

ANALYSIS OF
DIS/AGREEMENT –
with particular reference to
Law and Legal Theory

by

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Introduction

1. First formulation of major aims and main threads

In order to determine whether two participants in a discussion are in real *dis/agreement* one must *compare* their propositions. Comparison presupposes common yardsticks and common features: Just as the comparison of two phenomena with respect to length presupposes that one has concepts of units of length and that these concepts are applicable to both phenomena, so the comparison of propositions with respect to dis/agreement will presuppose that one has concepts of types of proposition and that these concepts are applicable to both sets of propositions. – If one has no concepts of proposition types, or if one applies them to propositions in relation to which they are out of place, then the comparison will be only an apparent one (pseudo-discussion) and the result a misunderstanding (pseudo dis/agreement).

A major aim of the present work is to describe and to clarify certain *yardsticks for the comparison of and choice between propositions*, and to demonstrate the area of origin and application of, as well as a certain independence characterising, these yardsticks. It is at the same time an aim *not* to take a standpoint on the *tenability of the propositions themselves*: in particular not to take a standpoint on controversial philosophical, moral, legal, political or similar questions (section 6 below).

The *description and clarification* of the yardsticks (certain proposition types and patterns, criteria and interests) have determined the systematic structuring of this work: from the simple to the complex (section 5.1 below, with further references).

In the parallel demonstration of the *area of origin and application* of the yardsticks, I often return to propositions about legal phenomena, including lawyers' propositions about what the law is. – Seen from the point of view of the yardsticks, it is true that lawyers' language and argumentation is *only one instantiation*: The area of origin and application of the yardsticks is everyday language, in everyday life as well as in academic subjects, science and philosophy, i.e. much wider than lawyers' language and argumentation (section 5.1 below). – However, seen from the point of view of lawyers, the yardsticks are *constitutive of their legal power of judgement*: The work will demonstrate the fact that, and the way in which, unity and continuity in lawyers' language and argumentation are created in and through the yardsticks (sections 5.1–5.2 below, with further references).

The *independence* of the yardsticks cannot in the same way as their area of origin and application be demonstrated continuously. Towards the end of the

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present introduction I shall give an account of what I mean by “independence” in the preceding sentence and in what way this property of the yardsticks appears from the work (section 6 below).

In and through the yardsticks (the proposition types and patterns, criteria and interests of which the work gives an account) significant acts take place, but these have not been systematically and concretely mapped in earlier literature. In this resides the *value of the work* (section 7 below).

As a concrete point of entry into the perspective and topic of the work I shall continue the present introduction by taking as a starting point one of the most common forms of proposition in everyday language: the form ‘*what something is*’ (section 2 below). After this I shall point to four *main yardsticks* for comparison of and choice between propositions of this form (section 3 below); and then I shall situate these main yardsticks, with specifications and combinations, in the *perspective of the work* (sections 4–6 below).

2. Propositions about what something is

In what follows some examples are presented of questions or propositions about what something is; these examples are intended to illustrate the fact that such questions and propositions are *omnipresent*, but have otherwise been randomly chosen:

“[A] *legal duty* so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; and so of a *legal right*” (my italics).¹

“A *precedent* is a judgment of the Supreme Court ...” (my italics).²

“The *case documents of the public administration* are documents which are drawn up by an administrative agency as well as documents which have been received by or submitted to such an agency” (my italics).³

“[P]*olitics* is a process of popular education – the task of adjusting the conflicting interests of diverse groups in the community, and bending the hostility and suspicion and ignorance engendered by group interests toward a comprehension of mutual understanding” (my italics);⁴ “Politics is the will to achieve something.”⁵

“So sehen wir also, daß *der Krieg* nicht bloß ein politischer Akt, sondern ein wahres politisches instrument ist, eine Fortsetzung des politischen Verkehrs, ein Durchführen desselben mit anderen Mitteln” (my italics);⁶ “*War* is not part of politics, but the negation of politics, a parasitic growth upon political life” (my italics).⁷

“What is ... a *national state*? Put simply, it is a state in which the population forms a cultural community” (my italics);⁸ “A national state is a state that gives expression to a national community.”⁹

“*Courage* is a moral quality; it is not a chance gift of nature like an aptitude for games. It is a cold choice between two alternatives, the fixed resolve not

¹ Holmes, ‘The Path of the Law’, p. 169.

² Peter Wessel Zapffe. Here quoted from Andenæs, *Innføring i rettsstudiet* [introduction to the study of law], p. 113.

³ Freedom of Information Act (Act No. 69 of 19 June 1970), section 3 first paragraph.

⁴ Frankfurter, *The Public and Its Government*, p. 161.

⁵ Palme, *Politikk – det er å ville noe* [politics – that is the will to achieve something].

⁶ Clausewitz, *Vom Kriege*, p. 34.

⁷ Collingwood, ‘Modern Politics’, p. 179.

⁸ Østerud, ‘Er nasjonalstaten foreldet?’ [is the national state a thing of the past?], p. 352.

⁹ Østerud, *Hva er nasjonalisme?* [what is nationalism?], pp. 102 et seq.

