Ratio Juris
An International Journal of Jurisprudence and Philosophy of Law
Edited by Enrico Pattaro
Volume 13, Number 3, September 2000

CONTENTS

Articles

Introduction
Aleksander Peczenik 231

Fusion of Descriptive and Normative Propositions. The Concepts of 'Descriptive Proposition' and 'Normative Proposition' as Concepts of Degree
Svein Eng 236

An Algebraic Analysis of Normative Systems
Lars Lindahl and Jan Odelstad 261

On the Puzzle Surrounding Hans Kelsen's Basic Norm
Stanley L. Paulson 279

On the Structure of Legal Principles
Robert Alexy 294

Law, Morals and Defeasibility
Jaap Hage and Aleksander Peczenik 305

Legal Knowledge about What?
Aleksander Peczenik and Jaap Hage 326

Ratio Juris. Vol. 13 No. 3 September 2000 (236–60)

Fusion of Descriptive and Normative Propositions. The Concepts of 'Descriptive Proposition' and 'Normative Proposition' as Concepts of Degree*

SVEIN ENG

Abstract. I introduce the concept of 'fused descriptive and normative proposition.' I demonstrate that and how this concept has a basis in reality in lawyers' propositions *de lege lata*, and I point out that and why we do not find fused modality in language *qua* language, morals and the relationship between parents and children. The concept of 'fused descriptive and normative proposition' is of interest in a number of contexts, *inter alia* in relation to law, cf. the debate about the status of lawyers' propositions *de lege lata* ("exactly what kind of propositions are lawyers' propositions about what is the law?"), and in relation to philosophy, cf. the debate about the relationship between 'the is' and 'the ought.' As a consequence of the reality basis and interest of this concept, I see the concepts of 'descriptive proposition' and 'normative proposition' as the extreme points on a graduated dimension, from the purely descriptive to the purely normative.

1. Introductory Remarks on the Concept of 'Fusion'. Terminology

In the work from which the present paper is taken, I have pointed to dimensions and degrees in different basic types of proposition (Eng 1998, sections II B–C). By using the concepts of dimensions and degrees as a basis for questions addressed to (for analysis of) the individual proposition,

* The present paper is a translation of parts of section II F of Eng 1998. The significant abridgement and the format have necessitated some modifications; otherwise, the paper follows the book. Readers who wish to make an in-depth study of my theory of fused descriptive and normative modality are referred to the discussion there. I would like to thank Patrick N. Chaffey, University of Oslo, for help with my English. The book is being translated into English, for publication by Kluwer. In the translation of the book one will also find discussion of and justification for the choices of English terms for my key concepts.

© Blackwell Publishers Ltd 2000, 108 Cowley Road, Oxford OX4 1JF, UK and 350 Main Street, Malden, MA 02148, USA.

one can nuance *what the distinction between descriptivity and normativity refers to*.

Yet given answers to such questions, most people still presuppose that *individual propositions are either descriptive or normative*.

This presupposition I consider sometimes to acquire the stamp of *prejudice*: One assumes that if the distinction between descriptive and normative propositions is applicable (for example, one is not confronted with a question), then the proposition *must* be *either* descriptive *or* normative. No third possibility exists.

In what follows I shall point to features of actually occurring argumentation that I consider to be such a third possibility: *a graduation in the descriptivity and normativity themselves*, not in the different types of proposition as such.

Descriptive and normative propositions can be *more or less tightly interwoven* so that it is more or less difficult to keep the propositions apart psychologically. In some cases the propositions are *so* tightly interwoven that it is in practice difficult to separate them even if one wants to: The individual utterance, after having been interpreted, can neither be said to express an individual proposition of either descriptive modality or normative modality, nor be said to express several propositions that can be separated and categorised as either descriptive or normative. The utterance expresses propositions that *cannot be categorised as either descriptive or normative*.

Cognition of the *sui generis* character of these cases, calls for a *separate concept*: the concept of 'fusion of descriptive and normative propositions'. To keep in mind the difference, and to facilitate psychologically separation from cases in which the descriptive and normative propositions can be kept apart, I use the *terms* "fusion of/ fused descriptive and normative propositions" instead of "combination of/ combined descriptive and normative propositions."[1] For the sake of simplicity, in a number of cases I use the abbreviated forms "fusion" and "fused propositions."

Fusion of descriptive and normative propositions is by definition, as the concept of 'fusion' is established here, a *feature of subjective meaning*, i.e., a feature of the sender's meaning or of a specific person's understanding.[2]

[1] In addition to their normal uses otherwise, I use double quotation marks (" ") to signify that I am talking about linguistic entities (words, phrases, sentences), and single quotation marks (' ') to signify that I am talking about meaning entities (criteria, concepts, propositions). An example of combination of descriptive and normative propositions is that a descriptive proposition *presupposes* normative definitions: custom-based, and, as the case may be, definitions stipulated for the occasion; see Eng 1998, section II A 2 (4)(a). Perhaps normative characterisations too are presupposed, cf. "discourse-ethical" justifications for fundamental norms; see Habermas 1973, 255–58; 1983, 96–103; 1991, 132–34, 154–55, 174, 194. Another example of combination is what Sundby and Eckhoff call "*påkallelser*" ("invocations"), for example, the car passenger who says "parking is prohibited here," and who thus intends both to describe to the driver the legal situation (descriptive proposition) and to give expression to what the driver ought not to do (normative proposition); see Eckhoff and Sundby 1976 and 1991, 65; 1988, 58; Sundby 1974, 174–76; see also von Wright 1977, 105.

[2] On subjective meaning, see Eng 1998, section II E 2.2.

© Blackwell Publishers Ltd 2000.

Fusion is not a feature of the objective meaning of linguistic entities, i.e., is not a feature of meaning according to widespread linguistic practice.[3]

The concept of 'fusion' can be illuminated by taking as a point of departure a certain criterion for the modality of a proposition, a criterion which I consider covers widespread intuitions with respect to whether we are confronted with a descriptive or a normative proposition: namely *the reaction of the language user to discrepancy between proposition and reality*.[4] In what follows I sometimes speak only of the sender, for the sake of simplicity. To sketch the reaction criterion briefly: If the sender corrects the proposition, then this is a criterion of his intending to advance a descriptive proposition. If the sender tries to correct reality, then this is a criterion of his intending to advance a normative proposition. I shall use this reaction criterion for the *operationalising of the concept of 'fusion'*, as follows:

(a) If one does not only look at the individual fused proposition, but at the class of such propositions as a whole, then one sees that the sender does not only use two possibilities with respect to correction, respectively only the proposition or only reality, but that the sender uses all degrees and combinations, thus including partial correction of propositions combined with partial correction of reality.

I shall supplement the reaction criterion with criteria concerning the *language user's deliberation* as follows:

(b) When advancing the proposition the sender lets it remain open whether in the event of subsequent discrepancy between proposition and reality he will correct proposition or reality.

(c) The sender sees any discrepancy as in itself a relevant argument in the consideration of what is to be corrected.

The fact that I add supplementary criteria concerning the language user's deliberation is because the reaction criterion alone is not sufficient *in the individual instance* to distinguish between on the one hand descriptive or normative propositions, and on the other hand fusions. A proposition may in fact have fused modality *even if* the language user in the individual instance only corrects the proposition or only tries to correct reality. For example: A lawyer may decide to correct in full his previous proposition about what the law is, because the Supreme Court has later unanimously and clearly advanced a different view, which according to the criteria for good legal argumentation the lawyer does not consider to be so poorly justified that he can argue against it. Thus the lawyer who prior to 7 April 1973 argued that the formulation "master of any ship [...] on duty" in section 422 of the Criminal Justice Act did not include drivers of pleasure craft, after this same date corrects his proposition in full in accordance with the unanimous judgment of the Supreme Court of this date according to which drivers of

[3] On objective meaning, see Eng 1998, section II E 2.1.
[4] On the reaction criterion, see Eng 1998, section II E 2.2.4 (3)(b).

© Blackwells Publishers Ltd 2000.

pleasure craft are included.[5] In spite of this one-sided correction it will most often be misleading to see the lawyer's previous proposition as descriptive. The reason lies in the criteria (b)–(c). These criteria must therefore be taken into account if one is to be able to capture the phenomenon of fusion.

