

Two Challenges to Normative Legal Scholarship

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In this paper, I examine two contemporary challenges to the status and legitimacy of normative legal scholarship. Both of these reject the distinction between the internal and the external point of view, so cherished by (normative) legal theory. Roger Cotterell does this in the role of social theorist, Martti Koskenniemi, who represents the approach I shall term the Critic's narrative, in the role of legal scholar.

An integral part of my argument will rely on what I have called the dual citizenship of legal scholarship. Legal science is one the legal practices of a modern legal system. Legal practices are social practices which have specialized in a specific task in modern society: in the production and reproduction of the law as symbolic-normative phenomenon, as a legal order. Legal practices provide the framework for legal discourses, for the speech acts making up these discourses. Different legal practices – such as lawmaking, adjudication and legal scholarship – fulfil different tasks in the legal system, but they also participate in a common, ongoing legal discourse. However, legal scholarship is not only a legal practice. It is also a scientific practice and subject to the limitations and commitments ensuing from this, such as the requirement of reflexivity. So, the peculiar dual citizenship of legal science explains the embarrassment which afflicts the attempts of both legal and social scientists to define the characteristic features of legal science and its relationship to social science.

I shall begin with the challenge presented by the social scientist.

1 The Internal and External Perspective on Law

The distinction between the internal and external perspective on law was one of main themes of H. L. A. Hart's (1907-1992) *The Concept of Law*. Hart had his predecessors but it is largely to his credit that this distinction has become almost a commonplace in legal theory: the legal scholar is supposed to adopt an internal, participant's point of view, whereas the sociologist is said to approach law from an external observer's perspective. In the view of many legal theorists, this divergence in perspective also explains the frequent breakdowns in the communication between legal and social scientists. It is not uncommon for the former to blame the sociologists for completely losing sight of the law, for talking in their supposedly legal analyses about something other than law. Consequently, legal science often grants very little space for sociological insights; sociologists are accorded merely the status of humble servants who are allowed to offer their services only on request and under conditions dictated by legal science.

In (legal) sociological debates, Niklas Luhmann (1927-1998) has occupied a position which comes close to the legal theoretical distinction between the internal and external perspective. However, he arrives at his position within the framework of a systems-theoretical interpretation of society. According to his account, both lawyers (legal scholars) and sociologists observe the law, but the former do this from the inside, the latter from the outside. Luhmann treats law and science as two different, autopoietically organized and operating social sub-systems, each with its own communicative network, and closed to its

environment. Sociology's demesne is in the sub-system of science, and its discourse is scientific discourse. Legal scholarship, by contrast, participates in legal and not in scientific discourse; the binary code it relies on is that of law/non-law (*Recht / Unrecht*) and not that of true and untrue. Owing to its specific code, legal discourse is inevitably closed to communication taking place in other social sub-systems. But so too is scientific discourse; communicative closure characterizes not only legal but also sociological discourse.

Luhmann (1993) concludes by making a sharp distinction between legal scholarship's self-description (*Eigenbeschreibung*) and sociology's external description (*Fremdbeschreibung*) of the law. Legal scholarship produces two types of theories, corresponding to the difference between legal dogmatics and legal theory. Dogmatic theories strive for conceptual consistency in law, and serve the internal norm of justice which requires like cases to be treated alike and unlike cases unlike. In the evolution of law, i.e. in the circular movement of variation, selection and stabilization (retention), the contribution of legal dogmatics lies in the phase of stabilization.

In Luhmann's conceptual scheme, dogmatic theories are based on the self-observation of the legal system but they do not yet amount to its self-description. In self-observation, individual legal operations are located within the structures and operations of the legal system; self-observation implies or explicates that what is at issue is legal communication. Self-descriptions, in turn, are reflexive; in them, the unity of the system is reflected in the system itself. Legal theory is the form in which the legal system reflects itself, its unity (Luhmann 1993, p. 496 ff.).

Legal theory addresses the legal system, whereas social theory functions in the scientific sub-system, with the scientific community as its audience. Luhmann is very cautious about social theory's potential to serve the self-description of the legal system, i.e. legal theory. The principal reason for this caution is evident: legal and social theory are inserted into different communicative networks, into different operatively closed social sub-systems. Although legal and social theory have no opportunity for direct communication across the boundaries of the social sub-systems, Luhmann does leave one channel open for their mutual influence.

The interaction between autopoietically operating, closed social sub-systems constitutes a general problem in Luhmannian social theory. It also affects the theory of law: assuming the autopoietic functioning of social sub-systems, how can we account for the impact of other social sub-systems on law and *vice versa*? One of the solutions proposed by Luhmann is what he calls structural coupling. In structural coupling, individual operations, communicative acts, partake simultaneously in the functioning of two different social sub-systems: contracts are operations of both the legal and the economic sub-system, and a constitution establishes a structural coupling between the legal and the political sub-system (Luhmann 1993, p. 440 ff.). Correspondingly, Luhmann hints at the possibility of theory acting as a medium for a structural coupling of the scientific sub-system with the reflexive self-descriptive theories of other sub-systems, such as legal theory in the system of law. The theory of which such coupling could be expected is, of course, the Luhmannian theory of autopoietic social systems (Luhmann 1993, pp. 563-564).

In sociological debates, Luhmann represents a minority position: the prevailing attitude towards the distinction between internal and external perspectives, so dear to legal scholars, appears to be rather critical. Cotterrell provides us with the opportunity of assessing the critical argument.

Cotterrell is inclined to treat the distinction as a device with which normative legal theory tries to legitimize the ideological closure of legal discourse that prevents it from attaining the level of a science. Ideology differs from science by its self-perception. It “assumes its own completeness and its unassailable integrity, closes off inquiry because within its sphere answers are already known, specified in advance of any observations of the complexity and contradictions of experience” (Cotterrell 1996, p. 11). Because of the ideological closure of its discourse, legal scholarship tends to reject sociological information about extra-legal social reality. Legal ideology also postulates unity where, in reality, diversity, complexity and fragmentation hold sway.

For Cotterrell, Ronald Dworkin seems to be the epitome of ideological legal thinking based on a discursive closure: “Dworkinian legal discourse generates its own closed world, observing morality, politics, and society only in its own discursive terms”. This discourse presents the legal sociologist with two options: “either to accept the Dworkinian characterisation of law’s discursive empire and share in legal knowledge as a participant in this discourse or else remain an outside observer unable to speak of ‘law’ as such since law is accessible only as and through legal discourse” (Cotterrell 1996, pp. 103-104).

In Cotterrell’s view, legal sociologists should examine the practices that reinforce, result from and depend on the normative and discursive closure of law. But he also emphasizes that legal sociology “must ultimately deny or transgress internal-external or observer-participant distinctions”. Thus, “in order to understand law, the legal sociologist has to understand it as a participant, or as a participant does, or rather as many different kinds of participants do – lawyers or citizens, for example, living in the world of law”. There are different participants’ positions, but none of them are “pure”: “participation blends with observation; there are innumerable, continually shifting forms of involvement and distancing that make up the diversity of legal experience and understanding”. Legal sociology “samples, inhabits, imagines, explores, compares, questions, and confronts different participant perspectives”. In sum, “legal sociology is the enterprise of trying to broaden legal perspectives while understanding the narrower perspectives of particular professional or other encounterers of law” (Cotterrell 1996, pp. 369-370).

Thus – to summarize Professor Cotterrell’s views – legal sociology is able to tell the truth of law which the ideological closure prevents legal discourse, including legal science, from achieving. Sociology and legal science relate to each other as science and ideology; and as science, sociology can be deemed to represent a superior form of knowledge in comparison with ideologically tainted legal scholarship.