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to quit; an act of renunciation which must be made not once but many times by the power of the will. Courage is will power” (my italics).¹⁰

“What is *philosophy*?” (my italics).¹¹

“What is the *world*? Is it spiritual or material? Or both? What is the relationship in which mind stands to matter? What is *man*? Where does he come from, where does he go? What is the *purpose of life*? What is the *greatest good*? These and similar questions are ones that human beings ask themselves over and over again. In spite of thousands of years of searching in vain for the final answer, each new generation always asks them again” (my italics; Schjelderup’s italics omitted).¹²

¹⁰ Lord Moran, *The Anatomy of Courage*, p. 67

¹¹ Various articles with this title in Stigen (ed.), *Generasjoner i norsk filosofi* [generations of Norwegian philosophy]; Deleuze/ Guattari, *Qu’est-ce que la philosophie?*

¹² Schjelderup, ‘Filosofiens vesen’ [the essence of philosophy], p. 48.

3. Fundamental proposition-types and ambiguities

Propositions about what something is (section 2 above) may be seen as (actual or possible) answers to questions of the form “*What is x?*”. Just as great as the diversity of directions in which this form of question points, is the diversity of proposition types about what something is, with which we operate.¹

(1) One fundamental ambiguity of propositions about what something is, arises between, on the one hand, propositions that contribute to determining the meanings of words (contribute to determining concepts), and on the other hand, propositions that presuppose this topic and thematise other topics. – In relation to the standard forms of expression “What is x?” and “X is ...”, the ambiguity is a question of whether “x” refers to the word (the concept) or to the phenomena that the word designates (the concept covers). For example, do the propositions quoted in section 2 above say something about the meanings of the words and expressions “legal duty”, “legal right”, “precedent”, “case documents of the public administration”, “politics”, “Krieg”, “war”, “national state”, “courage”, “philosophy”, “world”, “man”, “purpose of life”, “greatest good”? Or do these propositions say that the phenomena that are designated by these words and expressions have certain properties? In the terminology that is introduced in what follows: Are they *definitions* or *characterisations*?

The distinction between definitions and characterisations is important because *different facts are relevant in the assessment of their tenability*: – If the sentence “a precedent is a judgment of the Supreme Court”² is interpreted as expressing a descriptive definition, then the tenability of the proposition must be checked by comparing the proposition with actual language use (the way in which the word “precedent” is actually used). – If this sentence is interpreted as expressing a descriptive characterisation, then the tenability of the proposition must be checked by comparing the proposition with reality other than language use (with the properties of those phenomena that are designated by the word “precedent”).

In my subsequent discussion of definitions one main thread consists in mapping different aspects of language use to which definitions relate (sec-

¹ Robinson, *Plato's Earlier Dialectic*, p. 59: “[Questions of the What-is-x? form] is, perhaps, when unsupported by a context, *the vaguest of all forms of question except an inarticulate grunt*. It indicates less determinately than any other the sort of information the questioner wants” (my italics). – See also same writer, *Definition*, pp. 190, 192.

² In accordance with normal language usage among lawyers I use the spelling “judgment” for a type of decision of the court. In all other cases I use the spelling “judgement”.

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tions II B 4–7 below; cf. section II A 2 (1) below, which gives a survey of my discussion of definitions).

(2) Another fundamental ambiguity of propositions about what something is, arises between *descriptive propositions* and *normative propositions*. – In relation to the standard forms of expression “What is x?” and “X is ...”, the ambiguity is a question of whether the word “is” means ‘is’ or whether it means ‘ought to be’, ‘shall be’, or the like. When it is taken in isolation, one will certainly say that the word “is” has the descriptive meaning. However, as an element in contexts of concrete language use, a closer analysis often shows that the word “is” has a normative meaning, see for example many possible and reasonable interpretations of the quotations in section 2 above. – Questions or propositions about what something is, consequently often conceal disagreement about what something ought to be, shall be, or the like. This applies whether the propositions are definitions or characterisations. One thread in this work will be to give a more nuanced account of some techniques of language use by which one conceals one’s evaluations and choices (Chapter IV below).

The distinction between descriptive and normative propositions is important because one *uses different criteria when assessing their tenability*: – If the sentence “a precedent is a judgment of the Supreme Court” is interpreted as expressing a descriptive proposition, then the tenability of the proposition must be checked by comparing the proposition with reality (in the case of a descriptive definition: by comparing the proposition with the use of the word “precedent”; and in the case of a descriptive characterisation: by comparing the proposition with the properties of those phenomena that are designated by the word “precedent”). – If this sentence is interpreted as expressing a normative proposition, then the tenability of the proposition must be checked by testing the proposition against those arguments that are deemed relevant for justification and criticism of normative propositions (in the case of a normative definition: by testing the proposition against arguments for and against using the word “precedent” only of judgments from the Supreme Court, and not of judgments from the lower courts; and in the case of a normative characterisation: by testing the proposition against arguments for and against using only judgments from the Supreme Court, and not judgments from the lower courts, as binding arguments in later cases).

(1)↔(2) Definitions and characterisations, and descriptive and normative propositions, are important examples of what I call “fundamental types of proposition”.³

³ I use the word “*fundamental*” relative to the purpose and structuring of the present work. – A more complete survey of fundamental types of proposition is given in section II A below.