In the further discussion I first show lawyers' propositions *de lege lata* as *the paradigm case* of fused descriptive and normative propositions (section 2 below). Reflection on and a desire for insight into lawyers' propositions *de lege lata* have been an important factor behind my establishment of the concept of 'fusion'. Against this more concrete background I shall return to the delimitation of the concept of 'fusion' (section 3 below). For a satisfactory definition of the concept it is also necessary to say a good deal about *what the concept does not cover*; for it is an easy matter to *confuse* the phenomenon of fusion with other phenomena that in one or another vague sense may be said to concern the "relationship between the descriptive and the normative" (sections 2.2 and 3.2, below).[6]

Since fusion is a feature of subjective meaning and not of the objective meaning of linguistic entities, it is a factual question that must be investigated in the individual instance whether, and if so in what way, a fusion has been *given linguistic expression* (section 4 below).

In retrospect, fusion will appear as an apparently *specific feature* of lawyers' propositions *de lege lata*. Nevertheless I call lawyers' propositions *de lege lata* the "paradigm *case*," because it is a *factual* question whether fusion is also to be found in other areas of argumentation.

2. Lawyers' Propositions *De Lege Lata* as the Paradigm Case

By lawyers' "*propositions de lege lata*" I mean lawyers' propositions about what is the law. Lawyers' propositions *de lege lata* may be general in one or more dimensions, for example, the proposition that the formulation "master of any ship […] on duty" in section 422 of the Criminal Justice Act includes

[5] Rt. 1973/433. "*Rt.*" is an abbreviation for "*Norsk Retstidende*," which is the name of the leading general law report series in Norway. This series contains all the decisions of the Supreme Court, nearly all of them in full. In relation to the topic of the present paper I designate the decisions of the courts by the common term "judgment," independently of whether they are procedurally called "judgment," "order," "ruling," "decision," or something else.

[6] The literature contains many statements that might suggest that it was the phenomenon of fusion that was being spoken about. A general problem of interpretation is, however, that a distinction is seldom made to a sufficient degree between different phenomena that in one or another vague sense can be said to concern the "relationship between the descriptive and the normative." To the extent that the literature is determinable, it contains a good deal about a number of the phenomena with which I draw boundaries in my discussion (particularly about "wishful thinking" in the psychological genesis of propositions, section 2.2 below, and about close relationships between the cognitive criteria of evaluation prescriptions and decision with respect to values, Eng 1998, section II F 3.2.2 (3)). However, I have not found any statements about a concept of 'fusion of descriptive and normative propositions', as established here, or about that feature of lawyers' argumentation which I use here as the paradigm case of the concept.

© Blackwell Publishers Ltd 2000.

drivers of pleasure craft and, as the case may be, what types of boat and with what lower limits for the size of boat or motor; or lawyers' propositions *de lege lata* may relate to the individual instance in one or more dimensions, for example, the proposition that the formulation just quoted applies to John Brown's driving of a 17-foot plastic boat with a 115-hp motor.

As the expression "propositions *de lege lata*" is used here, it is *by definition open* whether the propositions are descriptive, normative or fused. This is an *empirical question*. I want to emphasise this. I wish to do so because lawyers contrast "propositions *de lege lata*" with "propositions *de lege ferenda*," and by the latter expression mean propositions about what the law ought to be. In consequence it might be tempting to believe that propositions *de lege lata* are by definition considered to be purely descriptive. On this point, the modality, lawyers' use of the term "propositions *de lege lata*" is, however, most often indeterminate. Definitional openness concerning the modality of lawyers' propositions *de lege lata* is also presupposed here. Thus we can formulate the *topic*: What modality have lawyers' propositions *de lege lata* in their actually occurring argumentation?[7]

The demonstration in what follows of the existence of the fused modality in lawyers' propositions *de lege lata* does *not* rest on the one or the other general definitional boundary in relation to the one or the other *border area* of lawyers' use of language (cf. note 7 on relevant terms in lawyers' use of language). I take as a starting point uncontroversial *model examples* of lawyers' propositions *de lege lata* and link the demonstration of the existence and diffusion of the fused modality to such examples.

I shall refer in a number of places in what follows to the above-mentioned example concerning section 422 of the Criminal Justice Act. The relevant part of section 422 of the Criminal Justice Act says: "The master of any ship [...] who wilfully or negligently becomes intoxicated while on duty or about to go on duty, is liable to fines or to imprisonment for a term not exceeding 1 year." In Rt. 1973/433 the Supreme Court arrived at the conclusion that the formulation "master of any ship [...] on duty" included the driver of a 17-foot plastic boat with a 115-hp motor. The accused had in a state of intoxication almost run down a smaller boat with four people in it. The question of what acts are covered by "master of any ship [...] on duty" has been subsequently discussed in Rt. 1975/374, 1992/759, 1995/1878; and later decisions of relevance to the questions of what types of boat are covered, and of lower limits for the size of boat or motor, are to be found in Rt. 1980/1154, 1982/808, 1986/823, 1995/901, 1995/1734.

[7] For stylistic reasons I vary in a number of cases between the formulations "propositions *de lege lata*" and "propositions about what is the law." The formulations "*rettsdogmatiske utsagn*" ("legal dogmatic propositions") and "*utsagn om gjeldende rett*" ("propositions about valid law") are also much used by lawyers, but here I use these on the whole only where there is a need to remind the reader of the connection with this usage.

© Blackwells Publishers Ltd 2000.

2.1. *Fused Modality in Connection with a General Descriptive Component: "What Opinion Other Lawyers Will Probably Hold"*

In the demonstration of the fused descriptive and normative modality in lawyers' propositions *de lege lata*, I shall examine three things: the source of the descriptive component, the source of the normative component, and fusion in concrete argumentation.

2.1.1. The Source of the Descriptive Component

(a) What I Claim

A relatively tangible source of the descriptive component in lawyers' propositions *de lege lata* is the possibility that lawyers always have of thematising *what norms motivate those enforcing the law*. For example, legal science or advocates can thematise what norms motivate judges or civil servants. Such propositions are *descriptive*; they are, as it has been put in the literature, "*uekte normer*" ("spurious norms"), "*om normer*" ("about norms") or "*norm-deskriptive*" ("norm-descriptive") (Eng 1998, section II A 5 (3)).

Propositions about what norms motivate those enforcing the law are considered to be of *interest* for a number of reasons. The most widespread motive is the wish to avoid wasting time, effort and money in actual conflict solving. For this purpose one wants to know what those with power, *inter alia* those enforcing the law, will say: The client wants the advocate's view on what possibilities he has of succeeding through a lawsuit or legal remedies in civil or criminal proceedings; and the advocate wants legal writers to lay the ground for such views (cf. Eckhoff 1993, 16; Selvig 1993, 537; Krüger 1989, 505 (bottom); Brusiin 1990, 154–55, 156; Hellner 1997, 358). Another motive, which is fairly widespread, is the desire to be scientific, using language in a way in which only descriptive propositions are called "scientific" (Eng 1998, section II B 7.3.2 (1)).

This first-mentioned and relatively tangible source I see as a special case of a *general feature* of lawyers' argumentation *de lege lata*, namely that it is always considered relevant to ask "*What will the other lawyers say?*" For example: "What will the other lawyers say about […] my saying that section 422 of the Criminal Justice Act […] does not cover pleasure craft/ covers pleasure craft/ in the latter instance, does not cover boats under 10 feet and with smaller motors than 15 hp?" "What will they say," partly in the sense 'do they agree?', and partly in the sense 'if not, what in that case is their argumentation and reaction otherwise?'.

As with the lawyer's relationship to those enforcing the law in particular, so too the relationship between lawyers more generally provides the opportunity for descriptive propositions about what are the norms that motivate, in this case propositions about *what are the norms that motivate in communities of lawyers*, be it in the community of *all* lawyers or in *partial* communities. How the individual lawyer more concretely imagines the

© Blackwell Publishers Ltd 2000.

community or communities of lawyers to which he relates, may vary. But what I take to be common is the ability to adopt the perspective of "the generalised lawyer" (section 2.3 below).

Propositions about what are the norms that motivate in communities of lawyers are relevant in *all* connections *de lege lata*. Other lawyers' rejection or acceptance of an argument is according to the tenability criteria for lawyers' argumentation *de lege lata* of *constitutive significance*: If the argument is rejected by other lawyers of sufficient number and repute, then the argument is not only more or less *unpopular*, it is also *untenable de lege lata*; and if the argument is accepted by other lawyers of sufficient number and repute, then the argument is not only more or less *popular*, it is also *tenable de lege lata*.

In lawyers' argumentation *de lege lata* there is thus not an absolute separation but a *mutual justificatory relationship* between what other lawyers *will* probably *assume* and what is *tenable*; between what other lawyers will probably assume to be the law and what is tenable law (section 2.1.3 below). The weight in the present section 2.1.1 lies on the omnipresent relevance and weight of what other lawyers will probably assume to be the law.