On Cotterrell’s account, sociology is also superior to legal scholarship in its reflexivity. Sociology is “fundamentally reflexive, self-contextualizing”; it “must also embrace the examination of the social foundations of all disciplines and discourses, including its own”. Law (legal discourse), by contrast, lacks this

inherently reflexive character; at least in normal conditions, it “necessarily presents itself as authoritative and normatively secure” (Cotterrell 1996, pp. 109-110).

For his comparison between sociological and legal knowledge about law, Cotterrell takes yardsticks from scientific practices. His judgement is based on the assumption that legal scholarship – and legal discourse more generally – harbours scientific aspirations similar to those of sociology but, as a consequence of its ideological closure, is unable to live up to these. Sociology, by contrast, can open the law’s normative and discursive closure and produce more satisfactory knowledge about social reality, including law and legal ideas. Such a view, assessing legal scholarship merely as a scientific practice, ignores the other side of the dual citizenship of this enterprise; its character as a legal practice.

Both Cotterrell and Luhmann draw a one-sided and defective picture of legal scholarship. If Cotterrell tends to reduce legal scholarship to a scientific practice, with scientific pretensions equivalent to those of sociology, Luhmann’s reductionism lies in the opposite direction. He examines legal scholarship, both legal dogmatics and legal theory, merely as a legal practice and, thus, rejects any claims of its scientific nature. Cotterrell and Luhmann disagree on the justification of the internal – external distinction but share a reductionist view of legal scholarship. The peculiar dual citizenship of legal science should be given the attention it deserves. Legal scholarship is not misfired or deficient sociology with validity or knowledge claims analogous to the latter; legal scholarship is not only a scientific, but also a legal practice. But nor does legal scholarship consist only of interventions in the on-going communication about valid law, with validity claims comparable to those of law-making or adjudication; legal scholarship is not just a legal practice, it is also a scientific one.

2 Legal Science in Legal Discourse

Legal science is a legal practice, and legal scholars participate with their interventions in legal discourse. I shall try to highlight the distinctive features of legal science and its theories through an analysis of legal discourse.

“Discourse” is a contested concept which is used in divergent senses. Michel Foucault’s (1927-1984) discourses (Foucault 1972) are not equivalent to Jürgen Habermas’ discourses, and Gunther Teubner’s (1989) concept of discourse receives a specific colouring from his adoption of the Luhmannian autopoietic systems theory. I shall define the concept of legal discourse with the aid of J. L. Austin’s (1911-1960) *speech act theory*. Legal discourse is a series or network of mutually linked legal speech acts.

Speech acts possess three elements or dimensions: locutionary, illocutionary and perlocutionary. A *locutionary* speech act is the act *of* saying or writing. An *illocutionary* speech act consists of what I do *by* saying or writing something; illocutionary speech acts include arguing, contesting, promising, baptizing etc. The *perlocutionary* dimension of speech acts consists of the effects they have in the extra-communicative world: of what I achieve *through* saying or writing something. The effects may be intentional but their causal chains may also be

followed beyond the conscious intentions of the speakers. Locutionary speech acts are characterized by a *sense*, illocutionary speech acts by a (illocutionary) *force* and perlocutionary speech acts by an *effect*. The distinction between locutionary, illocutionary and perlocutionary speech acts is analytical in nature. A locutionary speech act is also a illocution, and an illocutionary speech act is not possible without a locution. In addition, speech acts usually have perlocutionary effects in extra-linguistic reality.

Speech acts achieve an illocutionary force when they meet the requirements set up by specific social conventions: what makes a speech act a promise is the fulfilment of the felicity conditions of this type of illocutionary speech act. The felicity conditions of illocutionary speech acts may concern, say, the person entitled to make the speech act or the appropriate circumstances for making it. Some illocutionary speech acts derive their illocutionary force from legal norms which define their felicity conditions; in such cases we can speak of *legal-institutional speech acts*. An example of a legal-institutional speech act is provided by the declaration of marriage: the formula of the declaration, the persons entitled to make the declaration and the appropriate circumstances of such a declaration are all defined by legal norms (On speech act theory, see Austin 1984 and Searle 1988.).

Distinctive to legal discourse is, firstly, its *specific theme*. Legal discourse consists of speech acts which take a position on legal norms and their interpretation and application, and which, thus, contribute to the ongoing discussion on the contents of the legal order in force. A legal speech act receives an illocutionary force, when the other participants of the legal discourse recognize it as a contribution to legal discourse, assess it as an intervention in the discussion on the contents of the legal order. Legal discourse includes but is not exhausted by legal-institutional speech acts, such as the interventions of the legislator and the judges: laws and other regulations, as well as court decisions. In order for a speech act to be recognized in legal discourse as a law, it must conform to the constitutional provisions on lawmaking procedure. Correspondingly, a speech act can only amount to a court decision, if it meets the criteria set up by procedural law.

However, the felicity conditions of legal speech acts – their illocutionary force – is defined by, not only legal norms, but also social conventions of other types. Legal speech acts differ in relation to their level of institutionalization. The interventions of legal scholars are not, unlike the laws of the legislator and the decisions of the judges, legal-institutional speech acts; the conditions and procedures of legal scholarship are not legally determined. The illocutionary force the results of legal scholarship possess, their position in the legal discourse on the contents of the legal order, is based on the social conventions of the legal culture, such as the prevailing doctrine of legal sources; this is why the position of the legal scholar's interventions varies from one legal culture to another. But nor is the illocutionary force of the legislator's and the judges' speech acts defined solely by legal norms. The illocutionary force includes also the weight accorded to different legal speech acts in legal discourse. The *internal* hierarchy of legal regulations – the constitution, acts of parliament, decrees and other by-laws – is legally confirmed, usually by constitutional provisions. The *internal*

hierarchy of court decisions is based on the corresponding institutional hierarchy, and this too is regulated by law. By contrast, the constitution, or the legal order in general, does not contain provisions on the *respective* weight and hierarchical order of different kinds of legal speech acts, such as laws and other legal regulations, court decisions and scholarly interventions. This depends on the culturally varying *doctrine of legal sources*, as can be proved by a comparison between Roman-German and common law legal systems.

So the speech acts comprising legal discourse and its participants are defined by the prevailing legal culture; legal discourse embraces those speech acts which in this discourse are assessed as contributions to the discussion on the contents of the legal order. The ongoing legal discourse addresses the *validity claims* of these speech acts. Austin (1984, pp. 146-147) pointed out that in each group of speech acts a distinction should be made between their felicity conditions and the other criteria for their assessment which vary from group to group. Although a speech act succeeds and achieves an illocutionary force, it can still be appraised and criticized by means of criteria specific to its group: truth / non-truth, right / wrong etc. Correspondingly, although a legal-institutional speech act succeeds – the legislator’s speech act is recognized as a statute and a judge’s speech act as a court decision – in future legal discourse, statutes and decisions can still be examined in the light of their substantive validity claims.

The validity of legal norms possesses both a formal and a substantive aspect (Tuori 2002, p. 221 ff.). The central element of *formal validity* consists of the requirement that legal norms are established in accordance with the legal norms regulating lawmaking procedure. This requirement also defines the felicity conditions – the illocutionary force – of the corresponding speech act. The speech act of the legislator succeeds when the other participants in legal discourse, such as judges and other law enforcers, accept its formal validity claim and recognize the legal norm expressed in its locutionary part as valid. If the courts come to the conclusion that the norm (the norm candidate) has not been adopted in the procedure laid down in the constitution, they do not consider it valid nor apply it in their decisions: the speech acts fails and does not achieve an illocutionary force. Substantive validity can be approached from the perspective of both the legitimacy – the moral and ethical justifiability – and the expediency or the purposive rationality of the norms. What is crucial for the illocutionary force of the legislator’s speech act is formal validity. It is, however, possible that the locutionary part of the speech act – the legal norm (norm candidate) expressed therein – stands in such a contradiction with the substantive validity claims of legal norms that the courts leave the norm unapplied. In this case too the legislator’s speech act fails. Thus the criteria of illocutionary force, that is, the felicity conditions of the legislator’s speech acts, may also involve substantive elements.