4. A critically reflexive mode of questioning as a remedy. – Language users’ implementation of a relatively well-delimited critically reflexive form: the fundamental types of proposition with further nuancing and combinations. – The existence level of the critically reflexive form: the aspect of discussion and decision in language and argumentation

Indeterminacy with respect to the fundamental types of proposition leads to *pseudo dis/agreement*; participants in language and argumentation declare themselves in agreement with or challenge standpoints that other participants in language and argumentation do not have.

As a remedy against pseudo dis/agreement language users implement in different forms and degrees a *critically reflexive mode of questioning*, i.e. thought turning back on itself (“reflexive”) and asking for facts and criteria relevant in assessing the tenability of its own propositions (“critical”). – *My concepts of the fundamental proposition types* are laid down in this perspective. They bring into focus *loci for clarifying* facts (section 3 (1) above) and criteria (section 3 (2) above) relevant in tenability assessment. More particularly, they bring into focus loci that experience has shown to be “*essential*”, in the sense that clarifying these loci often has crucial significance for the further development of the argument. – The experience mentioned is particularly clear when it comes to the distinctions between definitions and characterisations, and between descriptive and normative propositions, cf. above. There are graduated transitions to less essential loci. With this proviso the *justification for the other parts of this work is the same*: The concepts of proposition types and of combinations of proposition types presented there, bring into focus loci in actually occurring language and argumentation which experience has shown it to be important to determine when one takes a standpoint with respect to what one dis/agrees on.

Within the perspective now outlined, this work aims to *demonstrate, and to create an awareness of*, the factual significance of a critically reflexive mode of questioning. As part of this, and more particularly, the work aims to demonstrate,

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and to create an awareness of, the existence, content and factual significance of a *relatively well-delimited critically reflexive form* in language and argumentation; and thereby, it aims to demonstrate, and to create an awareness of, the factual significance of analysis of dis/agreement on the basis of this critically reflexive form (sections 5–6 below).

I use the word “reflexive”, not “reflective”, because I wish to draw attention to the importance of thought *also* turning back *on itself* (“reflexive”), even though the immediate topic of thought is a different one, for example the law. The point is not that the critical attitude involves thought (in which case “reflective” would be more appropriate); this is presupposed as a matter of course.

I use the word “form”, not “level”, since the formulation “critically reflexive level” would have signalled partly a hierarchy and partly that the proposition types and patterns, criteria and interests that the work maps, were only to be found on a particular level in the hierarchy. This would have been misleading terminology, since these proposition types and patterns, criteria and interests are found, *inter alia*, at *all levels of abstraction* in language and argumentation: from discussions in everyday life, across academic subjects and science, to philosophy (section 5.1 below).

Some people may perhaps associate the word “form” with a Platonic level of existence. To the same extent as this happens, the word “form” is also misleading, cf. the main text after the present indent and the work in its entirety. However, the said association runs so clearly counter to the main threads in the work (the present Chapter I), and the word “form” is used in such a diversity of ways and has thus in itself such an indeterminate meaning, that possible occurrences of the said association are not a decisive argument against the use of the word “form”.

The perspective of the present work brings into focus the *interaction between language users*, including the individual language user’s interaction with himself; in this reality aspect lies the *reality basis* of the work. – I use here widespread and immediately comprehensible concepts of ‘language’, ‘language users’ and ‘interaction’. I say “immediately comprehensible”, because these concepts bring into focus elements in an activity in which we all continually participate and of which we are all continually able to give examples: such as conversation with ourselves, the reader’s imaginary conversation with the author (for example here and now), discussion of a political or moral issue with others, or lawyers’ discussions with one another of what the law is. – The critically reflexive form that the present work maps, *exists in and through* interaction between language users: Through their decisions in the continual process of language and argumentation, language users implement *inter alia* the distinctions between definitions and characterisations; and between descriptive and normative propositions; both with a diversity of further nuancing, as the work will demonstrate. – If one *abstracts* from the language users and their decisions, i.e. if one relates to language as an abstractum, then one at the same time abstracts from the identity criteria for the fundamental

proposition types with further nuancing, i.e. one is not able to capture the acts that the present work maps.

The reality aspect to which the present work relates: interaction between language users, in the sense now outlined, I term in shorthand form the “*discussion and decision aspect*” of language and argumentation; and the work’s corresponding perspective on language and argumentation, I term in shorthand form a “*discussion and decision perspective*”. The word “*discussion*” is used to indicate that the emphasis is on language and argumentation in the case of which it is deemed relevant to raise the issue of disagreement, cf. the title of the present work. The word “*decision*” is used to indicate the continual interplay in language and argumentation between demands for clarification of and decisions with respect to what one means.¹ – When in the present work I use the word “language”, I am referring to the discussion and decision aspect, not language as an abstractum. The theoretical and philosophical significance of the discussion and decision perspective will reveal itself through the work as a whole.