(b) Specifying by Drawing Some Boundaries with What Others Have Claimed

To go into greater depth about what has been said of the descriptive component (item (a) above), I shall point to certain *differences* from, on the one hand, pure prediction analyses, and on the other, criticism of prediction analyses.

(i) The descriptive component outlined *does not exhaust* my analysis of lawyers' propositions about what is the law (sections 2.1.2–2.1.3 below).[8]

(ii) My analysis is *not personally limited* (section 2.3 below). The descriptive component outlined entails a prediction *of what norms motivate lawyers more generally*, not only of what norms motivate judges or other persons enforcing the law (as in Holmes and Ross). Further, I claim that the element of prediction is *part of propositions about what is the law from all lawyers*: first, that the element of prediction is not only part of propositions about what is the law from, for example, legal writers (which is the starting point in Ross 1958); and second, that the element of prediction is also part of propositions about what is the law from judges and other persons enforcing the law.

There may be reason to emphasise the latter, that the element of prediction is *also* part of propositions *de lege lata from persons enforcing the law*, since a certain amount of criticism of prediction analyses seems to build on

[8] This is in contrast to the analyses by Holmes and Ross, in which lawyers' propositions about what is the law are subordinated to the prediction. On Holmes' propositions, see Eng 1998, sections I 2 (in the text at note 1) and V 1.1; and on Ross' propositions, Eng 1998, sections I 4, II B 7.3.2 (1), C 2.1, 2.3, 3.1 (2) and V 2.6.

© Blackwells Publishers Ltd 2000.

the premise that this is logically impossible. True enough, the proposition *de lege lata* from a person enforcing the law cannot be interpreted as a prediction of what the person concerned will *himself* conclude concerning what is the law. But there are no logical problems in interpreting the proposition from the person enforcing the law as descriptive with respect to what opinions *other* sections of the legal community hold.[9] And I consider that such a descriptive perspective is just as constitutive for the propositions *de lege lata* from a person enforcing the law as for other lawyers' propositions *de lege lata*; cf. item (a) above, and the discussion in what follows.

Hart therefore gives, in my opinion, a *misleading picture of the basic structure of the application of the law* when he writes in his argumentation against pure prediction interpretations (my italics): "[The judge] does *not* look upon the rule as a statement that he and *others are likely to* punish deviations [...] The predictive aspect of the rule (though real enough) is *irrelevant to his purposes* [...]"[10] and, further, when he categorises lawyers' propositions *de lege lata* as "*internal* statements," at the same time as he advances *a sharp conceptual and factual distinction* between on the one hand "internal statements" ("internal aspect of rules," "internal point of view") and on the other hand "*external* statements" ("external aspect of rules," "external point of view"), including assumptions about what motivates other lawyers (predictions).[11] I cannot see that Hart provides any tenable arguments for saying that assumptions about what motivates other lawyers (predictions) cannot logically be included or are not in fact included as *components* in judges' or other lawyers' propositions *de lege lata*.[12]

[9] This seems to have been overlooked, for example, by Strahl 1955, 293 ("the kitten chasing its tail"); von Eyben 1969, 105 (declares himself in agreement with Strahl); Fleischer 1968, 187; 1995, 50 ("does not make any sense to the judges [...] themselves"; "absurdity"); perhaps also, for example, by Arnholm 1954, 146–47; Aubert 1979, 21; Jørgensen 1970, 101; Hart 1961, 143; 1994, 146–47; Summers 1982, 131, 144; Harris 1980, 97. Another reason why the descriptive component may appear logically impossible is that one puts this into the formulation of the problem, see, e.g., Hart 1983, 165 (my italics): "[E]ven if in the mouth of the ordinary citizen or lawyer 'this is a valid rule of English law' is *a prediction* of what a judge will do, say or feel, this cannot be its meaning in the mouth of a judge who is *not engaged in predicting* his own or others' behaviour or feelings." *The question* is, however, precisely *whether, and if so in what manner and to what extent*, the lawyer, including the judge, "is engaged in predicting."

[10] Hart 1961, 10 (in the form Hart reproduces a view advanced by others, but it is apparent that he agrees with the passage quoted), 102; 1994, 11, 105.

[11] Hart 1983, 165–69; 1961, 55–6, 83, 86–8, 96, 99; 1994, 56–7, 85, 88–91, 98–9, 102–3. The only connection Hart seems to see between propositions *de lege lata* ("internal statements") and assumptions about what motivates other lawyers (predictions) ("external statements") is that propositions *de lege lata presuppose* that the legal system in its entirety is on the whole effective; see 1983, 168; 1961, 82, 86, 100–1; 1994, 84–5, 88, 103–4. Neither the advancement of the sharp distinction between "internal" and "external" statements nor of the presupposed connection between them just mentioned, are particular to Hart. The sharp distinction had been advanced in many forms and under many names, see, e.g., Eng 1998, section II A 5 (3), by way of conclusion; and the presupposed connection mentioned, had been advanced by Kelsen 1985, 72–3. Today, however, Hart is the most discussed and influential representative of this concept formation and is quoted here in this capacity.

[12] On the logical, see at and in note 9 above.

© Blackwell Publishers Ltd 2000.

(iii) My propositions *do not have the status of descriptive or normative definitions* of the formulations "lawyers' propositions about what is the law"/ "lawyers' propositions *de lege lata*." I presuppose the meaning of these formulations, and the phenomenon that is thereby delimited: lawyers' propositions about what is the law. My propositions are *descriptive characterisations* of this phenomenon, in that they aim to describe an actually occurring feature: fused modality. I do not say that fused modality is or ought to be a criterion for the use of the formulations "lawyers' propositions about what is the law"/"lawyers' propositions *de lege lata*."[13]

2.1.2. The Source of the Normative Component

The normative component in lawyers' propositions *de lege lata* stems from the fact that lawyers more or less directly solve conflicts. The parties and the public expect, and the lawyers themselves wish to achieve, what one considers to be *reasonable and just results*, both in the case of general interpretation (i.e., on the level of rules) and in the case of subsumption (i.e., in the individual case); neither the individual nor society can in the long run live with a picture of himself/itself as "unreasonable and unjust."[14]

Reflections on this have found direct expression in the work of many writers: "The judge will as far as possible understand and interpret the statute [...] so that he is able to accept his decision [...] also as 'just' or 'socially desirable'" (Ross 1958, 138, see further 99–100, 136–40, 145–47, 151ff.); "That a solution is found [...] to be the reasonable and best one [...] is particularly often the decisive factor both for theory and for the practice of the courts" (Augdahl 1973, 17); "In this book the significance [of evaluations] in the application of the law has been a recurring theme" (Eckhoff 1971, 312, see further chaps. 4 and 12; 1993, 127–28 and chap. 14); "Ethical demands [are] a significant group of practical fundamental preconditions for all application of the law and interpretation of statutes" (Strömholm 1996, 425); "Many lawyers understand the term 'legal argumentation' in such a way that the following supposition can be considered reasonable: If decisions are made in a particular area without any consideration whatsoever for justice, it is strange to consider these decisions as being of a legal nature" (Peczenik 1995, 100); "The common denominator shared by both judge and 'environment' is [...] that the solution found by a lawful procedure and proper application of legal concepts and of legal logic [...] 'must' be correct and rational" (Esser 1972, 24, see further *inter alia* 69, 118–19, 135, 140, 152)[15]; "[...] the importance in the [judicial] deciding process of considerations of

[13] This is in contrast to the analyses by Holmes and Ross, in which descriptive characterisations and normative definitions are combined, see Eng 1998, chap. V, sections 1.1 and 2.6 respectively.
[14] For the sake of brevity I use the formulation "reasonable and just" as the representative of fundamental normative concepts.
[15] "Gemeinsamer Nenner bei Richter und 'Umwelt' ist [...] daß die nach legitimer Verfahrensweise und in korrekter Anwendung juristischer Begriffsbildung und Logik gefundene Lösung [...] gerecht und vernünftig sein 'müsse'."

© Blackwells Publishers Ltd 2000.

sense, decency, policy, wisdom, justice […]" (Llewellyn 1960, 59, see further *inter alia* 23–4, 59–61, 121, 238). In particular with the science of law in mind: "If all statements on valid law were to be interpreted as predictions of judicial behaviour, the legal scholar would be bound by an adherence to the *status quo*, which would be objectionable, both from his own point of view and from that of wider social interests. It would deprive legal thinking of a creative, dynamic element which is probably socially beneficial" (Aubert 1965, 133).

