certain legal order are determined, assessed and tested, partly the possible connection between the substantive validity of a norm and its efficiency in application in the legal practices in concrete cases. This was dealt with by presentation of legal starting points for critical substantive validity testing of legal norms within a certain legal order [Cf. Section 1.2].

The legal starting points were substantive validity as a relational concept, the two faces of the law, the theoretical structure of the law, the relations between the levels of the law, the structure of the legal actor and the validity criteria and their tasks.

The presentation of legal starting points creates the preconditions for and opens the door

for future research in legal science. The legal starting points are only drafts. This relationship itself creates the preconditions for and opens the door for future research in legal science with regard to theory development. An example is development of formal validity as a relational concept.

The legal starting points can also provide the basis for deepened discussions in legal science because of their appearance and design. An example is the substantive validity criteria within a certain fragmented legal order.

In summary, the first part of this article has an inherent potential for development. The presentation of legal starting points for critical substantive validity testing of legal norms creates the preconditions for and opens the door for future research in legal science. It is my hope that this potential shall be realised in theory and in practice.

NOTES

¹ This article was written during my stay as a visiting researcher at the Centre for Studies in Legal Culture (CRS) at the Faculty of Law at University of Copenhagen. I would like to express my gratitude to CRS and the Faculty of Law for making possible the writing of this article. This article was first published in *Retfærd. Nordic Journal of Law and Justice*, Vol. 39, No. 4, 2016, pp. 38–56. *Retfærd* is published by Djøf Publishing. This article is published in *Legal Concept* by permission of Djøf Publishing. All rights are reserved.

² In the first part of this article, *legal norm(s)* or *norm(s)* and *critical substantive validity testing* or *validity testing* are used, for reasons of expediency. See further in Section 1.1.

³ In the first part of this article, *the legal analytical tool* or *the tool* is used, for reasons of expediency. The tool was elaborated in Study II of my doctoral dissertation titled *Unga på hem för vård eller boende. Om rättssäkerhet, legitimitet och tillit vid beslut om ungas vård* (2014). The dissertation deals with legal security, legitimacy and trust with respect to decisions on the care of young persons in placement at homes for care or residence according to Swedish social legislation. The monograph titled *Critical substantive validity testing of legal norms. The example of homes for care or residence* (2016) is an adaption, development and translation into English

of Study II in my doctoral dissertation. The presentation of the legal starting points for critical substantive validity testing is performed with point of departure in the research performed within both monographs. In the first part of this article, the page references are, as long as possible, made to the monograph in English, for reasons of expediency [See 3, pp. 215-573, 2, pp. 13-130].

⁴ The tool was elaborated during my stay as a visiting researcher with Tuori at the Faculty of Law at University of Helsinki in 2011-2013, in his capacity as an assistant supervisor for my doctoral dissertation. [Cf. 3, p. 19.2, p. 22].

⁵ In the first part of this article, *legal practices* or *practices* is used, for reasons of expediency. [Cf. Section 1.1, 2, pp. 13-130].

⁶ In the first part of this article, *legal criteria of validity* or *the validity criteria* is used, for reasons of expediency [Cf. 2, p. 17.9, p. 122].

⁷ In the first part of this article, *material(s)* and *linguistic act(s)* are used synonymously [6, pp. 11-12, 5, pp. 305-307, 9, p. 251, 2, p. 37].

REFERENCES

1. Chomsky N. *Aspects of the theory of syntax*. Cambridge, Mass., M.I.T. Press, 1965.
2. Eneroth E. *Critical substantive validity testing of legal norms. The example of homes for care or residence*. Stockholm, Jure, 2016.
3. Eneroth E. *Unga på hem för vård eller boende. Om rättssäkerhet, legitimitet och tillit vid beslut om ungas vård*, Stockholm, Jure, 2014.
4. Føllesdal D., Walløe L., Elster J. *Argumentationsteori, språk och vetenskapsfilosofi* (3. ed.). Stockholm, Thales, 2001.
5. Habermas J. *The theory of communicative action. Vol. 1, Reason and the rationalization of society*. Cambridge, Polity Press, 1984.
6. Habermas J. What Is Universal Pragmatics? *Communication and the Evolution of Society*. London, Heinemann, 1979, pp. 1-68.
7. Kolflaath E. *Språk og argumentasjon: med eksempler fra juss*. Bergen, Fagbokforlaget, 2004.
8. Mikkola M. Teser om rättsvetenskaplig forskning. *Tidsskrift for Rettsvitenskap*, 1981, vol. 94, iss. 2-3, pp. 273-313.
9. Tuori K. *Critical Legal Positivism*. Aldershot, Ashgate, 2002.
10. Zahle H. *Praktisk retsfilosofi* (1st ed.). Köpenhamn, Ejlers, 2005.

Information about the Author

Elisabeth Eneroth, LL.D., Lecturer, Malmö University, 205 06 Malmö, Sweden, elisabeth.eneroth@mau.se.

Информация об авторе

Элизабет Энерот, доктор юридических наук, лектор, Университет Мальмё, 205 06 г. Мальмё, Швеция, elisabeth.eneroth@mau.se.