In what I have said about the fact that language users implement a critically reflexive mode of questioning in various forms and degrees, and about the fact that the present work is to give a demonstration of the existence, content and factual significance of a relatively well-delimited critically reflexive form, it is not implied that a critically reflexive mode of questioning is omnipresent or that the consequences of this mode of questioning are the same in all areas. The absence of a critically reflexive mode of questioning makes itself felt in philosophy, science, academic subjects and everyday life, and the consequences of such a mode of questioning may vary with the areas.

Philosophy, including the philosophy of law, has historically speaking not contented itself with describing and working within the rationality frames of everyday life. It has purported to discover or to elucidate being (“ontology”); what we can know (“theory of knowledge”, “epistemology”); reason (“theory of rationality”); or other aspects that it has claimed to be particularly fundamental. Yet with what right? Philosophy must itself demonstrate whether, and if so in what way, what it does makes any sense, so long as this does not obviously follow on the basis of the rationality frames of everyday life. In this lies inter alia a requirement for a critically reflexive mode of questioning. – The consequences of this mode of questioning can be dramatic; it is a well-known phenomenon that philosophers declare large areas of traditional philosophy or other thinking “meaningless”, “without any value”, or the like.

Let us take a look at an example from the philosophy of law: an example partly of dramatic consequences in the form of large areas of traditional philosophy and other thinking being declared “meaningless” etc., partly of lacking implementation of the critically reflexive mode of questioning. – In his main work on legal philosophy, *Om ret og retfærdighed*, 1953 (English

¹ More precisely I could thus have used the formulation “the perspective of problem discussion and language decision”, but that would have been too cumbersome.

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edition: *On Law and Justice*, 1958), Ross denies the existence of any tenability criteria other than empirical un/truth, i.e. dis/agreement with sense-experience, which we use to decide the tenability of empirical assertions; and analytic un/truth, i.e. un/truth in the light of presupposed definitions (compare “all spouses are un/married”), which according to Ross we use to decide the tenability of, inter alia, propositions in logic and mathematics.² – However, what sort of status do these propositions about the existence of tenability criteria have? Their tenability can obviously not be determined through dis/agreement with sense-experience, nor through un/truth in the light of presupposed definitions; i.e. Ross’ propositions are neither empirically nor analytically un/true. Consequently, they cannot according to themselves be subjected to a rational discussion. Ross’ rationality theory is thus according to itself (applied to itself) “meaningless”, “metaphysical”, “unscientific”, or the like, as Ross said (about the propositions of others when he applied his rationality theory to these).³ – My point in this connection is not to declare myself in agreement or disagreement with Ross’ view with respect to what we have rational criteria to discuss. My point is the lack of any systematic critically reflexive mode of questioning in Ross.⁴ And this lack becomes all the more striking when in addition to the paradox above one sees how categorically he rejects other rationality criteria than his own; precisely in the case of such sharp disagreement there is reason to demand a reflexive justification for choice of tenability criteria.

Within the individual academic subjects, for example in law, the consequences of a critically reflexive mode of questioning are less dramatic than in philosophy. This is the case, because the individual subjects must presuppose certain traditionally accepted rationality frames, so that the task of the members of the community in the subject is to place their propositions in relation to these frames. Some of these frames are specific to the individual subjects, such as the lawyers’ doctrine of the sources of law. Others are common to several or most subjects, such as the distinction between definitions and characterisations and the distinction between descriptive and normative propositions.

² Ross, *On Law and Justice*, e.g. p. 39 final paragraph.

³ I shall be returning in more detail to the said propositions in Ross in sections II B 5.2 (5)(b)(ii), 7.3.2 (1); C 2.1 (1), 2.1 (2)(a)(i), 2.3, 3.1 (2); and III 2.2.2 (3).

⁴ Compare also section III 2.2.2 (3)(c) below, at and in notes 43–45, where in another connection I mention some other writers’ answers to a critically reflexive mode of questioning concerning propositions about “what meaning is”.

5. Survey. Guidance for the reader

5.1. Survey of the content of the work. The generality of the critically reflexive form

The present work brings into focus a critically reflexive form in *everyday language*. – I use “everyday language” in contrast to “artificial languages”, including in particular logic and mathematics.

The term “natural language” is often used with the same meaning as “everyday language” here. In my experience, however, the term “everyday language” gives more apposite associations in relation to matters which I consider to be essential and which constitute the perspective and topic of the present work.

I do not, however, use “everyday language” in contrast to “academic”, “scientific” or “philosophical” forms of language and argumentation. Many academic subjects, many sciences and much philosophy are wholly or mainly formulated in forms of language and argumentation which by degrees, and sometimes only to a small degree, differ from those we use in everyday life.¹ This applies, for example, to law and large areas of legal theory.² – The area of application of everyday language thus overlaps but far from coincides with everyday life: Everyday language has a *general area of application*, from everyday life, across academic subjects and sciences, to philosophy. And the critically reflexive form that this work maps, has a *corresponding generality*.³

On the *conceptual and theoretical level*, the present work is, therefore, not in general limited to propositions within certain areas of life, within certain academic subjects, sciences, or the like. – In its *concrete demonstration* of the reality basis of my concepts and of the tenability of my theory, my presentation is first and foremost directed at *propositions about social phenomena*: be they propositions within morals, politics, law, psychology, history, sociology, or the like.