Cognition of the factual element of others' expectations of and one's own wishes for reasonable and just results may also be expressed in a more concealed form: through the proposition that it is not only so, that the result in the individual instance is justified through the rule, but at the same time so, that the rule is justified through the result in the individual instance.[16] "Expressed," if one by the said proposition means a structure in which (i) the result in the individual instance is justified through *that* aspect of the result that it (the result) falls under the linguistic formulation of the rule and contributes, as the case may be, to realising the purpose of the rule; (ii) at the same time as the rule is justified through *that* aspect of the result that it (the result) is considered reasonable and just.

"Reasonable and just" shows itself on closer examination of actual expectations and wishes to be a property of propositions that is *not* reduced to truth, for example, that is not reduced to 'conforming with earlier practice', 'conforming with other lawyers' views', 'conforming with widespread moral views', 'conforming with divine commandments', or the like. The factors mentioned are also considered to be relevant to a greater or lesser degree. But in addition come expectations of and wishes for a reasonable and just *decision*, in the light of the specific nature of the typical instance or of the individual instance.[17] For example, in addition come expectations of and wishes for a reasonable and just decision with respect to whether the formulation "master of any ship […] on duty" in section 422 of the Criminal Justice Act covers the drivers of pleasure craft, and if so, what types of boat and with what lower limits for the size of boat or motor. Such propositions are *normative* in the terminology of this work; they are, as it has been put in

[16] For occurrences of this proposition, see Hyllested 1910, 246; Cardozo, declaring himself in agreement with Munroe Smith, in Cardozo 1947, 114 at and in note 16; Arnholm 1952, 510; Eckhoff and Sundby 1988, 138; 1991, 165; Esser, declaring himself in agreement with Radbruch, in Esser 1972, 32 at and in note 2; Luhmann 1983, 359. By virtue of its being (directly) a proposition about reciprocal effect, the proposition mentioned is among those that are often expressed through the formulation "hermeneutic circle," see, e.g., Kaufmann 1984, 73–6, with further references.

[17] In conformity with the superordinate perspective and topic of the work from which the present paper is taken, I do not adopt any standpoint here on whether the use of "reasonable," "just," or the like, *can* be reduced to truth; cf. Eng 1998, chap. I and sections II A 5 (2)(b) and 8. What is relevant in relation to the said perspective and topic is that lawyers are not expected to undertake and do not in fact undertake such a reduction when they take standpoints *de lege lata*.

© Blackwell Publishers Ltd 2000.

the literature, "*ekte normer*" ("genuine norms"), "*i normer*" ("in norms") or "*norm-ekspressive*" ("norm-expressive") (Eng 1998, section II A 5 (3)).

The normative propositions can coincide with a descriptive proposition about what motivates larger or smaller sections of the legal community, i.e., in relation to these other lawyers they can be *normative-traditional* propositions: for example, "it is reasonable and just that the formulation "master of any ship […] on duty" in section 422 of the Criminal Justice Act covers the drivers of pleasure craft." Or the normative propositions can deviate from a descriptive proposition about what motivates larger or smaller sections of the legal community, i.e., in relation to these other lawyers they can be *normative-innovative* propositions: for example, "it is not reasonable and just that the formulation "master of any ship […] on duty" in section 422 of the Criminal Justice Act covers the drivers of pleasure craft" (probably a deviation from the opinion of many other lawyers).[18]

I should add that to an adequate picture of the role evaluations and choices play in lawyers' argumentation belongs the fact that others' expectations of and lawyers' wishes for reasonable and just results not only enter into lawyers' propositions *de lege lata*, cf. the present paper, but also into lawyers' propositions concerning the facts of the individual case (Eng 1998, section III 3.2.3 (3); 1999, section 2.3 (3)).

2.1.3. Fusion in Concrete Argumentation

Even though neither the purely descriptive interpretation nor the purely normative interpretation appears completely unreasonable in the *abstracting perspectives* that have now been outlined (respectively sections 2.1.1 and 2.1.2 above), neither of these interpretations is particularly often apt in relation to lawyers' *concrete argumentation*. There one finds instead that the *fused modality* dominates. A criterion of this is *how lawyers react in the event of discrepancy* between their propositions about what is the law and a decision from a body enforcing the law, for example, a decision from a court.

On the one hand the advocate, the legal writer, the judge, the civil servant, or other lawyers will seldom say quite simply that they made a mistake and unilaterally correct their own propositions *de lege lata*; i.e., they will seldom consider their own propositions as purely descriptive. The most practical exception is the advocate's proposition about what is the law in a situation in which he is deliberating whether a lawsuit will succeed. It is less practical that legal writers consider their propositions about what is the law as purely descriptive.[19] And it is least practical that propositions about what is the law from judges and civil servants are intended as purely descriptive.

[18] The quotation from Aubert above is aimed at the normative-innovative propositions. If one is to give an adequate picture of the significance of fused modality, the normative-traditional propositions must, however, also be taken into consideration, see Eng 1998, section II F 3.2.1.
[19] One example is the Swedish legal scholar Knut Rodhe, who has consistently stated a wish to limit himself to descriptive characterisations; see Rodhe 1944, 96–7 ("necessary that […] from the scientific presentations one takes away all statements about how legislators and courts

© Blackwells Publishers Ltd 2000.

On the other hand, the same groups of persons will seldom say quite simply that a decision that does not conform with their own earlier propositions is incorrect, and unilaterally criticise the decision; i.e., they will seldom consider their own propositions as purely normative.

Instead one sees, first, a characteristic openness with respect to what ought to be adjusted. Second, one sees a desire to go through the earlier arguments behind one's own proposition and to consider them in the light of the discrepancy, before one decides what is to be adjusted.

If one asks the lawyer whether he can *sort* the descriptive from the normative in his proposition *de lege lata*, the answer will often be negative: The lawyer will say that in the making of his proposition *de lege lata* he did *not adopt any standpoint* on what should be adjusted in the event of subsequent discrepancy.[20] And the lawyer will often add that *nor does he see taking such a standpoint as right or possible*, in the perspective of generally accepted criteria for (good) legal argumentation *de lege lata*. What is to be adjusted in the event of subsequent discrepancy depends on the arguments behind the earlier proposition *de lege lata* considered in the light of the nature and degree of the subsequent discrepancy, all assessed in the light of the criteria for (good) legal argumentation. Lawyers will, for example, be more inclined to revise a proposition *de lege lata* if it does not agree with a subsequent unanimous judgment of the Supreme Court,[21] than if it does not agree with a subsequent judgment of the Supreme Court with dissent.[22]

To put things in more general terms: Lawyers' propositions *de lege lata* often seem to have the special modality that in section 1 above I have defined and called "*fusion*." They are often neither purely descriptive nor purely normative: neither "*uekte normer*" ("spurious norms") nor "*ekte normer*" ("genuine norms"), neither "*om normer*" ("about norms") nor

ought to act and contents oneself with investigating how they actually act"); Rodhe 1956, III ("The handbook is not intended—in conformity with the writer's fundamental view of the task of legal science—to give any recommendations to legislators and courts other than in questions of terminology"); Rodhe 1996–97, 1 ("a legal writer can and should concern himself with description and prognoses but […] should refrain from recommendations"), cf. 3–4. Rodhe's standpoint has won little support, see *inter alia* Ekelöf 1991, 121–24; Arnholm 1958, 125–26.

[20] Andenæs 1962, 419–20: "[If a legal writer] has expressed his view on the correct solution of a legal issue and he is then asked whether his statement means that the *Supreme Court* will probably resolve the matter in this way, or whether it is the solution *he himself* would choose, he will perhaps be slightly embarrassed and not quite know what to answer" (Andenæs' italics).

[21] For example, Rt. 1973/433, where the Supreme Court unanimously concluded that the formulation "master of any ship […] on duty" in section 422 of the Criminal Justice Act covers the drivers of pleasure craft.

[22] For example, Rt. 1992/759, where the Supreme Court concluded with a majority of 3–2 that the formulation "master of any ship […] on duty" in section 422 of the Criminal Justice Act also covers passengers aboard pleasure craft who "abruptly and unexpectedly [are] given control of the craft," unless the passenger "has no reasonable possibility of preventing the situation or of limiting the driving by stopping the motor or in any other manner" (p. 761, the majority; the minority wished on account of the abruptness and unexpectedness in the situation not to deem the passenger as being "master of any ship," and could consequently not accept the last quoted and cumulative condition for acquittal).

© Blackwell Publishers Ltd 2000.

"*i normer*" ("in norms"), neither "*norm-deskriptive*" ("norm-descriptive") nor "*norm-ekspressive*" ("norm-expressive"). Squeezing lawyers' propositions *de lege lata* into these dichotomies is liable to obscure their *distinctiveness in the modality dimension*.

