"Law and the End of Discourse"

Emmanuel Melissaris

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ABSTRACT

The thesis argues against Jürgen Habermas' and Robert Alexy's discourse theory of law that legal discourse cannot be understood as an instance of uncoerced and unfettered practical discourse due to features inherent to the law and bound to its materiality. The law's normativity necessarily rests on an epistemological paradigm. Precisely because the law's normative content depends on that epistemology, the latter cannot be problematised in the course of legal discourse. Moreover, in order to maintain its systemic integrity and its social effectiveness the law needs to take positive action. Therefore, legal discourse is either not allowed to develop freely, as its input is censored from the outset, or it is violently and prematurely interrupted in order for action to be taken.

This low degree of discursiveness of the law is argued by looking at three of the dimensions of legal discourse. On the level of justification, legal discourse is disabled as the justification of sanctions is always an arbitrary calculation of relations between means and ends. However, in and by the law this calculation is considered just, it is ascribed normativity and it becomes irreversible. The law also colonises the temporal dimension of legal discourse thus manipulating it and depriving the participants of the freedom to decide. Moreover, in order to satisfy the need for certainty and predictability the law compromises universalisation in time with the rule of law requirement of non-retroactivity. Finally, on the level of fact-finding, the law precludes informational input that is not in accordance with its epistemological paradigm and also screens input through criteria of relevance imposed by the urgent need to act. The thesis also argues that, precisely because the law is marked by a low degree of discursiveness, it does violence to other normative orders by silencing them. It is also argued that the project of legal pluralism cannot remedy this deficit without resorting to utopia, as institutionalisation and normative pluralism are necessarily incompatible. Finally two tentative suggestions are made as to how, without losing its critical sting, legal theory can help the law become more attentive to that plurality of legal order.
DECLARATION OF ORIGINALITY

I hereby declare that, except where otherwise stated, the research recorded in this thesis and the thesis itself was composed entirely by myself in the Faculty of Law at the University of Edinburgh.

Emmanuel Melissaris
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Lindy’s strength and love help me regain my lost faith and reconsider my view of the world. Isn’t that what it’s all about?

This thesis is dedicated to my parents for giving me so much so generously. It is only by calculating the incalculable that I can thank them.
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INTRODUCTION

Although philosophy has become an autonomous academic discipline and it is the university that philosophers nowadays consider their habitat, it certainly does not belong in thought-laboratories. On the contrary, philosophy is necessarily political. It is inevitably bound to the person, his/her predisposition, his/her placement in the world and understanding of it. Moreover, it always concerns, and this is not just a normative claim, the polis. Otherwise, it is stripped of all meaning and aim. This thesis was not produced in a sterile environment. It is the outcome of four years of academic research but at the same time it incorporates, sometimes tacitly other times more explicitly, my knowledge and views of the world, law and politics.

Academically I was brought up in an environment of acute positivism. What I learned as an undergraduate student was the grammar and the logic of norms; how to combine rules by understanding their language; that whenever there seemed to be no applicable rule, I was either not looking for it at the right place or that there was some principle of interpretation located well within the law, that could provide the solution. My law degree certified that I knew a core of rules and how to read the codes. At the same time though my political involvement and my interest in law as justification rather than practice alone, made me rather sceptical of that faith. I began suspecting that rules do not cover everything, that decisions are always an approximation. I felt that if legal norms are aspirations, then judgements are also nothing but aspirations. But judgements differ to rules in that they can raise a claim to accuracy with greater certainty to the extent that they deal with the actual and the concrete. After spending some time in practice I also realised that legal discourse is by and large a strategic venture and that the institutions of law do not merely provide a framework facilitating the distribution of justice; very often they seemed to be the raison d’être of the law.

So if the only problem is the inconclusiveness of the law, perhaps the solution to this was to be found in the social sciences. After all they often purport to be hard sciences claiming to get to the objective truth. Such knowledge cannot but be useful in determining policies,
consequences, social trends; all those things that should be informing the law. After a year of studying Criminology and Penology more closely I realised that empiricism did not have much to teach us about how to make the law more conclusively just. Although they can offer rational and fairly plausible ways of understanding social phenomena, they can only play a complementary and auxiliary part in the question of law and justice.