¹ In the text at the present note and throughout this work I use the term “academic subject” in the broad sense of the Scandinavian “fag” and the German “Fach”, i.e. I use it of crafts, professional subjects and academic disciplines. Further, I use the term “science” (1) in the broad sense of the Scandinavian “vitenskap” and the German “Wissenschaft”, i.e. to cover natural, social and human sciences, and (2) as an abbreviation for “activity one traditionally terms “science” in this broad sense” – that is, I neither presuppose nor lay down anything contentious through this concept of ‘science’.

² I use the formulation “legal theory” in a broad sense, also of discussions that are traditionally designated “legal philosophy”.

³ Concerning the everyday-language orientation, see in addition e.g. sections II B 1 (3); 2; and III 1.

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And among such propositions, a main emphasis is on *propositions about legal phenomena*, and within these again, on lawyers' propositions about what the law is: lawyers' "propositions de lege lata" (section 5.2 below).

This concrete demonstration has been designed with the intention that, seen as a whole, it is to give an approximately *representative* picture of the generality of the critically reflexive form. – The picture in itself can never be exhaustive. But part of the evidence for the generality of the critically reflexive form consists in the instantiations of the critically reflexive form given in this work awakening *recognition* in the reader, in his capacity of himself being a participant in language and argumentation; and in the instantiations of the critically reflexive form given in this work thus initiating in the reader, in relation to the reader's own acts of language and argumentation, a process towards the cognition of the generality of the critically reflexive form.⁴

In *Chapter II*, I give an account of the fundamental types of proposition. Section *II A* provides a survey, and sections *II B–D* deal in more detail with, respectively, descriptive and normative definitions, descriptive and normative characterisations, and analytically un/true propositions. The main emphasis is on definitions: a nuanced and coherent conceptual model for mapping the modalities, functions and means of this proposition type (section *II B*). Section *II E* gives an account of some common ways of deciding whether one is confronted by one or another type of proposition in the individual instance. In section *II F*, I argue that the distinction between descriptive and normative propositions ought to be seen as a graduated distinction: Lawyers' propositions de lege lata often lie roughly in the middle of the graduated dimension, i.e. lawyers' propositions de lege lata are fusions of descriptive and normative propositions, the two extreme points on the dimension.

In *Chapter III*, I take up two topics from tenability assessment which in my opinion deserve greater attention than they are normally given: In section *III 2* criteria used in the setting up of and choice between normative definitions are refined and systematised. In section *III 3*, I map the factual significance of other criteria than the truth criterion in the setting up of and choice between descriptive characterisations.

In *Chapter IV* an account is given of a practically central phenomenon: the strong tendency to use language in such a manner that it becomes unclear, to oneself or⁵ to others, what proposition type one is confronted with in the individual instance. More particularly, an account is given of a distinct tendency in the case of evaluations and choices: the tendency to use language that is polysemous between the descriptive, logical and normative, or that is one-sidedly descriptive or logical.

⁴ On the relationship between the presentation given in this work and the reader's own reality, see further a retrospective treatment in-depth in Chapter I↔V.

⁵ The word "or" I use throughout in the broad sense 'either the one alternative, or the other alternative, or both alternatives'.

In *Chapter V*, I discuss a distinct and widespread combination of the fundamental proposition types, which I term “reconstruction and redefinition”: I establish the concept of this mode of analysis. And I put forward and provide evidence for a hypothesis that this mode of analysis can be traced in a large number of propositions about what something is, inter alia in lawyers’ propositions de lege lata (sections V 2.4, partly also 2.2–2.3) and in legal theory (sections V 1.1(1), 2.5–2.6, partly also 2.2–2.3). – The diffusion of this mode of analysis calls for a causal explanation; this is the topic of section V 4.2.

At the same time as the work proceeds from the simple (Chapter II) to the complex (Chapter V), I have put emphasis on writing the work in such a way that the individual chapters can *be read on their own*. However, Chapter II lays much of the conceptual foundation for subsequent discussions. For those who do not wish to go in depth into the details in Chapter II, I have provided an introductory survey of this chapter (section II A) which should be adequate with a view to the subsequent discussions.

5.2. Guidance for the reader with a view to law and legal theory. The fundamental significance of the critically reflexive form for lawyers’ power of judgement

The aim of *describing and clarifying* a certain actually occurring critically reflexive form has determined the systematic structuring of the present work (sections I cf. 5.1, above). – Readers who are particularly interested in this main thread in the work can go directly to the detailed table of contents.

The demonstration of the *area of origin and application* of the critically reflexive tools does not come out equally adequately in the table of contents, and more specifically, nor does the demonstration of the applicability of these tools in analyses of *language and argumentation about legal phenomena*. – I refer readers who are particularly interested in this applicability partly to what does appear from the table of contents, partly to the subject index, and partly to the references that have already been given.⁶ By way of supplementation, in what follows I shall emphasise certain points.

Lawyers’ propositions de lege lata

Among propositions about legal phenomena, lawyers’ propositions about what the law is, lawyers’ “*propositions de lege lata*”, are of those that have been most

⁶ See section 5.1 above concerning sections II F (fused descriptive and normative propositions) and V (reconstructions and redefinitions).