I said earlier that in lawyers' argumentation *de lege lata* there is a mutual justificatory relationship between what other lawyers will probably assume to be the law and what is tenable law (section 2.1.1 (a) above, by way of conclusion). This proposition can now be made more precise: Often in lawyers' propositions *de lege lata*, the lawyer's view of what other lawyers will probably assume to be the law (the descriptive proposition) *fuses with* the lawyer's view of what ought to be the law (the normative proposition) *into* the lawyer's view of what is tenable law (the fused descriptive and normative proposition).

2.2. *Drawing the Boundary with Descriptive Propositions about Particular Source-of-Law Facts and "Wishful Thinking" in the Genesis of such Propositions*

Above I have identified and concentrated on a *general* descriptive component in lawyers' propositions *de lege lata*: that it is always considered relevant to ask and to take into account "what opinion other lawyers will probably hold."

Lawyers' argumentation *de lege lata* links up with many other and *particular* source-of-law facts. In particular, it is linked up with what the legislator, legal draughtsmen, contracting parties, courts or administration have said, and what they have meant by what they have said.

In relation to these topics for descriptive propositions, *fusion-like phenomena* often arise. For example, in connection with judges' propositions about the legislator's intention, Ross points out:

> [T]he distinction between [the judge's] cognitive and evaluating functions is an artificial one, so far as these two merge in practice, leaving it impossible to say precisely where one ends and the other begins. This is because it is impossible for the judge himself as well as for others to distinguish between those evaluations which are manifestations of the judge's own preferences and those evaluations ascribed to the legislator which are therefore a datum for a purely cognitive interpretation. […] If now […] the judge identifies his own evaluations with those of the legislator, in his mind the two types of interpretation will fuse into one. (Ross 1958, 140)

I keep such phenomena *outside* the concept of 'fusion of descriptive and normative propositions'. They do not satisfy the concept criterion that, when advancing the proposition, the sender lets it remain open whether in the event of subsequent discrepancy between proposition and reality he will correct the proposition or reality (section 1 above, criterion (b)). This may be illustrated by a specification of the situation described by Ross: If it turns out that a lawyer has overlooked a statement in the *travaux préparatoires*, and this statement shows that his proposition about "what the legislator meant" was

© Blackwells Publishers Ltd 2000.

untenable, then the lawyer will not be in any doubt that he must correct his proposition.

To put this in general terms: Propositions about the particular source-of-law facts entail by definition an obligation to revise the proposition if there later turns out to be discrepancy between proposition and reality. Upholding the proposition would not be understood.

Propositions about the particular source-of-law facts are thus *descriptive*. There is no fusion in the modality of these propositions. However, there is, and *that* is the topic of the quotation from Ross above, often "wishful thinking" in the *psychological genesis of the propositions*[23]:

Because one wishes that something be so (psychological cause), for example, because the lawyer, on the basis of what he deems reasonable and just, wishes a question of law to be resolved in a particular manner, one believes and says that it is so (psychological effect), for example, the lawyer believes and says, in the absence of any proof to the contrary, that the legislator or a contracting party intended to lay down the solution the lawyer deems reasonable and just ("the legislator's/contracting party's intention was [...]"). Such "wishful thinking" in the genesis of the proposition does not make the proposition into a fused descriptive and normative proposition. If when making the proposition one is asked what one will correct in the event of discrepancy between proposition and reality, no other answer is meaningful but that one will correct the proposition.

This is different in the case of the general descriptive component in lawyers' propositions *de lege lata*, concerning what motivates the legal community as a whole. Here it makes good sense and is institutionalised practice to say that the question of what is to be revised, is kept open (section 2.1.3 above): If it turns out that other lawyers judge the question differently, it is not thereby given that the lawyer must revise his proposition 'the rule is [...]/ the solution of the individual question of law is [...]'. The lawyer will go through the earlier arguments behind his own proposition and consider them in the light of the discrepancy before he decides what is to be adjusted.[24]

"Wishful thinking" in the psychological genesis of descriptive propositions is widespread in everyday life, professional subjects, science and philosophy. Fusion in the modality of propositions, as this phenomenon is

[23] The inverted commas ("wishful thinking") signalise that at the same time as widely held views on wishful thinking point our thought in the right direction, the expression has not been defined in a theoretical context and will easily be liable to be too indeterminate in relation to other theoretical purposes. The signpost function is however sufficient here, where the emphasis is not on positive determination of wishful thinking, but on differences in relation to fused modality.

[24] In the light of this, I am not completely in agreement with Ross when he says that the matter he is discussing in the quotation above, is "*parallel to* [...] the fluid boundary between legal-theoretical intention and legal-political intention in doctrine," Ross 1958, 140 (my italics). "[T]he fluid boundary" between legal dogmatics and legal politics is due *both* to "wishful thinking" in the genesis of descriptive propositions about particular source-of-law facts *and* to fusion in the modality of the propositions *de lege lata*; and these matters should, as argued in the main text, be kept apart.

© Blackwell Publishers Ltd 2000.

delimited here, is not equally widespread: Through the further discussion the phenomenon of fusion will appear as an apparently specific feature of lawyers' argumentation.

2.3. The Perspective of "the Generalised Lawyer"

The general descriptive component in lawyers' propositions *de lege lata* corresponds with the *perspective of "the generalised lawyer."* This is in contrast to propositions about particular source-of-law facts (section 2.2 above), which do not correspond with any specific lawyer perspective. The physical and mental facts that form particular source-of-law facts (what particular individuals or groups have said or intended) are, on the contrary, often more easily accessible to non-lawyers and their working methods. For example, professional opinion researchers are better equipped than lawyers to make statements about what the individuals who constituted the legislative assembly when an Act was passed, meant by the text and what purposes they wished it to promote.

By the perspective of "the generalised lawyer" I mean a *fundamental consciousness perspective* on the part of the individual lawyer[25]: a perspective that cannot be reduced to propositions about what particular individuals, courts or administrative bodies have said or intended; a perspective that seizes on *particular aspects* of the phenomena (in general terms: "legal persons," "right," "duty," etc.; in more concrete terms: "contract," "breach of contract," "building," "duty to obtain a licence," etc.) and which uses a *particular method* (lawyers' language and argumentation) to decide the existence, content and duration of these aspects; a perspective which *is extended in depth* through knowledge of actual exercise of power (in what public bodies/parts of private firms is what decided) and through knowledge of other individual lawyers (who is a judge, public prosecutor, director general in a ministry, company lawyer, etc., and what type of lawyer is the person concerned). The perspective builds on and generalises from the opinions and actions of other lawyers. Thus it ties the lawyer's foremost loyalty to other lawyers. Loyalty to the legislator or to the people ("the general sense of justice") is only derived.

By virtue of his being a politically and morally motivated individual, the individual lawyer can obviously feel loyalty to the legislator, people or other groups outside the circle of lawyers. But such loyalty does not lie in the basic structure of lawyers' consciousness that is the topic here.

It seems *necessary to assume the existence* of such a consciousness perspective on the part of the individual lawyer. For if this perspective is

[25] This terminology has been inspired by Mead, who in discussion of the constitution of linguistic meaning, self-awareness and society introduces the term "the generalised other"; see Mead 1962, 89–90, 152–64, 253–56. The concept, however, has been formed on the basis of the purposes here.

© Blackwells Publishers Ltd 2000.

hypothetically eliminated, then the possibility of the general descriptive component in lawyers' propositions *de lege lata* also seems to disappear, and thereby the possibility of the fusion modality in these propositions; but I consider the fusion modality in lawyers' propositions *de lege lata* to be a fact (section 2.1 above. See also Eng 1998, sections II F 3 and 4 in their entirety). Consequently, I consider that the ability to adopt the generalised lawyer's perspective is a necessary condition for transition from lawyer standpoints *learnt by heart* (for example, in the case of the non-lawyer or the law student) to *one's own production* of propositions *de lege lata*. An important effect of legal education is that it lays the foundation for this ability in the individual lawyer, so that lawyers' propositions *de lege lata* are passed on as a distinctive type of proposition.

3. More on the Concept of 'Fusion' and Its Consequences for the Distinction between Descriptive and Normative Propositions

3.1. The Concepts of 'Descriptive Proposition' and 'Normative Proposition' as Concepts of Degree

3.1.1. The Concepts of Degree, and Three Resting Places for Thought

The essential *reason* for being conscious of and applying the distinction between descriptive and normative propositions is that the tenability criteria are different. If one is not aware of or if one does not implement the distinction, analyses and argumentation soon become too loose.