In spite of the success of a legal-institutional speech act its substantive validity remains an open question which can always be addressed anew. The arguments presented in support of the substantive validity of laws and court decisions are tested in subsequent legal speech acts in a way which, as a rule, does not affect the legal validity. Legal scholarship, especially legal dogmatics, participates in the assessment of the substantive validity of previous legal speech acts. At the same time, its speech acts for their part raise specific validity claims

which are also subject to testing in future legal discourse: the norm and interpretation standpoints and systematization proposals of legal scholars can be appraised, not only by other scholars, but also by judges and the legislator. It is precisely the ongoing reciprocal testing of the validity claims attached to legal speech acts which link individual speech acts together and makes the legal scholar a participant in legal discourse. Legal science lacks the institutional, legally regulated aspect of lawmaking and adjudication, and the validity claims of a legal scholar's speech act do not possess a corresponding formal aspect. The illocutionary force of scholarly interventions, their participation in legal discourse, is grounded in culturally varying social conventions, such as the prevailing doctrine of legal sources. But this does not deprive the legal scholar of her position as a participant in legal discourse.

Legal science is normative, not only in its objects, but also in its results. The results of legal science entail explicit or at least implicit normative claims, be it a question of interpretative standpoints, legal dogmatical theories or reflexion theories – to use Luhmann's terminology – aiming at a self-description of the whole legal system. Legal scholarship participates in legal discourse and appraises the validity claims raised by the speech acts of this discourse, that is, by interventions of the legislator, the judges as well as other legal scholars. And, correspondingly, with its own contributions it presents normative validity claims whose significance is weighed in subsequent legal practices, i.e. in future legal discourse. Through their normative consequences, the interpretations and theories of legal science affect what counts as valid law and thus alter the state of the legal system. This also holds for legal theories as self-descriptions of the legal system: in Luhmann's words, "through the production of a theory of the system in the system, the system itself is changed, the object of the description changes through the act of description" (Luhmann 1993, p. 543).

In the distinction between theoretical and practical discourses, legal discourse belongs to the latter class. *Theoretical* discourses deal with the *truth claims* of speech acts, practical discourses with *normative correctness*. The validity claims of legal speech acts accentuate normative correctness, but within this similarity the validity claims of different legal speech acts diverge from each other: the validity claims of the legislator's speech acts are not equivalent to those raised by court decisions, and the validity claims of the legal scholar also possess their distinctive features. The validity claims of the legislator's speech acts are affected by the dual nature of lawmaking as both a political and a legal practice. The political connection makes possible the instrumental use of legislation as a means for achieving political aims and accounts for the purposive rational aspect in the substantive validity of the legislator's speech acts. The emphasis in adjudication lies in the application and not in the justification of legal norms, and this leaves its mark on the substantive validity claims of court decisions. The validity claims of the legal scholars' contributions, again, are affected by the other side in the dual citizenship of legal science, its position as a scientific practice. The validity claims of legal speech acts put the emphasis on normative correctness, but they also possess an aspect pointing to truth claims. The purposive rationality of the legislator's speech acts – their instrumental rationality – cannot be judged without judging the reliability

of their factual assumptions concerning society and societal causal relationships; a court may take resort to consequentialist argumentation and base its decision on an assessment of its probable factual consequences; and the interpretative standpoints of a legal scholar are related to (hypothetical) fact descriptions, and her theories and systematization proposals contain a “hidden social theory”. However, in legal discourse truth is subjected to normative correctness.

Legal argumentation is normative argumentation, and this goes even for argumentation in legal science, i.e. in legal dogmatics and in legal theory. Legal science does not aim to provide us with “true” descriptions of extra-legal social reality or with causal explanations of processes taking place therein. Legal science cannot be declared a loser in a competition with sociology over which offers the most adequate social descriptions or explanations; legal science does not take part in any such competition. It does not occupy the pole of ideology opposite to that of sociology as science. The Althusserian opposition between ideology and science should be rejected in the analysis of legal discourse for the simple reason that it completely loses sight of the normativity of legal argumentation.

The concepts of legal discourse and legal speech acts help us to perceive the differences between legal and social scientific research on law and, correspondingly, between the internal and external perspective on law. Legal science’s internal point of view is a participant’s point of view: a legal scholar participates in the debates on the contents of the legal order, assesses the validity of other participants’ speech acts and presents with her own speech acts validity claims which are discussed in subsequent legal discourse. The interventions of a social scientist are not speech acts in legal discourse, nor does she present with her speech act any validity claims to be tested in legal discourse. The results of social science can become part of legal discourse only if the participants of this discourse have recourse to them in their speech acts; for instance, as arguments supporting a certain interpretative standpoint in adjudication or legal dogmatics. Why? Because the social conventions defining the illocutionary force of legal speech acts, such as the prevailing doctrine of legal sources, does not accord social scientists’ a participant’s position in legal discourse. Accordingly, the validity claims of social science emphasize, in stead of normative correctness, the dimension of truth.

My concept of legal discourse differs from Luhmann’s way of defining legal communicative practices and the legal system as a network of such practices. On Luhmann’s account, what is distinctive for legal communication is the reliance on the binary code of law / non-law. The legal system comprises all communicative acts employing this code irrespective of the institutional position of their subjects; both legal professionals and legal laymen participate in legal communication. When “legal discourse” is defined, as I have proposed, through the specific theme and validity claims of legal speech acts, it can also be used in a wide sense. In that case it is not merely restricted to the practices specialized in the production and reproduction of the legal order, such as lawmaking, adjudication and legal scholarship, but covers also the debates on the legal order within the public at large, among the legal community in *sensu largo*. However, the important role legal specialization plays in modern law supports the narrower definition I have adopted.

Cotterrell has criticized the legal theoretical internal / external distinction for ignoring the multiplicity of participants' positions. If the participant's position is specified through the concept of legal discourse, this multiplicity can be given due attention: it is manifested in the differentiation of legal speech acts and their validity claims. In the background of this differentiation we can depict the various functions that various legal practices, such as lawmaking, adjudication and legal scholarship, fulfill in the legal system. However, the variety of participants' positions should not be allowed to obscure their points of connection; their networking to a discourse on the contents of the legal order in force. One of the central presuppositions, opening up the possibility of such networking, consists of a *legal cultural pre-understanding*, common to legal actors occupying different participants' positions.

3 Norms and Facts

The legal cultural pre-understanding common to legal actors includes the basic distinction – in Luhmann's terms *Leitunterscheidung* – between facts and norms. This distinction is also central to legal scholarship. In legal sociology, it seems to evaporate: what for lawyers constitute norms, and, as such, something distinct from facts, appear for sociologists as facts among other facts, for instance in the wake of Max Weber (1864-1920) as conceptions in the minds of social actors, influencing causally their behaviour. Legal sociology may include in its descriptive account the significance of the facts/norms distinction for the functioning of the legal system and legal discourse, and this indeed it also should do. For all that it does not itself adopt the distinction but treats it as a fact about the law.

Employing the distinction between norm and fact, legal science focuses on the former pole. In spite of the emphasis on the normative side, legal discourse deals not only with norms but also with facts. But what is important to note is that within the purview of legal discourse and knowledge, facts do not appear independently of norms. In law, facts are dependent on norms and observed through norms. This is a fact of which especially the institutional theory of law has recently reminded us (MacCormick – Weinberger 1986). In legal discourse and knowledge, facts come in the guise of legal-institutional facts. The subjugation of facts to norms also affects those validity claims raised in legal discourse which concern the depiction of extra-legal social (or psychological) reality. The truth claims of legal speech acts are not identical to the truth claims raised and assessed in sociological discourse.