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discussed from a critically reflexive angle: “Exactly what kind of propositions are lawyers’ propositions about what the law is?”

Lawyers’ propositions de lege lata lie throughout in the area of application of the systematic conceptual apparatus of the present work: The critically reflexive form that the work will describe and clarify, is *also* the form of lawyers’ power of judgement; and the work will demonstrate that and in what way the critically reflexive form *constitutes* this power of judgement. – In relation to lawyers’ propositions de lege lata, the conceptualisations and discussions in the work may be likened to a set of *filters*: For an *apt picture* of lawyers’ propositions de lege lata, in contrast to an understanding of the individual aspects, one must look through several of these filters *at the same time*. When we proceed from the fundamental proposition types to lawyers’ propositions de lege lata, a recurrent theme in the work will be that the latter in various ways *build on* the former.

Lawyers’ propositions de lege lata build on the fundamental proposition types in three main ways: *fusion* of descriptive propositions and normative propositions (section II F); *alternation* between definitions and characterisations (section IV 3.3.3); and *combination* of all four proposition types (sections V 2.4, partly also 2.2–2.3). – Thus the *tenability assessment* becomes correspondingly complex (section III 4, with further references).

Definition theory

The definition theory in the present work has also been influenced by law and legal theory: partly in the form of concepts for the definition theory, and partly in the form of actually occurring definition activity for which a definition theory of analysis and argumentation⁷ formulated in everyday language ought to be able to account. I refer to the more detailed account with further references in section II B 2.1 (2)(c) below.

⁷ Unless more special definition is explicitly stated or is clear from the context, I use “analysis and argumentation” as a derived variant of “language and argumentation”. There are two reasons for my use of this variant. First, I wish to point to a practically important specification: In relation to the broad area designated “language and argumentation”, “analysis” points to the sub-area of more reflected activity. Secondly, there is the consideration for effective communication of a major feature of the perspective and topic of the present work, namely the focusing of and on everyday language in contrast to artificial languages, including in particular logic and mathematics (section 5.1 above, introductory remarks, cf. the present section 5 in its entirety): To remind the reader of this major feature of the perspective and topic of the work, in a number of places I bring in the qualifier “formulated in everyday language”. Even though strictly speaking one might justify the formulation “language and argumentation formulated in everyday language”, such a formulation may at first glance provoke resistance (“language ... formulated in ... language” may at first glance look like three terms for the same thing) and may thus get in the way of comprehension. Therefore I link the qualifier “formulated in everyday language” to the formulation “analysis and argumentation”.

The question of dispositivity

By the “*question of dispositivity*” I mean the question of transition from the stage of preliminaries to that of being legally bound in the case of stipulated normative propositions: be it in the case of statutes, administrative decisions, judgments, contracts, wills, covenants, or other species of stipulated normative propositions.

Language and argumentation in connection with the question of dispositivity lies in a number of contexts in the area of application of the systematic conceptual apparatus of the present work. Here I want to point in particular to the *analysis of lawyers’ argumentation in the question of dispositivity in respect of contracts*: the typically relevant arguments in lawyers’ discussions of this question (section IV 2.2 (6)(b)); their ways of using these arguments (sections IV 2.2 (6)(b) and 3.3.1 (3)(b)(ii)); historical continuity with respect to the relevance of and ways of using these arguments (section IV 3.3.1 (3)(b)(ii), concluding remarks); and the pattern of reconstruction and redefinition in their discussions (sections V 2.2 and 2.4).

The flight from the normative proposition

The tendency, in the case of evaluations and choices, to use language that is polysemous between the descriptive, logical and normative, or that is one-sidedly descriptive or logical, extends far beyond lawyers’ language and argumentation de lege lata; see Chapter IV. However, lawyers’ language and argumentation de lege lata bears strong, and in its linguistic form often distinctive, witness to this tendency (see, for example, sections IV 2.2 (6)(b) and 3.3).

6. The status of the present work's own propositions. The independence of the critically reflexive form

I have pointed to the significance of a *critically reflexive mode of questioning*, i.e. thought (also) turning back on itself and asking for facts and criteria relevant in assessing the tenability of its own propositions. In the light of the fundamental elements in this work presented above, the main aim of the work can now be stated as follows: to demonstrate, and to create an awareness of, the existence, content and factual significance of a relatively well-delimited critically reflexive form (section 4) in the discussion and decision aspect (section 4) of analysis and argumentation formulated in everyday language (section 5); and thereby, to demonstrate, and to create an awareness of, the factual significance of analysis of dis/agreement on the basis of this critically reflexive form. – In this perspective one is logically led to ask what is the *status of the work's own propositions*. This question requires answers in two directions.

The relationship to the conceptual apparatus of the present work

The topic of the work is a critically reflexive form in analysis and argumentation formulated in everyday language. At the same time the propositions advanced in the work are themselves formulated in everyday language. Consequently, the propositions in the work can be determined with respect to their kind and assessed with respect to their tenability in the same *dimensions* of which the work will give an account and demonstrate the applicability.