So I was left with nothing but questions. Is there any way that the law can offer conclusive and at the same time just answers? Can justice and institutionalisation be reconciled? Is the law really not coercive although it appears to be so? Are emancipation and regulation compatible? My questions became even more frustrating and crippling as the greatest part of legal theory seemed to be conformist in the sense that it was trying to prove the rightness of existing law ex post facto, to show that it is only empirical problems that stand between law and justice.

In this thesis I try to make sense of this discrepancy between rhetoric and reality. I set out to prove that, pessimistic as they may be, my intuitions about the law were true. I will argue that all law operates with violence and that violence is denial of communication. At the same time I aim my thesis to be constructively critical. My arguments are underpinned by my belief that the boundaries of the law must be drawn anew and in the light of the law's inability to accommodate free practical discourse. At the same time it must be recognised that there are other concurrent and often competing regulatory orders of a legal quality. The attentiveness to that plurality of legalities could to a certain degree remedy the law's discursive deficit, which hinders the pursuit of justice.

The thesis is systematised as an examination of the possibility of free practical discourse in a legal, institutionalised context. Of the various theories that advocate the connection of the law with morality and therefore justice in one way or another, I chose to argue primarily against discourse theory as developed by Jürgen Habermas and Robert Alexy. It could be argued that critique of discourse theory can only be external and holistic or internal and restricted, because discourse theory is itself holistic and its presuppositions must either be taken for granted or the whole thing must be rejected altogether. I do not think that it is necessarily the case. Essentially Kantian and drawing heavily from linguistic philosophy, discourse theory can very easily be broken down to its component parts. One can accept all
those parts but still not accept their combination. In this thesis I implicitly accept the Austinian linguistic-philosophical groundwork of discourse theory. I also assume that discourse is a necessary albeit not sufficient prerequisite of justice. However, this does not mean that I necessarily buy into the package deal of a procedural theory of justice or the claim that discourse theory is not merely normative but also descriptive of the political and the legal systems. In other words, discourse theory provides an excellent target, because one can freely jump in and out of it and have the best of both worlds, so to speak.

Furthermore, I use discourse theory because I find its basic premise that everything ought to be constantly and at all times problematised and put to the test of discourse insightful and promising. It will soon become clear that an intuition running through my theses is that justice is an ideal that motivates but cannot be achieved; it is what all efforts ought to be directed toward but never should it be believed that it has been conquered. And the notion of endless discourse captures it wonderfully for one more reason: in discourse some kind of justice is already done.

So, in chapter one I give an account of Habermas’ theory of general practical discourse and Alexy’s application of discourse theory to the context of law. The crux of Alexy’s legal theory is the Special Case Thesis (Sonderfallthese) according to which legal discourse is a case of general practical discourse, but a special one due to the real (temporal, social and so on) institutional constraints. The question I ask is not whether legal discourse raises a claim to rightness or whether it involves practical questions but whether these ‘real’ constraints are much more important than Alexy makes them out to be.

Following the suspicion that the law’s real aspects are detrimental of legal discourse, I go on to examine two theoretical strands critical of the law on grounds of its materiality, namely Legal Realism and Marxism. I argue that the proponents of legal realism are right in focusing on the real aspects of law and legal practice and the problems posed to legal discourse by that material character of the law. However, legal realist critique is not powerful enough, for it remains incidental. It refers to problems that are not immanent in the law but can be remedied with institutional means. On the other hand, Marxism did not share this faith in the law. By and large law is seen as a vehicle of coercion either by its enforcement with the exercise of explicit physical violence or by way of ideology. I refer to
three legal theories, namely those of Pashukanis, Althusser and Poulantzas. Each one of them offers valuable insights into the way the law operates by manipulating reality and the representation of it. I then set the agenda of the thesis more specifically. My argument is that the constraints of legal discourse are not merely incidental; they are bound to features inherent in the law and therefore they necessarily obstruct the unfettered development of discourse. I argue that the law imposes insurmountable constraints on legal discourse in two ways. Firstly, in order for it to operate effectively the law must adhere to an epistemological paradigm, upon which the law’s normativity rests. Therefore, in order for the law to be able to maintain its validity and function, that epistemology must remain beyond discourse. While the adherence to an epistemological paradigm constrains discourse by censoring the informational input, the need to act prematurely interrupts discourse. My claim that the law always obstructs the horizon of discourse and decision-making is also informed by Jacques Derrida and, in particular, his thesis concerning the aporias of the law in his “Force of Law”. I organise the study of these constraints of legal discourse around the dimensions of the latter. Although I do not claim that these are the only parameters of legal discourse, I understand it as existing in and as defined by *topos*/*space*, *logos*/*justification*, *chronos*/*time*, and *aletheia*/*truth*.