Law's "truth" is different from sociology's truth; this we can perceive already by examining the role of facts in court proceedings. In court proceedings, the "truth" of the facts is ultimately determined not by criteria employed in empirical sciences but by those provided by procedural and substantive legal norms. Facts are not facts if legally appropriate and sufficient evidence has not been presented to support them and if the court does not acknowledge them as facts for legal purposes. In addition, legal facts are selected facts, with substantive legal norms providing the criteria for pruning.

For example, not all that witnesses recount in their statements is considered legally relevant and included in the factual premise of the judicial syllogism of the court's decision. "Legal truth" is only attributed to facts which are accorded legal significance by the norm to be applied in the case at hand. In legal proceedings, facts are legal-institutional facts as defined by the institutional theory of law. The peculiarity of legal truth is manifested by the institute of *res judicata*. Unlike scientific truth, legal truth cannot, as a rule, be challenged afterwards by new evidence; legal facts retain their status in the face of counter-evidence presented after the proceedings have ended. There are exceptions to this rule, but these too are legally determined. In the relationship between facts and norms, the latter have the last word.

Law's normativity also influences the facts that legal science deals with. In its interpretative task, legal dogmatics construes hypothetical sets of facts, typified facts, which function as factual premises in the recommendations for statutory interpretation. Such typified facts could perhaps be compared with Weberian ideal types (Weber 1988, p. 190 ff.; Prewo 1979, p. 85ff.). But their role is entirely different: they are not tools for empirical research but for normative argumentation.

Thus, facts appear in legal discourse as factual premises of court decisions and the interpretative standpoints of legal dogmatics. In addition, facts may enter judicial or legal dogmatic reasoning through consequentialist argumentation. In such argumentation, facts are resorted to even in the formulation of the normative premise: alternative interpretations of legal material are appraised according to their probable factual consequences. But in this case too facts remain subjected to norms. Facts are relied on in finding and justifying the correct interpretation of norms – in establishing, not the truth about facts, but the "truth" about norms. And if it turns out that the court was mistaken in its prediction of subsequent developments in extra-legal reality, this does not, as a rule, strip the decision of its legal validity.

Facts also have a role to play in legal theories. Dogmatic theories organize the general legal concepts and principles of different fields of law, such as contract law, penal law or constitutional law; the focus of such theories is on legal institutions, understood in the sense indicated by Karl Friedrich von Savigny (1779-1861). Savigny emphasized that legal institutions possess both a normative and a factual side: legal institutions combine legal norms and the factual social relationships (*Lebensverhältnisse*) regulated by them. Accordingly, legal dogmatical theories focusing on legal institutions always refer to, not only legal norms, but also to social facts. They are always based on a certain conception of the extra-legal reality, subjected to legal regulation: private law theories of the economy, state law theories of the state and the political system, international law theories of international relations ... However, the main thrust in legal dogmatic theories with their general legal concepts does not lie in the precise portrayal of extra-legal social phenomena or in the depiction of the causal relations between these. Dogmatical theories are tools for legal argumentation, employed in adjudication and other legal practices. They contribute to the maintenance of the law's coherence and of the consistence and predictability of adjudication; their normative purpose is to promote formal justice and equality.

“Power” in the constitutional doctrine of separation of powers refers to legally defined competences and not to factual social and political power. The relations of competence, as determined in the doctrine of separation of powers, do not give direct information of factual power relations between state organs or the political and social groupings holding sway in these organs. It is a different matter to examine the separation of powers as a normative problem of constitutional law and as a political or historical problem concerning factual power relations. The constitutional doctrine of separation of powers does not aim at a description or explanation of the factual functioning of the political system. It does not participate in political discourse, nor does it raise validity claims to be judged by the criteria of this discourse. Its communicative network consists of (constitutional) legal discourse.

We shouldn't, of course, deny the relations of influence between the legal and the factual division of powers. Constitutional law and the doctrine of separation of powers affect factual power relations. The “context-sensitive” history of ideas serves to remind us of the socio-political reality that lies behind constitutional doctrine, of the power constellations between social classes and groups which, for their part, account for doctrinal positions but have themselves also been shaped by these (e.g. Althusser 1959). The debates in Finland in 1917-1919 on the constitutional division of powers in which leading constitutionalists actively participated were very clearly part of the then socio-political power struggle. The Weimar Republic also proffers ample material which evidences the links connecting constitutional doctrinal interventions to their ideological and political context. But the specific normative character of legal theories does not concern so much their perlocutionary as their illocutionary dimension.

As Cotterrell, among others, has pointed out, legal ideas have social causes, and the emergence of dogmatic theories can be explained sociologically; thus, only in certain social conditions, at a certain historical point in time, do modern concepts of property or contract or the legal concept of state become possible: the concept of property after market relations had extended to cover landed property and the doctrine of divided property had lost its societal basis (Paasto 2004); and the doctrine of the legal personality of the state after the differentiation of economic and political relations and the emergence of the modern, centralized state (Tuori 1983, p. 111 ff.).

In legal practices, dogmatic theories generally operate in an unconscious way. This should not be interpreted as a symptom of their ideological character. Instead of the binary opposition of ideology and science, it could be more fruitful to approach dogmatic theories through Anthony Giddens' notions of practical and discursive knowledge, or Michel Foucault's *savoir* and *connaissance*. *Practical knowledge* is tacit knowledge which is indispensable for the conduct of our daily routines but about which we are not immediately aware nor do we need to be. We become conscious of its significance only when confronted with problems. In such a situation we have to convert our practical, tacit knowledge into discursive form.

In legal practices, lawyers employ dogmatic theories and legal concepts but are not necessarily always conscious of their importance. *Nulla poena sine lege* is applied in criminal law and *pacta sunt servanda* in contract law cases, even if

they are not even mentioned in the court's argumentation. In adjudication, the need to transform knowledge of dogmatic theories from practical into discursive form, to specify and assess their significance, only arises in hard cases; in routine cases they operate as practical or tacit knowledge and – we may add – as a central element of lawyers' professional competence.

Dogmatic theories constitute an integral part of the common legal culture which is shared and internalized by lawyers as the main agents of legal practices and which functions through their practical knowledge. This enables these theories to accomplish their stabilizing and justice-promoting task. However, this does not hinder legal discourse from taking a reflexive stance towards its doctrinal premises. The elaboration of dogmatic theories by legal scholarship and the courts' argumentation in hard cases attest to legal discourse's reflexive potential under the conditions of modern law. The specific normativity of legal discourse entails a certain inertia but does not create any irremovable blockage for the development of dogmatic theories.

In Cotterrell's view, one of the indications of the inferiority of legal discourse and knowledge in relation to sociology is their lack of reflexivity. However, the deliberate elaboration of dogmatic theories already tells of a reflexivity in legal discourse. This reflexivity is even more conspicuous in those comprehensive accounts of law that Luhmann has called *reflexion theories*: legal theories which reflect on law's unity.

It is obvious that these theories also imply a conception of extra-legal social reality or, in other words, a hidden social theory. Luhmann has distinguished in contemporary legal theoretical discussion between two main alternative accounts of law's unity: rationalist and positivist ones. *Rationalist* theories seek to found law's unity on rationally justifiable principles. *Positivist theories* employ a doctrine of legal sources which derives legal validity from explicit decisions by the legislator and the courts (Luhmann 1993, s. 529). The representatives of rationalist theories include such figures as Ronald Dworkin and Jürgen Habermas and those of the positivist camp Hans Kelsen (1881-1973) and H. L. A. Hart.