However, the concept of 'fusion' reveals *a limit* to the applicability of a dichotomy between descriptive and normative propositions: The concepts of 'descriptive proposition' and 'normative proposition' I see as *extreme points on a graduated dimension*, from the purely descriptive to the purely normative. In the middle of this dimension one has pure fusions. From the middle towards the extremes one has degrees of preponderance of descriptive or normative elements.

As appears from the discussion above: The graduated empirical basis which I here take as a point of departure as a concept criterion is the *sender's reaction* to any discrepancy between proposition and reality. The reaction criterion *is supplemented by the sender's deliberation* at the time of making the proposition (actual or hypothetical deliberation), with respect to how he will react to any future discrepancy (section 1 above). This part of my conceptualisation (sender's reaction, and his deliberation with respect to his own reaction) *is applied against a background of double interest* on the sender's part: interest partly in purely descriptive propositions, and partly in purely normative propositions (section 2.1 above).

The three features of reality mentioned (sender's reaction, his deliberation with respect to his own reaction, his double interest), in the functional relationship outlined (reaction as a point of departure, supplemented by

© Blackwell Publishers Ltd 2000.

deliberation, against a background of interests), constitute the content of my definition of the concepts of 'descriptive proposition' and 'normative proposition' as concepts of degree, and thereby also of my definition of the concept of 'fused descriptive and normative proposition'.

It may seem misleading to say that a fused proposition is *both* descriptive *and* normative: Our thought is then easily led towards a notion that the fused proposition is only a temporary mixture, in which the elements can be separated if one so wishes. However, if this is the case, one is by definition confronted not with a fusion, but with a combination. It is therefore better to say that fusions lie in the graduated dimension between descriptive and normative propositions, but are themselves *neither* the one *nor* the other (cf. the relationship of the colour grey to white and black). Thus in the case of fusions it is not a question of anything but *metaphorical estimates* of a certain relationship between the descriptive and the normative.

Against this background I consider it *more appropriate to speak of a tripartite division than a dichotomy in the 'descriptive-normative' dimension*: The concepts of 'descriptive proposition', 'normative proposition' and 'fused proposition' provide three points for our thought, which each allow our thought to rest, and which seen in connection with each other show the grading of the dimension and thereby the necessity of openness of thought.

The concept formation now outlined focuses on features of reality that it is not usual to see in connection with each other (reaction, deliberation with respect to reaction, interests). As appears from the discussion above, I consider these features to be in fact active in an interesting way; that it is these which lawyers are intuitively motivated by when lawyers consider it neither possible nor right to call their propositions *de lege lata* either "descriptive" or "normative" (section 2.1, especially 2.1.3, above. See also Eng 1998, section II F 3.2.4). Thus, this concept formation serves to demonstrate a basis in reality for intuitions about fusion, and to clarify this basis.[26]

3.1.2. The Concepts of Degree Refer to the Individual Proposition, Not to Systems of Propositions

Galtung too emphasises the graduation in the distinction between the descriptive and the normative. However, with reference to, and by analogy with, Quine's criticism of the distinction between analytical and synthetic propositions, Galtung transfers the graduation from the individual proposition to the *system* of propositions.

[26] I place emphasis on concept formation having a demonstrable reality basis, in contrast to (i) the simply thinkable; cf., e.g., Ofstad 1958, 48–9, who points to graduation of concept formation as possible in thought ("possible conceptual systems," "possible worlds"), not as a feature of actually occurring language and argumentation (Ofstad does not directly discuss the distinction between descriptive and normative propositions); (ii) concept formations that are claimed to cover something real, but where the connection with reality is indeterminate; see Eng 1992, 498–500 (item 5); see also Eng 1998, section III 2.2.2.

© Blackwells Publishers Ltd 2000.

> [T]he degree of normativity is just as little inherent in the expectation itself as the degree of analyticity, but is rather a function of the structure of attitudes and beliefs held by the individual [...] Like Quine, we see no immediate way of translating these ideas into operational devices that could give us, for a given person, a given situation and a given expectation, the degree of normativity. (Galtung 1959, 217–18)[27]

I do not agree that graduation and fusion are an argument for separating the distinction between descriptivity and normativity from the individual proposition. First, there is *no definitional connection* between on the one hand dichotomy or graduation with respect to the distinction between descriptive and normative propositions, and on the other hand individual propositions or systems of propositions: Both dichotomy and graduation can refer to both individual propositions and systems of propositions.

Second, in connection with Quine's criticism, I have explained why it *is not apt* in relation to actually occurring analysis and argumentation to separate the concepts of 'definition' and 'characterisation' from the individual propositions (Eng 1998, section II G 2). This argumentation will apply *correspondingly* in relation to the quoted statement from Galtung and in relation to the concepts of 'descriptive proposition', 'normative proposition' and 'fused descriptive and normative proposition'.

I shall briefly outline the main points that apply *correspondingly* (the references in parentheses are to the work from which the present paper is taken, Eng 1998): In actually occurring analysis and argumentation one *uses* descriptive, normative and fused propositions, and concepts of these propositions (section II F 2.1 (3), *compare* section II G 2 (4)(a)). Furthermore, one links these concepts to *the individual propositions*, not to whole systems of propositions (section II F 2.1 (3), *compare* section II G 2 (4)(b)). Often it is indeterminate what, when advancing the proposition, one meant by the words one used, e.g., whether one intended to make a descriptive, normative or fused proposition. However, one accepts a demand that one must make a *decision* with respect to which proposition type one will now understand by the words (section II F 2.1 (3), *compare* section II G 2 (4)(a)–(b)). The legitimacy in actually occurring analysis and argumentation of the demand for such a decision constitutes the "*operational device*" that Galtung is seeking in the quotation above. Quine, and Galtung insofar as he builds on Quine in the context of the present problem, *abstract from* the discussion and decision aspect of language and argumentation. Thus they abstract from the existence level of the critically reflexive form that constitutes the perspective and topic of the work from which the present paper is taken (section II G 2 (4)(c), cf. section I 4).

[27] Cf. also Galtung 1959, 215–16. As appears, Galtung is more precisely speaking of expectations and not of propositions; but since this distinction is not of significance here, I content myself with "proposition" in the main text. On the relationship between proposition and expectation, see Eng 1998, section II E. 2.2.4 (3)(b).

© Blackwell Publishers Ltd 2000.

In the light of this, the occurrence of graduation and fusion is *not an argument for separating* the distinction between descriptivity and normativity from the individual propositions. Graduation and fusion are a *decision alternative on the level of proposition*, on a par with descriptive proposition and normative proposition.

3.2. *Contrasting of Fusion with Some Other Phenomena*

The work from which the present paper is taken illuminates the concept of 'fusion of descriptive and normative propositions' by contrasting fusion of descriptive and normative propositions with a number of other phenomena.[28] These other phenomena have been chosen because I have the impression that they are often confused with fusion of descriptive and normative propositions. All these contrasts are important for a good understanding of the concept of 'fusion'. Here I must content myself with drawing boundaries with structures in language *qua* language (in contrast to structures specific to particular areas of language), morals and the relationship between parents and children.

I shall point out that and why the phenomenon of fusion is not found in language *qua* language, morals and the relationship between parents and children. For the sake of brevity I use the formulation "is not found." The differences to be pointed out lie, however, in different dimensions, and the individual dimensions are of a graduated nature. The differences may therefore be more or less considerable; see the present section 3.2 by way of conclusion. The structures that I shall point to with respect to language *qua* language, morals and the relationship between parents and children are also of interest, and should also be investigated, on account of their distinctiveness. Here, however, the task will be limited to placing the phenomenon of fusion in relief.

When we use *language*, we build on custom-based normative definitions (Eng 1998, section II B 3.2.2.), for the sake of brevity called "language norms" in what follows. One aspect of the fact that these norms are custom-based, is the possibility of using them as a basis for prediction with respect to how other language users will understand and apply the words of the language. Thus there is a normative proposition and the possibility for a descriptive proposition. The fact that the phenomenon of fusion is nevertheless not found in language *qua* language is *inter alia* because of the following

[28] Eng 1998, section II F 3.2.1: Drawing the boundary with the graduated distinction between normative-traditional and normative-innovative propositions; section II F 3.2.2: Drawing the boundary with evaluation prescription in the connotation of concepts and, as the case may be, evaluation-free language attire; section II F 3.2.3: Drawing the boundary with persuasive definitions; section II F 3.2.4: Drawing the boundary with indeterminacy; section II F 3.2.5: Drawing the boundary with lack of knowledge on the part of the recipient; section II F 3.2.6: Drawing boundaries with structures in language *qua* language, morals and the relationship between parents and children.