That the propositions and analyses in the work can be determined in kind and assessed for tenability in the same dimensions of which the work gives an account, does not mean that the *individual concepts* the work establishes necessarily apply. For example, in the modality dimension I shall distinguish between descriptive, normative and fused propositions (sections II A 5; F). In this dimension the propositions in the work are descriptive or normative, never fused, cf. section II F concerning the content and presuppositions of fused modality.¹

There is thus no difference in principle between the method of the present work and the practices that the work maps. It is this relationship to which I am referring when in a number of instances I designate the critically reflexive form “*the per-*

¹ As the work proceeds, it will provide a basis for a retrospective treatment in-depth of the paragraph containing the present note, see Chapter I↔V, in the second indent.

spective and topic of the work". Likewise, it is this relationship to which I am referring when in a number of instances I use the formulation "the critically reflexive form that the work *brings into focus*"; "brings into focus" is here to be interpreted both in the meaning of 'placing in the centre' (compare "topic", compare also "focusing on") and in the meaning of 'making sharper' (compare "perspective", compare also "focusing of").

The relationship to other perspectives on analysis and argumentation occurring in fact and formulated in everyday language: the independence of the critically reflexive form

My discussions will demonstrate the actual existence of certain types and patterns of proposition with their accompanying tenability criteria and motivating interests. Considered as a unit, the types and patterns of proposition, the criteria and the interests constitute a critically reflexive form with a *certain independence*.

First, there is "independence" in relation to higher levels of abstraction, including in particular the level of fundamental philosophical positions, i.e. the level of ontological, epistemological or other positions of a presumed fundamental nature: There is "independence", partly in the sense that the critically reflexive form is not constituted through deductive argumentation from higher levels, but through such constellations of propositions, modes of analysis, tenability criteria and interests as will be demonstrated in the present work. And there is "independence", partly in the sense that the critically reflexive form according to its own content does not claim to be or not to be a fundamental and exhaustive rationality structure, i.e. does not claim to be or not to be a competing position on the level of fundamental philosophical positions. – Signs that one is *outside* the perspective and topic of the present work, will in the light of this be that one starts seeking the standpoint of the work on philosophical schools.²

Secondly, there is "independence" in relation to standpoints on (other) controversial questions: be they of a moral, legal, political or similar nature.³ The present work will demonstrate the existence and content of a critically reflexive form, not set up theses from which one can derive standpoints on controversial questions. – Signs that one is *outside* the perspective and topic of the present work, will in the light of this be that one starts seeking the standpoint of the work on "what is x?"-questions, when by "x" one is asking about something other than the elements of the critically reflexive form or the meanings of words (concepts) concerning these elements.⁴

One might imagine that the outlined independence of the critically reflexive form could be *justified via a "theory"*: a concept frame within which one could

² "Is the author a realist?"

³ Of a philosophical nature too, if one uses the designation "applied philosophy".

⁴ "What does the author believe science is?"

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say “this is how it must be”. This is *not* the perspective and topic of the present work. – The independence of the critically reflexive form will *be demonstrated as a fact*: as an aspect of the work’s discussions, seen as a whole, of the existence and more detailed content of the critically reflexive form.

In the light of this, I have for two reasons sought to the greatest possible extent to *avoid taking any standpoint* on conflict between fundamental philosophical positions, or on (other) controversial questions, be they of a moral, legal, political or similar nature. – I shall specify these reasons especially in relation to *fundamental philosophical positions*, since the danger of failing to appreciate the status of the work is greatest in this relation (sections 7 and II A 8, below).

First, the absence of certain univocal (cf. fourth preceding paragraph) connections between the critically reflexive form and the level of fundamental philosophical positions entails that to the same extent (as this absence) it *is not necessary to take any standpoint* on conflict between fundamental philosophical positions.

Secondly, the way in which I shall demonstrate the independence of the critically reflexive form (cf. third preceding paragraph) – as a fact, or more precisely, as an aspect of the present work’s discussions, seen as whole, of the existence and more detailed content of this form – entails that to the greatest possible extent it *is necessary not to take any standpoint* on conflict between fundamental philosophical positions. Partly such standpoints may overshadow the demonstration of the independence of the form, and partly they may deceive the reader into placing the critically reflexive form on the level of fundamental philosophical positions.

Standpoints on fundamental philosophical positions can show themselves through the concepts one uses, through one’s definitions; one defines for example ‘normative proposition’ as propositions with truth value. Or the standpoints can show themselves through views one asserts in other questions than questions of definition, through one’s characterisations; one asserts for example that only normative propositions that are in harmony with a certain fundamental ethical position, deserve to be followed. – What has just been said about taking standpoints on conflict between fundamental philosophical positions, applies to both forms of appearance of standpoints: Both in conceptualisations and in assertions of views otherwise it is (to the extent outlined and for the reasons outlined) both not necessary to take and necessary not to take any standpoint on conflict between fundamental philosophical positions.

After the mapping of the critically reflexive form has been carried out, I shall point out that the absence of certain univocal connections does not mean the absence of any connection whatsoever; the work *also* represents a challenge on the level of fundamental philosophical positions (Chapter I↔V).⁵

⁵ On the theme of independence, see further in section 7 below; a brief specification in section II A 8 below; and a retrospective treatment in-depth, with further references, in Chapter I↔V.