Cotterrell's analysis is quite similar when he writes of *ratio* and *voluntas* as the two poles between which legal discourse rotates. *Voluntas* represents "the element of sovereign will, coercive power, or unchallengeable political authority that shapes legal doctrine and is expressed through it ... the co-ordinating and hierarchical characteristics of law as a system of *political control*". *Ratio*, in turn, is "the element of reason or principle that structures and presents doctrine in patterns of ideas whose strength to bind and convince the citizen (and the lawyer or official) comes from their logical persuasiveness, normative consistency, or rational coherence" (Cotterrell 1996, p. 317). Theories emphasizing *ratio* or *voluntas*, respectively, clearly imply differing conceptions of law's social environment. Again we might refer to Cotterrell, now to his thesis of *community* and *imperium* "as images of society that are presupposed in legal doctrine and rhetoric". The former is "the image of a cohesive association of politically autonomous people" and the latter "the image of individual subjects of a superior political authority" (*Ibid.*, p. 223).

We are ready for a pro term conclusion. There are compelling reasons for not rejecting the distinction between the internal and the external perspective on law

and for not treating it merely as a legitimizing move intended to justify the ideological closure of legal discourse. Legal science is not only a scientific practice; it is also a legal one, and as such it partakes in legal discourse; this imposes on it a normativity foreign to the enterprise of sociology. Legal discourse does also deal with extra-legal reality, but views it through normative lenses. The truth in and for law is not identical with the truth in sociology, and the validity claims of legal discourse are different from those of sociology. Legal discourse should not be seen as flawed sociology, presenting ideological conceptions of society which call for correction and rectification derived from the science of sociology. Legal science adopts an internal view on law, relies on the constitutive distinction between norms and facts and raises normative validity claims addressed to subsequent legal discourse. Sociology's position is diverse: it does not participate in legal discourse, it is not bound to adopt the distinction between norms and facts, and its outcomes do not display pretensions of normative validity. Sociology remains an outsider to law and its point of view an external one. As many sociologists – and Cotterrell is one of them – have emphasized, sociology must include the lawyers' understanding of law in their descriptions. But meeting this requirement does not transform sociologists into participants; their talk remains talk *about* law also when discussing talk *in* law.

4 What can Legal Science Learn from Social Science?

Luhmann is acutely aware of legal science's participation in legal discourse and of its ensuing normativity. But his autopoietic systems theory leads him to ignore the other side in legal scholarship's ambivalent position, namely its character as a scientific practice. Legal science shares with other scientific practices certain fundamental commitments, concerning, for instance, methodology, argumentation and publicity; these commitments include reflexivity. Legal scholarship also shares with other disciplines the same institutional framework, with universities as the most important loci. Legal scholarship is a legal practice, but in important respects it differs from the other main practices of modern law: adjudication and lawmaking. Its outcomes receive their binding force only through other legal practices, through their acceptance by judges and/or lawmakers; the practice of legal scholarship is not legally reserved for specific institutions; nor are its procedures legally fixed. The distinctive features of legal scholarship as a legal practice are largely due to the scientific aspect of its dual identity.

However, legal scholarship's scientific identity appears to be rather insecure. This too is a consequence of its dual citizenship, of its domicile not only among scientific but also among legal practices. If its peculiarities as a legal practice derive from its also being a scientific practice, the same holds conversely. Here we again encounter corollaries of the normativity which results from legal science's participation in legal discourse. This normativity gives rise to legal science's almost continuous bad conscience, its qualms about its own scientific nature. Its weak self-identity as a scientific practice accounts for the phenomenon commented on by, among others, James Balkin (1996): legal

scholarship's tendency to borrow methodologies from other disciplines. However, as Balkin has also noted, its professional focus compensates for the lack of a purely intellectual one; consequently, law cannot be entirely absorbed by any other discipline. "Law is continuously invaded but never conquered", Cotterrell (1996, p. 178) concludes his summary of Balkin's analysis. What shelters legal scholarship from conquest is its safe haven as one of the legal practices. We could perhaps speak of a paradox: the non-scientific side of legal science shields its independence as a scholarly discipline!

Legal scholarship is not and does not pretend to be sociology, nor should it be judged as a defective version of that discipline. But legal scholarship's inclusion among legal practices does not necessarily make it deaf to sociological insights, it only creates a filter which these insights must traverse before they can find their way into the legal discourse. Sociology's talk *about* law has first to be transformed into legal science's talk *in* law. Conceding this much, we can still criticize Luhmann's (and Teubner's) thesis that sociology and law as discursive realms are closed to each other. Thanks to legal scholarship's dual identity, what it hears from social sciences far more than mere noise (cf. Teubner 1989). There is much that legal scholarship can learn from sociology, even if sociology has no means of imposing its lessons, of "conquering" legal scholarship.

These lessons may be at least threefold in nature: argumentative, critical and reflexive. Consequentialist legal argumentation, where alternative interpretations and decisions are judged according to their probable social effects, gains in cogency if it is supported by sociological evidence; this constitutes the *argumentative* lesson social science can offer to legal scholarship. But here too the truth of social science is subjected to legal normativity. The methodological aspect of legal culture – in Koskenniemi's (2005, p. 563 ff.) terms the grammar of legal argumentation – which includes the doctrine of legal sources, defines the position of consequentialist arguments and the place social scientific insights have in legal argumentation.

I have stressed the normative character of legal theories. But with my emphasis on the specificity of legal theories, I do not deny the possibility or legitimacy of sociology's taking a critical stance towards legal theories. Sociology can try to expose the conception of society implied by dogmatic theories and assess it by social scientific standards. It may well be that the "hidden social theory" of legal dogmatics no longer provides a sociologically adequate description of the extra-legal social reality. Given the inherent fossilizing tendency of dogmatic theories such findings should not come as a great surprise.

Dogmatic theories lie at the kernel of lawyers' professional legal culture, which primarily functions as their practical, tacit knowledge. However, one of the central tasks of legal scholarship is the conscious elaboration of these theories in order to meet the requirements of their heuristic function in legal problem-solving. In this task, legal scholarship should be receptive to social scientific criticism of the social theoretical premises on which dogmatical theories are based.

The procedure of excavating and explicating the implicit social theoretical assumptions of legal dogmatics and comparing them with the sociological truth bears a resemblance to the programme of the critique of ideology. Has my own

argument ultimately led me to accept the distinction between ideology and science and to assign these positions to legal scholarship and sociology, respectively? Presumably not. Sociology's critique remains a critique from the outside; it employs standards that are not equivalent to the yardsticks of legal discourse. Again we have to be aware of the normative aspect of dogmatic theories and of their subservience to the fundamental principle of formal justice. The peculiar inertia of legal concepts and dogmatic theories should not be attributed to some kind of ideological blindness; this inertia may perform an important task in the functioning of the legal system. Thus, too much susceptibility to ever-new sociological insights would deprive dogmatic theories of their potential to secure consistency of adjudication and to enhance the realization of formal justice. In this respect, the closure of legal discourse is not a consequence of an ideological self-deception but of the specific normativity of this discourse.

Dogmatic theories display an in-built inertia, deriving from their stabilizing task in the functioning of the legal system. This inevitable and even normatively desirable immobility should not, however, disqualify us from making a sociologically-grounded critique of their implicit social theoretical premises. Even comprehensive legal theories – Luhmann's reflexion theories – should be sensitive to a disclosure and critical assessment of their sociological assumptions. The disclosure and eventual criticism of legal theories' implicit social theoretical assumptions constitutes an important meeting-place of legal and social scientific discourse; perhaps this is the very locus of the "structural coupling" between law and sociology! However, a fruitful line of communication requires not only legal scholarship's openness towards social scientific criticism but also such criticism's awareness of the tasks legal theories fulfil in the legal system and of the specific normativity these tasks entail.