© Blackwells Publishers Ltd 2000.

differences from lawyers' propositions *de lege lata*: Particularly in relation to the descriptive proposition, it is the case that there is no general institutional context consisting of bodies that have competence to make final and binding decisions concerning interpretation of and subsumption under formulations of language norms (cf. Eng 1998, section II B 3.3.1 (3)), and accordingly no corresponding interest either, on the part of the language user, in prediction with respect to what such bodies will conclude. Particularly in relation to the normative proposition, it is the case that, for one thing, the norms are not linked to reasonableness and justice (cf. Eng 1998, section II B 3.3.2 (1)), and that, for another, they are not advanced with the same force as the normative component in lawyers' propositions *de lege lata*. In the case of disagreement about how words ought to be used, the one's gain is not the other's loss, as is usually so in legally formulated conflicts. If two people discover that they are using a word in different ways, then they have a joint interest in co-ordinating their language usage (cf. Eng 1998, section II B 4.2 (5)(d), by way of conclusion).

Normative propositions relating to *morals* have greater similarity than language norms with the normative component in lawyers' propositions *de lege lata*: For one thing, normative propositions relating to morals are linked to reasonableness and justice, and for another, two people who advance incompatible propositions relating to morals will often advance their propositions with (at least) the same force as lawyers advance the normative component in their propositions *de lege lata* (the one's gain is often the other's loss). However, neither in morals is there any institutional context consisting of bodies that have competence to make final and binding decisions concerning interpretation of and subsumption under norm formulations; and accordingly no corresponding interest either, on the part of the participants in moral argumentation, in prediction with respect to what such bodies will conclude. Therefore, not in morals either is there any fusion.

In the relationship between *parents and children*, the normative propositions are linked to reasonableness and justice, and if parents and their children discover that they are advancing incompatible normative propositions, they often advance their propositions with (at least) the same force as lawyers advance the normative component in their propositions *de lege lata* (the one's gain is often the other's loss). Furthermore, in the relationship between parents and children there is an institutional context in which one or two people, one or both parents (here there are great cultural variations), have the competence to make final and binding decisions concerning interpretation of and subsumption under norm formulations; and accordingly there is a corresponding interest on the part of the child in prediction with respect to what one or both parents will conclude. That we do not find any fused descriptive and normative modality in the case of the child's propositions either, is *inter alia* because the descriptive proposition remains

© Blackwell Publishers Ltd 2000.

particular. It is linked to one or two particular individuals. There is no parallel to the generalised lawyer's perspective, which constitutes special aspects of reality and which employs a special method to decide the existence, content and duration of these aspects. The child *qua* opposite party to the parents does not assume a position analogous to the lawyer's in relation to other lawyers, but a position analogous to the advocate's client in relation to the judge, after the client has been told which judge is to deal with his case. Therefore, not in the relationship between parents and children either is there fusion.

Generally it is the case that we may perhaps find phenomena that show similarity with the phenomenon of fusion in one or more of the dimensions in which I have now pointed to differences. However, we would only find similarity, in different dimensions and in different degrees. I have not been able to find the same phenomenon outside lawyers' argumentation *de lege lata*. What is to be reckoned as the 'same phenomenon' depends on the concept formation. If one forms more abstract concepts, i.e., if one renounces distinctions that lie in the concept of 'fusion' as it has been established here, then one will soon reach a level of abstraction on which one finds the same phenomenon also outside lawyers' argumentation *de lege lata*. Then, however, one will no longer be talking about the phenomenon that has been brought into focus in the present paper.

4. Forms of Expression, within the Framework of Lawyers' Language and Argumentation *de lege lata*: Not Direct Expression through Individual Words, but Indirect Showing through Patterns of Argumentation

As appears from the definition and the examples above, the concept of 'fusion of descriptive and normative propositions' lies on the level of "*meaning*" *in a subjective sense*, i.e., on the level of the individual language user's deliberation and decision. The concept of 'fusion' does *not* lie on the level of "meaning" in an objective sense, i.e., does *not* lie on the level of meanings of words and expressions according to widespread linguistic practice. This entails that fusions *can, but need not, find linguistic expression*.

I have cited lawyers' propositions *de lege lata* as the paradigm case of fusion of descriptive and normative propositions. However, within the framework of *normal legal language use* there are *few means of expression* for the phenomenon of fusion.[29]

[29] This is the reason why, in formulating some items in the present paper, namely items that might possibly be read as saying something about the reality basis of the concept of 'fusion', I have not used terms like "language" or "language and argumentation" (in relation to the paradigm case: "lawyers' language," "lawyers' language and argumentation"). Instead I have used terms like "proposition," "argumentation," "analysis and argumentation" and "thinking" (in relation to the paradigm case: "lawyers' propositions *de lege lata*," "lawyers' argumentation," etc.), i.e., terms that do not imply anything about the composition of the language plane.

© Blackwells Publishers Ltd 2000.

First, the *linguistic expressions* are adapted to the presupposition of *dichotomy* between descriptive and normative propositions that I have above argued is dogmatic and untenable in relation to lawyers' propositions *de lege lata*. It may well be that lawyers make gradations *internally in respectively* descriptivity and normativity: That a rule is a legal rule, is "more or less probable," or "more or less reasonable." However, the distinction between descriptive and normative propositions *itself* is more seldom graduated. Thus lawyers say that a legal rule either "is" or "ought to be" (valid) law; that a proposition is either "*de lege lata*" or "*de lege ferenda*"; that they are engaged in "legal dogmatics" or "legal politics." Even though the two latter distinctions are not (without reservation) explained as coinciding with the distinction between descriptive and normative propositions, they are not used either to graduate this distinction. By virtue of being dichotomies they actually reinforce the general grip on our way of thinking that dichotomies appear to have (cf. Eng 1998, sections III 2.2.6 (4)(b) and 2.5.2).

Second, there is a tendency for fused descriptive and normative propositions, like purely normative propositions, to be formulated in ways that are either *polysemous* between the descriptive, logical and normative, or *one-sidedly descriptive or logical*, at the expense of the purely normative or fused (cf. Eng 1998, chap. IV, respectively sections 2 and 3). The consequence is in both cases that the fused modality gets less attention, irrespective of the supply otherwise of means of expression.

If one is to find expression of the phenomenon of fusion among lawyers, one must therefore go from the individual *words and expressions* to the argumentation and the more comprehensive *patterns of expression* to be found there. In stylised form, the relevant expression pattern in cases of subsumption may be specified as follows: "In the light of the facts of the case, an overall consideration of the legally relevant grounds—in particular the wording of statutes, *travaux préparatoires*, practice, equitable considerations, *and* other lawyers' probable views of what these other grounds indicate—suggests that John Brown has the right/a duty to [...]." And the relevant expression pattern in cases of interpretation may be specified in stylised form as follows: "An overall consideration of the legally relevant grounds—in particular the wording of statutes, *travaux préparatoires*, practice, equitable considerations, *and* other lawyers' probable views of what these other grounds indicate—suggests the rule that [...]."

The phenomenon of fusion is thus something that *indirectly*, via more extensive argumentation patterns, *shows itself*, not something that directly, in particular words for this, is specified. A symptom of this being the case, may be that many lawyers seem to sense that a dichotomy between 'descriptive propositions' and 'normative propositions' is not well suited to lawyers' propositions about what is the law, at the same time as the phenomenon of fusion is a feature of lawyers' argumentation that has been little treated and understood, cf. *inter alia* the fact that the phenomenon is confused with

© Blackwell Publishers Ltd 2000.

other phenomena (Eng 1998, section II F 3.2; see also section 3.2 above including note 28).

5. Some Concluding Remarks Concerning the Status of My Analysis

By way of conclusion I shall briefly emphasise some main points concerning the status of my analysis. First, my analysis consists in *characterisations* of a presupposedly well-delimited phenomenon, lawyers' propositions *de lege lata*. The analysis has seized on *typical instances* of such propositions. The analysis does *not* consist in a definition of a concept of 'lawyers' propositions *de lege lata*'; thus, I do not lay down as a criterion of the concept of 'lawyers' propositions *de lege lata*' that these propositions have a fused modality.

Second, my analysis is *descriptive*; it is intended as a contribution to cognition. My analysis is *not* normative; it says nothing about whether one ought to act as, for example, Alf Ross said one should, or whether one should act like a politician, or whether one ought to participate in traditional legal language and argumentation.