**In chapter two** I begin the exploration of these dimensions of legal discourse by looking at the parameter of logos. More specifically, I examine the justification of sanctions. I argue that the imposition of a sanction is always the outcome of reasoning concerning the transition from means to ends. A look at various philosophies of punishment shows two things. Firstly, the justification of punishment in general on one hand and the justification of the choice of a particular sanction as an application of the decision concerning the kind of punishment one the other have been merged into one problem, although they are analytically and practically separate questions. Secondly, partly as a result of that confusion, theories and policies of punishment have not been able to account for the incalculability of offence and punishment. I argue that this incalculability is inevitable and that there is always a certain degree of contingency in action. However, the law must take positive action by imposing the sanction as necessary, not contingent. Thus the discourse is interrupted and justice is compromised. Moreover, that decision is ascribed normativity and thus becomes irreversible.
In the third chapter I turn to the dimension of time. A propos of a reconstruction of the justification of imprisonment I argue that the law perceives time as a succession of events in the linear continuum of past-present-future. The strict separation between past, present and future though implies that there must be a moment of severing of the continuum, from which only fragments will survive in order for the order that is the future to be built. I then go on to argue that, as normativity is meaningful only in the present, the law reserves for itself this privileged diachronic existence, which guarantees the continuity of time, as the law itself perceives it. I support this argument by showing that under a different epistemology of time, such as the psychoanalytic perception of time as bound to the person or Heidegger’s and Lévinas’ time as the experiencing of the end as contained in the subject, the whole construct of law as generalisation and action with guaranteed certainty would collapse. By presenting itself as endless it relieves legal agents from the burden of justification and absolves them from responsibility and it also colonises the temporal dimension of legal discourse and does not allow discourse to exist outwith it. Thus legal discourse is always and unavoidably ensnared in the legal institution and subordinated to its functional imperatives. I show this by pointing out the paradox in the rule of law requirement of non-retroactivity. The prerequisite of universalisation refers to both space and time. That means that a norm covers everybody and everybody at all times. If two temporally distant judgements are contradictory, they cannot both be right. However, because the law promotes predictability and the maintenance of its systemic integrity as primary aims and it because it needs to act and uphold these actions, it cannot allow the reversal of older decisions. As a result, discourse is distorted and disabled.

In chapter four the discussion is about judicial fact-finding. I give accounts of Frank’s critique of the judicial discovery of the truth on grounds of the psychological and practical impediments in the course of the trial; Bennett’s and Feldman’s account of the biases inherent in narratives in court; and finally Bankowski’s and Mungham’s theses about the inevitable axiological substratum of fact finding. I also give an exposition of MacCormick’s defence of the judicial discovery of truth on grounds of coherence and correspondence. I then discuss these accounts and come to the conclusion that the law must base its fact-finding function on an undiscussed epistemological presupposition, which I call the law’s common sense. I also argue that, as the law uses aletheia as an operative prerequisite
whereas for legal discourse it is a dimension, the latter is constrained by the background of relevance, against which the law assesses all informational input.

In **chapter five** I give a summary of my arguments thus far and I also deal with the discourse-theoretical objection that legal discourse is not different to any other real discourse.

**Chapter six** looks at the law's low degree of discursiveness on a macro-level as the silencing of other concurrent normative orders. I refer to Robert Cover's account of state law as a jurispathic system that suppresses other legal orders and Walter Benjamin's theses on law's violence. I find the notion lending coherence to these diverse theories of law's violence in Niklas Luhmann's systems-theoretical approach to the law's normative closure.

In **chapter seven** I look at a possible solution to that problem, namely legal pluralism. I examine positivistic legal pluralism as well as Boaventura de Sousa Santos' theory of intertwined legalities; Warwick Tie's epistemological approach to legal pluralism; and Günther Teubner's thesis on the co-existence of legal orders by way of structural coupling. I come to the conclusion that, because the law inevitably does violence to discourse, legal pluralism can only be radical, extra-legal value pluralism. However, I argue that legal pluralistic theories are valuable to the extent that they focus on social discourses developing institutional regulatory orders.