Legal discourse possesses its own reflexivity: under the conditions of modern law, the law's different layers have opened up for reflexive examination. However, this reflexivity is the law's internal reflexivity. What is difficult to perceive from the internal perspective is the position law and legal discourse, including legal science, hold in society as a whole. Such a perception seems to require the adoption of an external point of view. Here social theory can add to the reflexive self-conception of legal scholars, by enhancing their awareness of the social presuppositions and consequences of their activities.

It should be recalled that legal science is not merely on the receiving end in the learning processes operating between legal and social science. In order to be able to talk *about* law, sociologists must understand talk *in* law; they must adopt what Neil MacCormick (1981, p. 37) has termed the hermeneutic point of view. The grammar and the vocabulary employed in the talk in law they can learn from legal science. As Weber noted, legal science also provides legal sociology with epistemological and causal support. Legal sociology must also acknowledge that legal facts are institutional facts; legal sociology can only identify legal phenomena – say, the elements of legal proceedings – through legal concepts, i.e. concepts worked out and systematized by legal dogmatics. Legal science may even have a causal significance in legal sociological inquiries: it is justified to assume that in legal conflicts, parties and their lawyers

are guided by the prevailing dogmatic interpretations and theories (Tuori 2002, pp. 298-299).

5 The Critic's Narrative of Law and Legal Discourse

When social science claims to be able to tell the truth about law and legal discourse, it challenges normative legal scholarship from without, as it were. Normative scholarship, which understands itself as a participant in legal discourse, has also faced challengers from within legal science. In addition to positivist and rationalist strands, 20th-century legal science includes a third, *realist* trend. It is characterized by a denial of the law's normativity, its *Sollen*-dimension, by the reduction of *Sollen* to empirically observable facts of *Sein*; such as the behaviour of judges and other enforcers of the law. However, the rejection of the legitimacy of normative legal science does not necessarily presuppose an empiricist legal ontology. It is also possible to simply deny the scientificity of legal scholarship participating in legal discourse, to require that academic legal science maintain an external, observer's perspective and refrain from adopting normative standpoints.

The conception of law and legal science I shall present challenges normative legal scholarship from the inside. I shall call this the Critic's narrative. As will be shown in the following chapters, the Critic's narrative has far-reaching historical antecedents; its founding fathers include Jeremy Bentham (1748-1832), even Thomas Hobbes (1588-1679). A kinship with the way American legal realists approached law and legal discourse is also obvious. In contemporary debates, versions of the Critic's narrative have been produced by scholars standing close to the Critical Legal Studies movement, such as Martti Koskenniemi, Duncan Kennedy and David Kennedy.

In the Critic's narrative, the law appears, first of all, as an instrumental tool for realizing interests: legal actors' personal or collective interests; the "institutional" interests of a legal institution, such as a court; clients' interests; or the interests of social classes and groups. The law's instrumentality permeates and determines legal discourse. Legal actors, participants in legal discourse, adopt a strategic posture towards the law and other legal actors; and this posture guides their normative standpoints on, for instance, the law's interpretation and application: they propound interpretative standpoints which, in their view, further the interests they try to realize through their legal activity and intervention in legal discourse. Law and legal discourse include consensus and universalism, but these result from strategic action, from the hegemony achieved by a particular standpoint. In legal discourse, the "raw" preferences of social actors are translated into universalist legal language, and particular interests are presented as general and "objective":

"Consensus is, after all, the end-point of a hegemonic process in which some agent or institution has succeeded in making its position seem the universal or "neutral" position. ... All law is about lifting idiosyncratic ('subjective') interests and preferences from the realm of the special to that of the general ('objective') in

which they lose their particular, political colouring and come to seem natural, necessary or even pragmatic.” (Koskenniemi 2005, p. 597).

In the Critic’s narrative, the basic constellation of law is that of a legal dispute, where the parties, aided by their legal counsellors, strive for a solution favouring their interests; the perspective of the Critic’s narrative is that of a legal counsellor. As seen from that perspective, legal argumentation appears as strategic action aiming at benefits at the expense of the other party. Thus, “the lawyer comes to a normative problem always from some perspective, to defend a client, an interest, a theory; therefore “the field of legal argument is constructed in an adversarial way: a defence is meaningful only as defence against something” (*ibid.*, s. 598-599).

The Critic may also define her task as a disclosure of legal discourse’s deep structures. In the Critic’s narrative, reconstruction is attached to legal disputes and the perspective of a legal counsellor, which, for the Critic, constitutes the paradigmatic constellation of and perspective on the law. In his critical narrative, Koskenniemi calls the law’s deep structure its *grammar*. This grammar consists of argumentative rules, which guide the production of arguments regarded as valid arguments in legal discourse. In Ferdinand Saussure’s (1868-1943) terms, these rules constitute the *langue* of the law (of legal discourse,) its *parole* being represented by the arguments produced according to these rules. The grammar of international law is based on the “binary opposition” of apology and utopia, and international law discourse can be analyzed as variations on this fundamental opposition. What is essential is that the grammar does not dictate the substantive contents of discursive interventions, that is, of legal argumentation. The grammar only provides legal discourse with its basic structure: apology and utopia constitute the poles between which international law discourse rotates and which, in deconstructionist analysis, can be shown to depend on and to be constantly transformed into each other. Legal discourse displays at the same time both strict structural formalism and vague substantive indeterminacy. The deep structure of the discourse, its *langue*, does not contradict the strategic posture determinant of its *parole*, that is, the arguments of the participants; on the contrary, even here it is the *langue* which makes the *parole* possible in the first place (Koskenniemi 1999a, p. 363). The strategic posture is imposed on legal actors by the law’s fundamentally adversarial nature. The reconstruction of legal discourse’s deep structure does not proceed from “the adversarial nature of (international) law ... (as) an anthropological or sociological datum about it – even less (as) an essentialist claim about its “nature”; the law’s adversarial nature is “an internal, constitutive presupposition of legal argument itself”. Antagonism is “embedded in the *raison d’être* of the law itself and carried within it as the endlessly repeated rejection of its ‘other’ (discretion, politics, power, violence, corruption etc.)” (Koskenniemi 2005, s. 599).

In her narrative, the Critic extends to all legal actors and participants in legal discourse the strategic posture which ensues from the law’s adversarial character. Unlike legal counsellors, judges and legal scholars are not openly attached to the interests and strategic aims of the parties to individual legal disputes. However, the Critic detects beneath the robe of seeming neutrality of

these legal actors various kinds of interest which govern the way they use the leeway given by the law's grammar. Judges have their professional interests, which may be connected to the position of their courts in the power play between institutional legal actors. As parties to this power play there may appear, say, the judiciary and the legislature; private and criminal law courts and administrative courts; national and transnational courts; European Court of Human Rights and European Court of Justice etc. International law displays a differentiation or fragmentation into relatively independent regimes, which, in addition to their norm orders, also possess a distinct institutional structure. The regimes try to control their respective fields and define legal disputes from the perspective of their norm order and institutional structure: for the regime of international environmental law, whale trade constitutes a problem of environmental law, while the WTO regime sees in it an issue of international commercial law; from the perspective of the WTO regime, even the patents on AIDS medicines concern international commercial law, whereas for the human-rights law regime at issue is the right to life, guaranteed by international human rights instruments (Koskenniemi – Leino 2002).

The Critic's narrative of the law is a story of a strategic power play where at stake is the power to define the contents of the law in force; the power to universalize and objectify one's particular interests. Through their arguments from principles and from basic rights, the courts prop up their position in relation to the legislature; when deciding on issues concerning the boundaries of their respective jurisdictions, the courts promote their institutional interests; the ECJ develops the basic rights dimension of EU law in order to ward off the threat from national (constitutional) courts and the ECHR on its interpretative monopoly under EU law.