Third, with respect to the *reality basis* of the concept of 'fusion', I indicated earlier that I had not found other examples of fusion than lawyers' propositions *de lege lata*. One important reason for this is that *only in law* does one find a general institutional context consisting of bodies that have competence to make final and binding decisions concerning interpretation of and subsumption under norm formulations, and, accordingly, *only in law* do the language users have the *possibility for* and the *interest in* prediction with respect to what such bodies will conclude. As we have seen, these aspects of reality are central to the descriptive component in lawyers' propositions *de lege lata*, and, in consequence, to the fused modality of such propositions (sections 2.1.1 and 3.1.1, above). And, as we have also seen, these aspects of reality distinguish law from *inter alia* structures in language *qua* language and in morals (section 3.2 above).

A seemingly plausible objection to my analysis is the following: "You say it is impossible to distinguish between descriptive and normative propositions. I take the view that it is possible to make the distinction, and that one ought to make it."

The essentials of my response are as follows: I do not assert that it is *logically* impossible to make the distinction. However, I do assert that it is logically impossible *both* to accept the doctrine of the sources of law, lawyers' decision situations and the interests that these situations in fact actualise, *and* at the same time to demand that the distinction between descriptive and normative propositions be carried out without exception: The latter would mean that one asked the lawyer to do something else than advance propositions *de lege lata* within the factual frames in which these propositions are advanced, i.e., that one did *not* accept the doctrine

© Blackwells Publishers Ltd 2000.

of the sources of law, lawyers' decision situations and the interests that these situations in fact actualise.

Nor do I assert that it is always impossible *in fact* to make the distinction between descriptive and normative propositions; and I do not take any standpoint on whether it is impossible *in fact* always to make the distinction. However, I do assert that if one makes the distinction, then one is doing something else than advancing propositions *de lege lata* in the way in which this is traditionally done among lawyers.

University of Oslo
Department of Public and International Law
Karl Johans gt. 47
N-0162 Oslo
Norway
E-mail: svein.eng@jus.uio.no

References

Andenæs, Johs. 1962. Rettsteori og rettspraksis. In *Avhandlinger og foredrag*, 408–24. Oslo: Universitetsforlaget.

Arnholm, Carl J. 1952. Noen metodologiske betraktninger. *Svensk Juristtidning* 37: 505–23.

———. 1954. Fra rettens grunnproblemer. *Tidsskrift for Rettsvitenskap* 67: 113–76.

———. 1958. En håndbok i obligasjonsrett. *Tidsskrift for Rettsvitenskap* 71: 124–42.

Aubert, Vilhelm. 1965. Predictability in Life and in Science. In *The Hidden Society*, 116–36. New York: Bedminster.

———. 1979. *Om straffens sosiale funksjon*. Oslo: Universitetsforlaget.

Augdahl, Per. 1973. *Rettskilder*. 3rd ed. Oslo: H. Aschehoug & Co.

Brusiin, Otto. 1990. Über das juristische Denken. In *Der Mensch und Sein Recht, Ausgewählte rechtstheoretische Schriften*. Ed. U. Kangas, 132–264. Berlin: Duncker & Humblot.

Cardozo, Benjamin N. 1947. The Nature of the Judicial Process. In *Selected Writings*. Ed. M. E. Hall, 107–84. New York: Fallon Law Book Company.

Eckhoff, Torstein. 1971. *Rettskildelære*. Oslo: Johan Grundt Tanum.

———. 1993. *Rettskildelære*. 3rd ed. Oslo: Tano.

Eckhoff, Torstein, and Nils Kristian Sundby. 1976. *Rettssystemer*. Oslo: Tanum-Norli.

———. 1988. *Rechtssysteme*. Berlin: Duncker & Humblot.

———. 1991. *Rettssystemer*. 2nd ed. Oslo: Tano.

Ekelöf, Per Olof. 1991. Är den juridiska doktrinen en teknik eller en vetenskap? In *Valda Skrifter 1942–1990. De Lege, Årsbok fra Juridiska fakulteten i Uppsala*, 91–126. Uppsala: Iustus.

Eng, Svein. 1992. Teoristruktur og teorivalg. *Tidsskrift for Rettsvitenskap* 105: 496–504.

———. 1998. *U/enighetsanalyse—med særlig sikte på jus og allmenn rettsteori*. Oslo: Universitetsforlaget.

———. 1999. Criteria That Are Used in the Setting Up of and Choice between Descriptive Characterisations. *Law and Philosophy* 18: 475–95.

Esser, Josef. 1972. *Vorverständnis und Methodenwahl in der Rechtsfindung*. 2nd ed. Frankfurt: Athenäum.

Eyben, William E. von. 1969. Gældende ret. In *Festskrift til Alf Ross*. Ed. M. Blegvad et al., 97–112. Copenhagen: Juristforbundet.

© Blackwell Publishers Ltd 2000.

Fleischer, Carl August. 1968. *Grunnlovens grenser*. Oslo: Universitetsforlaget.
———. 1995. *Rettskilder*. Oslo: Ad Notam Gyldendal.
Galtung, Johan. 1959. Expectations and Interaction Processes. *Inquiry* 2: 213–34.
Habermas, Jürgen. 1973. Wahrheitstheorien. In *Wirklichkeit und Reflexion: Walter Schulz zum 60. Geburtstag*. Ed. H. Fahrenbach, 211–65. Pfullingen: Neske.
———. 1983. Diskursethik—Notizen zu einem Begründungsprogramm. In J. Habermas, *Moralbewußtsein und kommunikatives Handeln*, 53–125. Frankfurt: Suhrkamp.
———. 1991. Erläuterungen zur Diskursethik. In J. Habermas, *Erläuterungen zur Diskursethik*, 119–226. Frankfurt: Suhrkamp.
Harris, J. W. 1980. *Legal Philosophies*. London: Butterworths.
Hart, H. L. A. 1961. *The Concept of Law*. Oxford: Clarendon.
———. 1983. Scandinavian Realism. In *Essays in Jurisprudence and Philosophy*, 161–69. Oxford: Clarendon.
———. 1994. *The Concept of Law*. 2nd ed. Oxford: Clarendon.
Hellner, Jan. 1997. Positivism och metod inom rättsvetenskapen. In *Festskrift till Stig Strömholm*. Ed. Å. Frändberg, U. Göranson and T. Håstad, 351–73. Uppsala: Iustus.
Hyllested, E. 1910. "Individualismen." Nogle Bemærkninger om juridisk metode. *Tidsskrift for Rettsvitenskap* 23: 211–54.
Jørgensen, Stig. 1970. *Ret og samfund*. Copenhagen: Berlingske.
Kaufmann, Arthur. 1984. Über den Zirkelschluß in der Rechtsfindung. In A. Kaufmann, *Beiträge zur juristischen Hermeneutik*, 65–77. Köln: Heymanns.
Kelsen, Hans. 1985. *Reine Rechtslehre*. Aalen: Scientia. (1st ed. 1934.)
Krüger, Kai. 1989. *Norsk kontraktsrett*. Bergen: Alma Mater.
Llewellyn, Karl. 1960. *The Common Law Tradition*. Boston: Little, Brown and Company.
Luhmann, Niklas. 1983. *Rechtssoziologie*. 2nd ed. Opladen: Westdeutscher Verlag.
Mead, George H. 1962. *Mind, Self, and Society*. In *The Works of G. H. Mead*. Vol. 1. Ed. C. W. Morris. Chicago: The University of Chicago Press.
Ofstad, Harald. 1958. The Functions of Moral Philosophy. *Inquiry* 1: 35–71.
Peczenik, Aleksander. 1995. *Vad är rätt?* Stockholm: Norstedts Juridik.
Rodhe, Knut. 1944. Om gränserna för lagstiftarens makt på civilrättens område. *Ekonomen*: 96–106.
———. 1956. *Obligationsrätt*. Stockholm: Norstedt & Söner.
———. 1996–97. Beskrivning—prognos—rekommendation. En trosbekännelse. *Juridisk Tidskrift* 8: 1–4.
Ross, Alf. 1958. *On Law and Justice*. London: Stevens & Sons.
Selvig, Erling. 1993. Kontraktsretten. In *Knophs oversikt over Norges rett*. 10th ed. Ed. B. Stuevold Lassen, 298–647. Oslo: Universitetsforlaget.
Strahl, Ivar. 1955. En allmän rättslära. *Svensk Juristtidning* 40: 289–315.
Strömholm, Stig. 1996. *Rätt, rättskällor och rättstillämpning*. 5th ed. Stockholm: Norstedts Juridik.
Summers, Robert S. 1982. *Instrumentalism and American Legal Theory*. Ithaca: Cornell University Press.
Sundby, Nils Kristian. 1974. *Om normer*. Oslo: Universitetsforlaget.
Wright, Georg Henrik von. 1977. *Norm and Action*. London: Routledge & Kegan Paul.

© Blackwells Publishers Ltd 2000.