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It should after this be clear that the fact that to the greatest possible extent I seek to avoid taking any standpoint on conflict between fundamental philosophical positions, is not an expression of caution in a philosophical sense, as an alternative position on the level of fundamental philosophical positions (compare “scepticism”, “fallibilism”, etc.). On the contrary, the point is precisely, as has been mentioned, to demonstrate that the critically reflexive form that the work brings into focus, has a certain independence, i.e. to demonstrate the absence of certain univocal connections between the critically reflexive form and the level of fundamental philosophical positions. The work neither claims nor denies caution on the level of fundamental philosophical positions.

7. The shadow existence, in theoretical respects, of the critically reflexive form. The value of the present work

In and through the critically reflexive form that constitutes the perspective and topic of the present work, *significant acts* take place. But neither in literature within general or legal philosophy, nor in any other literature, have I been able to find any analysis of this form along the lines presented above: no nuanced and coherent conceptual model for mapping the critically reflexive form, with accompanying demonstration of – the reality basis of the concepts – the internal coherence of the form (its system character and dynamics) – the independence of the form – and the factual significance of the form: what acts take place, and in what connections and for what language users these acts are significant. In *theoretical respects* the critically reflexive form leads a *shadow existence*.

Accordingly, the feature of the work that to the greatest possible extent I seek to avoid taking any standpoint on conflict between fundamental philosophical positions (section 6 above, before the penultimate indent) does not express any particular caution in a research-strategic, methodological, psychological, or other sense, either (compare section 6 above, in the final indent, on caution in a philosophical sense). On the contrary, since the critically reflexive form has not previously been systematically treated in the literature, the work has not been able to fit into any tradition and is thus both in its consistency on the level of theory, and in the way it mediates throughout between this level and our linguistic practice, the opposite of a cautious work.

Especially in relation to philosophical literature I assume that one *cause* of this shadow existence is the combination of (i) the independence of the critically reflexive form, i.e. the absence of certain (section 6 above) univocal connections between this form and particular philosophical positions that have traditionally been deemed fundamental, often also mutually exclusive, and (ii) the fact that in general philosophy and the philosophy of law one traditionally relates one's discussions to conflict between such positions. – To take the philosophy of law as an example: Concepts formed with an eye to conflict between positions that legal philosophers traditionally deem fundamental, often also mutually exclusive, for example “natural law”, “positivism”, “hermeneutics”, “coherence theory”, etc., have shown themselves incapable of capturing the wealth of nuances, the internal coherence (system character and dynamics), the independence and the factual significance that all characterise the critically reflexive form that the present work

brings into focus. Through legal philosophers' traditionally relating their discussions to conflict between such positions, legal philosophy to a great extent relates *blindly* to important parts of our power of judgement mediated in and through everyday language, including important parts of lawyers' power of judgement.¹

This background (a system of significant acts, in theoretical respects leading a shadow existence) gives value to the present work. After I have demonstrated the wealth of nuances, the internal coherence (system character and dynamics), the independence and the factual significance of the critically reflexive form, I shall by way of summary point back to those threads in the work that I consider to a particularly high degree supplement and represent a challenge to other theoretical work on language and argumentation (Chapter I \leftrightarrow V).

¹ To take general philosophy as an example, and especially in relation to definition theory: Concepts formed on the basis of "falsificationism" (Popper) or "physicalism" (Quine) show themselves incapable of capturing the wealth of nuances, the internal coherence (system character and dynamics), the independence and the factual significance of the definition field of everyday language; see respectively sections II B 1 (4) and G 2, below.

8. Summary of the main aim of the present work

At the beginning of the present introduction I formulated a major aim of this work in the following way: “to describe and to clarify certain yardsticks for the comparison of and choice between propositions, and to demonstrate the area of origin and application of, as well as a certain independence characterising, these yardsticks”. In the light of the presentation in the present introduction of fundamental elements of the work, the formulation quoted may now be supplemented and elaborated as follows:

The *superordinate perspective and topic* of the work is a relatively well-delimited critically reflexive form (section 4), in the discussion and decision aspect (section 4) of analysis and argumentation formulated in everyday language (section 5), and with a certain independence (section 6).

There is no difference in principle between the method of the work and the practices that the work maps. It is this relationship to which I am referring when I designate the critically reflexive form “the perspective and topic of the work” and when I use the formulation “the critically reflexive form that the work brings into focus” (section 6).

The *main aim* of the work is to demonstrate, and to create an awareness of, the existence, content and factual significance of the outlined critically reflexive form; and thereby, to demonstrate, and to create an awareness of, the factual significance of analysis of dis/agreement on the basis of this critically reflexive form.

In fact there are close connections partly between demonstrating and creating an awareness, and partly between on the one hand the existence, content and factual significance of the critically reflexive form and on the other the factual significance of dis/agreement analysis on the basis of the same form. In the light of this, I use for the sake of simplicity the singular form “the main aim”. – When in certain contexts I use the formulation “a major aim of the work”, it is with reference to parts of the main aim now outlined (see, for example, the first sentence of the present section 8). I use the formulations “the purposes/ aims of the work” as common designations for the main aim and aims derived from the main aim; see the accounts linked to my individual discussions.