In the Critic's view, the strategic dimension in judges' activity is not restricted only to professional and institutional interests. Judges are also guided by their conscious or unconscious ideological and political preferences, which affect, say, the weighing of principles and counter-principles. Principles are shown to be mere rhetorical facades, covering social interests; they are policies, encrusted by rhetoric (Kennedy 1997, p. 316 ff.; Koskenniemi 1999b).

A similar analysis is valid with regard to principles developed and articulated by normatively-oriented legal scholarship. Lists of principles and their *prima facie* ordering imply positions on social interests and their relations; even legal scholars are unable to escape the law's political determination through rhetoric of principle. In addition, legal scholars, like judges, have their professional interests, which now appear in the (dis)guise of legal scientific discourse. Scholars strive for academic positions, and disciplines compete for resources and influence. Private law and public law argue about the privileged perspective on the law of the "post-expansionist" welfare state; about the respective weight of private and public law considerations in privately produced social services, such as daycare. Labour law and social law, fighting for its independence, may squabble over the control pension legislation's interpretation and systematization. Different schools and paradigms with their particular interests also contribute to the demarcation of the frontlines crossing the field of legal scholarship: in Finland after World War II, the analytical school challenged conceptual legal dogmatics (*Begriffsjurisprudenz*) and had later on to face its

own post-analytic challengers, such as the so-called alternative jurisprudence. The Critic perceives also in social and legal scientific research on law two alternative ways of depicting law, each with its distinctive vocabulary and argumentative grammar. Social science and normative legal scholarship wage a strategic battle over the power to tell the truth about the law.

Of its nature, the criticism of the Critic's narrative is to unmask: the truth of strategic interest and power game is disclosed beneath the normative rhetoric of legal discourse, and the characteristic universalism of legal discourse is shown to be a mere drape covering particular interests, and eventual consensus a hegemony of interests, successful in their strategic aims. The law's *ratio* is revealed to be only concealed *voluntas*. The Critic refrains from adopting a normative position, from setting up and applying normative criteria; the Critic doesn't want to replace one form of misleading universalism with another, equally misleading universalism. The criticism of the law's strategic power game does not apply a normative yardstick; the Critic is content with the reconstruction of the grammar of legal discourse – its deep structure – and the disclosure of the ties which attach legal speech acts to particular interests.

In the Critic's view, the deceptiveness of legal universalism is not necessarily attributable to the cynicism of legal actors. It may well be that legal actors, the participants of legal discourse, are not aware of the strategic dimension in their activities; of the interests which govern their interventions. The Critic's narrative may include an intrigue of self-deception. The judge may believe that her decisions derive solely from the law in force and its correct and neutral interpretation in light of the facts of the case. Correspondingly, the legal scholar may be convinced of the correctness of her interpretative standpoint or the superiority of her theoretical articulation concerning, say, the constitutional doctrine of the separation of powers, over the previous alternatives proposed by the legal literature. Thus, the Critic may also perceive her role as that of a Therapist who makes what is unconscious conscious, frees legal actors from their illusions and empowers them to adopt a "healthy" posture towards the law and legal discourse; to detect in law an instrument for the attainment of extra-legal aims; to recognize the political choices which are unavoidable in legal practices; to discover the truth of *voluntas* that lies behind *ratio*. The aim of the critical narrative about international law has been "to liberate the profession from false necessities" (Koskenniemi 2005, p. 572).

6 The Problem of Reductionism

Modern law is pervaded by certain basic tensions which, to a large extent, account for its internal dynamics. These include the relationship between the law's *voluntas* and *ratio*, which, in modern law's and legal doctrine's development, assumes various guises. In the legal theoretical debates of recent decades, it has been examined through, for instance, the concepts of policies and principles.

There are three ways to treat these tensions. The first of these transforms the tensions into *dichotomies* which remain strictly segregated. This is how Kelsen

conceived of the relationship between the Ought and the Is, *Sollen* and *Sein*: social and psychological facts belong to the world of the Is, legal norms to that of the Ought. The world of the Is could not be examined from the normative perspective of the Ought, nor the world of the Ought from the point of view of the causality reigning in the world of the Is. Kelsen's pure doctrine of law appeared to be particularly vulnerable at the unavoidable interface of the worlds of the Is and the Ought, say, at the point where a legislative act in the world of Is bears a new inhabitant into the world of the Ought: a new legal norm.

The second way of dealing with the internal tensions of modern law can be called *reduction*: the chosen strategy consists of reducing one side of the tension to the other, of defining it in terms of the latter. This has been the realist programme in legal theory: the search for an empiricist definition of the law's normativity. Reference can be made to American or Scandinavian realists' proposals for defining "legal norm" through predictable reactions on behalf of law enforcement authorities or Alf Ross' (1899-1979) definition of the law in force as the prevailing ideology among the judges, that is, as a social psychological fact. The realists' reductions have not succeeded: all the definitions include an obstinate normative, non-factual element. Thus, in my examples neither the law enforcement authorities to whose predictable reactions the concept of legal norm is tied nor the judges whose social psychology we are supposed to examine when examining the law can be identified without relying on legal norms defining authorities and judges: authorities and judges are legal-institutional facts which do not exist without respective constitutive legal norms.

My own approach follows a third alternative: that of *mediation*. There is no permanent solution to the tensions, they are tasks and challenges which the actors of modern law have to tackle over and over again. Dichotomization and reduction adhere both to either/or thinking; by contrast, the programme of mediation follows the logic of both/and. Modern law includes both *voluntas* and *ratio*; they are not only perspectives *on* the law but are present *in* the law as its internal tension. Legal research should explore their varying forms and mediations and reject a one-sided voluntaristic or rationalistic approach.

The basic problem afflicting the Critic's narrative is its reductionist nature; it is, though, not easy to convince the Critic of her reductionism. It is difficult for the Critic and her critic to find a common language of debate. The Critic tends to fend off every criticism by reducing it to the hegemonistic goals of her interlocutor which the latter tries to achieve through the "politics of descriptions", by employing vocabulary that serves the strategy of the criticism. In spite of these difficulties, I venture to propose speech act theory as the conceptual framework of the discussion.

As with speech acts generally, legal speech acts, such as laws, court decisions and legal scholars' interventions, possess three dimensions: locutionary, illocutionary and perlocutionary. When focusing on the locutionary aspect, at issue are the propositional contents of legal speech acts, whereas the perlocutionary aspect concerns their extra-discursive effects. In the illocutionary dimension, attention is turned, firstly, to the speech acts' illocutionary force – those legally regulated or culturally defined conditions which make speech acts legal speech acts. In addition, the illocutionary aspect is related to legal speech acts' (substantive) validity claims which are tested in ongoing legal discourse

and which emphasize elements defining normative correctness. It is the reciprocal testing of validity claims which connects legal speech acts to each other, links them together into legal discourse. In this sense, it is the illocutionary aspect which is crucial for identifying the distinctiveness of legal discourse.

By contrast, in the Critic's narrative the dominant dimension is the perlocutionary one. What for the Critic is essential in legal speech acts is their overt or covert strategic aims, which relate to speech acts' consequences beyond the discourse. The locutionary or illocutionary side gains significance in the Critic's narrative only as a means for achieving perlocutionary effects.

The dominance of the strategic, interest-oriented perspective means that the Critic's narrative does not allow any space for such an assessment of the normative justifications for legal speech acts which would bracket the speech acts' strategic aims and effects. The Critic attempts to remain beyond legal discourse: she does not perceive herself as a participant of legal discourse nor her speech acts as legal speech acts belonging to this discourse. She expels normative argumentation intervening in legal discourse from academic research, from legal *science*. Here we have the first manifestation of the reductionism afflicting the Critic's narrative: the Critic absolutizes the strategic aspect of legal discourse – legal speech acts' perlocutionary dimension – and excludes from her narrative normative argumentation with its emphasis on the illocutionary dimension.

Legal speech acts involve a perlocutionary dimension, and they can be analyzed from the perspective of this dimension. However, this does not prevent one from focusing on judging the speech acts' normative correctness while bracketing the perlocutionary aspect: the examination of legal speech acts from a perlocutionary and an illocutionary point of view are complementary and not mutually exclusive research tasks.

Contributions coming from different schools within legal scholarship have their perlocutionary aims: the schools contend over academic positions, chairs, law reviews, resources etc. Scholars who put forth proposals for a new systematization of the legal order, for new branches of law and corresponding academic disciplines – communication law, media law, sports law, medical law – strive to secure new positions within the legal and the academic field. However, the proposals and their justifications can also be assessed independently of such strategic, extra-discursive purposes: if it is possible to bracket the illocutionary dimension of legal speech acts and focus on their perlocutionary effects, it is also possible to bracket the perlocutionary dimension and focus on speech acts' illocutionary validity claims. To stress the significance of the perlocutionary aspect is not to commit to reductionism; what is reductionism is to absolutize it and to examine the illocutionary aspect merely as a servant of strategic aims.

The Critic's reductionism subjects the law's *ratio* to its *voluntas*. The law's *voluntas* is allied with instrumental reason: from the *voluntas*' perspective the law is a means to achieve political aims. In her narrative, the Critic shares the instrumentalist interpretation of law: legal speech acts – whether laws issued by the legislator, decisions given by the judges or interpretative standpoints or

systematization proposals presented by legal scholars – are strategic moves in an interest-oriented power play. For the Critic, law is politics, and political goals are determined by interests attached to social positions. Such a conception ignores those restraints limiting the law's instrumentalism which derive from legal cultural structures, from legal traditions. These restraints manifest the law's sedimented *ratio* which primarily functions through the legal cultural pre-understanding of legal actors, as their tacit or practical knowledge and which also maintains the law's coherence. The Critic is inclined to reduce the law to its surface level. It is true, though, that the Critic too perceives in law a kind of deep structure but it consists only of fundamental argumentative rules. The Critic ignores the normative and conceptual sides of the law's sub-surface layers; they play as important a role in the legal cultural pre-understanding of legal actors as the grammar of legal discourse.

The law and legal discourse undoubtedly possess a strategic aspect, and it is no doubt justified to examine the law from the adversarial perspective of a legal counsellor. But this is not the only possible perspective, nor should it be allowed to dominate the picture of law and legal discourse. Law and legal discourse involve, not only strategic, but also consensual elements; these are linked to the illocutionary dimension, ignored by the Critic. Even the interventions of parties to legal disputes – and of the lawyers representing the parties – are not free from such elements, in spite of the importance of the strategic aims: these interventions involve normative arguments and they raise normative validity claims, which can be judged independently of the strategic goals, attached to the interests of the party. If the reconstruction of the deep structure of legal discourse is not tied to the perspective of the parties and their lawyers but to that of the judge, the speech acts of the lawyers appear in a new light. The parties to a legal dispute describe the facts of the case from the point of view of their own interests and put forward those *prima facie* applicable legal norms whose fact description corresponds to these facts. Thus, it can be argued that from the judge's point of view the lawyers' strategic posture serves the appropriateness of the decision; that it ensures that all relevant facts and norms are taken into account (Habermas 1992, p. 283). According to this reconstruction of the dialectics of legal proceedings, the lawyers' strategically motivated speech acts are only an independent preliminary phase of thesis and anti-thesis which is surpassed by the judge's synthesis.

What is the reason for the Critic's absolutism, for his emphasis on adversarialism as the law's basic constellation and on the interest-bound nature of legal argumentation? One explanation might consist of the background in international law of some of the researchers who have appeared in the Critic's role; Koskenniemi being the foremost of these. International law is marked by its intimate links with politics, which render it particularly conflictual by nature and attach to its argumentation a more obviously strategic label than is usual in other fields of law. In international law, court procedures are still quite undeveloped, and courts and other dispute-solving bodies do not generally possess a similar independent jurisdiction which does not require the parties' consent as do the courts in national legal systems. The particular features of international law should warn us of making too sweeping generalizations from what might be the case in this specific field of law. Such generalizations in a way subvert the

habitual legal theoretical way of treating international law. Traditionally, legal theory has treated international law as a limiting case because of the still rudimentary stage of its application and enforcement (e.g., Hart 1980, p. 208 ff.). If international law is elevated into a paradigmatic model, the rule is subordinated to the exception.

As the Critic's narrative leaves no independent space for the law's *ratio*, it also excludes a normative criticism which, in accordance with the programme of *immanent* criticism, would justify its yardsticks through a reconstruction of the law's internal *ratio*. An example of such a reconstruction is provided by Habermas' exposition of basic rights – or, in Habermas' terms, the system of rights – and fundamental *Rechtsstaat* principles as the normative deep structure of modern law. On the other side, immanent criticism can accommodate even the Critic's narrative. In the relation of critique between the normative yardstick and the object to which it is applied, reconstruction only specifies the former side; the Critic's narrative of the strategic dimensions of law and legal discourse may well be of assistance in conceiving of the latter pole of the relationship. Although immanent and unmasking criticism are based on divergent conceptions of the character of (socio-)legal criticism, they are not necessarily mutually exclusive.

In the apparently never-ending debate on the scientificity of legal scholarship, realistic trends in particular have tended to deny the scientific character of normative legal scholarship. The Critic follows the realists' footsteps in the exclusion from academic research of legal dogmatics, presenting openly normative interpretative standpoints and systematization standpoints. As a researcher the Critic does not consider herself a participant of legal discourse; she tries to retain with regard to law and legal discourse the position of an external observer. The Critic's reductionism extends to her conception of (legal) science. Like Cotterrell and Luhmann, the Critic tries to solve the problems ensuing from the dual citizenship of legal science by denying it, by expelling normative legal scholarship from the realm of science. Through this move, one more tension characterizing modern law is effaced.

The wall the Critic erects between academic research and normative legal discourse may also separate different aspects of the Critic's professional activities. The Critic may engage in normative argumentation as a practicing lawyer, as a counsellor to her government or as the author of a legal dogmatical article. However, according to her self-understanding she no longer acts in the role of a researcher, as a Critic; she has adopted another language game, another style. In the Critic's view, her academic research and her legal dogmatical or counselling activities are as unrelated to each other as are a Writer's writing a novel and compiling an income declaration for taxation (Koskenniemi 1999a, p. 360). But this stretches the point: the legal research that the Critic acknowledges as academic retains at least at the legal cultural level its connection to legal discourse which deals with openly normative standpoints, arguments and validity claims.

The Critic does not recognize the multi-layered nature of legal normativity and is, therefore, unable to thematize what might be called the *imposed normativity* of all legal scholarship. Its significance is not restricted to legal

dogmatics. Legal research adhering to the Critic's programme also draws its pre-understanding, its tacit knowledge, from the law's legal cultural layer. By the same token, it also contributes to its reproduction; this accounts for the imposed normativity which even the Critic's legal research cannot escape. The Critic brackets the normative validity claims of the legal speech acts she examines and refrains herself from presenting such claims. But through this move, she is not able to free herself from the normativity that her dependence on a legal cultural pre-understanding imposes on her.

The Critic's narrative does not include such a reconstruction of the law's sub-surface layers that the recognition of the imposed normativity of legal scholarship presupposes. The Critic's reductionism prevents her from perceiving those unavoidable preconditions and implications of her critical activities which are related to the multi-layered nature of the law's normativity: the law involves more than just speech acts on its surface level and argumentative rules governing them. The Critic herself may be in need of a therapy enhancing her self-understanding!

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