I extend these arguments in **chapter eight** and make a suggestion concerning how the problematic of legal pluralism can be of use in the transformation of the law. I argue that it is legal theory that ought to be more attentive to self-regulating social discourses, make that knowledge explicit and feed it back into the law.

So this is the task I set myself in this thesis: to prove that the law does not allow legal discourse to develop freely either by not admitting certain information or by prematurely interrupting discourse. As a result the law also distances itself from general practical discourse and the ideal of justice, because by constraining discourse it does violence both to the situation, as it does not allow the communicative assessment and resolution of the dispute, and the discussants, as it deprives them of the possibility to be heard. This does not
of course mean that the contrary argument holds: discourse does not necessarily lead to justice. Not everybody has something to say, let alone something right to say, and in principle there is no reason why one should trust the law less than any other normative order. However, such normative orders do exist and they are often qualitatively not different to state law and their silencing is a kind of violence. Therefore a way must be sought to include them in the regulatory discourse.
CHAPTER ONE

LAW'S MATERIALITY AND THE DIMENSIONS OF DISCOURSE

INTRODUCTION

First chapters are rarely very exciting reads. The reader will find that this one is not an exception, at least for the greatest part. Nonetheless it is a necessary first step. I have already announced that the thesis revolves around the concepts of legal discourse and its real constraints. Here I explain these terms and set their boundaries. But the purpose of the chapter is not only to clarify my terminology so in that sense it is not merely introductory; it also has a substantive function. I look for the real aspects of the law and begin to examine how this materiality is opposed to and incompatible with the conditions of free and uncoerced general practical discourse.

So I begin with an exposition of the theoretical background of discourse theory and then its application to law. Robert Alexy, who was the first to formulate a discourse theory of law, argued that the law is a case of general practical discourse but a special one, because of the real temporal, spatial and social constraints of the legal process. The discussion of the material character of the law automatically leads to two theoretical strands that criticised the law on precisely those grounds: Legal Realism and Marxism. I discuss and qualify their main theses and with the help of Jacques Derrida's aporias of the law I systematise the main real constraints of legal discourse as: a) the rigidity of law's adherence to an epistemological paradigm and b) the need to bring processes of discourse and justification to an abrupt end for the sake of and in the name of taking action. The combination of these constraints is
revealed in all the dimensions of legal discourse, which I identify as *topos*\(^1\), *chronos*\(^2\), *logos*\(^3\) and *aletheia*\(^4\). The next three chapters of this thesis will be devoted to the discussion of the ways in which violence is done to communication in these dimensions.

**THE THEORETICAL FOUNDATIONS OF DISCOURSE THEORY**

Since the 1970's Jürgen Habermas has been elaborating his theory of general practical discourse. His aim is to propose a solution to the theoretical and practical problems of modernity by re-defining reason and by seeking to find a way of reconciling the concepts of private and public, and freedom and equality. He set out to achieve that by formulating a procedural theory on the prerequisites of rational communication.

Habermas questions the plausibility of the correspondence theory of truth. He argues that an accord between an actual state of affairs (facts) and an utterance, which expresses them, cannot be adequately established, because there is no specific account of what counts as a fact. The alternative he proposes is the distinction between *facts* and *objects* (1995a:132). He designates facts not as something that can be physically experienced but rather as a language-dependent category, substantiated by statements. In other words, facts are what true statements state. Conversely, objects are happenings or things, with which statements are concerned (ibid.).

As it becomes clear from the previous point, at the basis of discourse theory lies the combination of Austin's theory of speech acts (1962) and a theory of truth. According to the former, an action is being carried out, every time something is being said. Within a speech act Austin distinguishes three acts: i) The *locutionary* act (which can be subdivided into the phonetic, the phatic and the rhetic acts) is the expression of a sentence with a specific meaning, ii) The *illocutionary* act is the act performed in saying something, as opposed to the act performed by saying something. iii) The *perlocutionary* act is the one performed by

\(^1\) *Τόπος* = space.
\(^2\) *Χρόνος* = time, but also year.
\(^3\) *Λόγος* = reason and speech.
\(^4\) *Λάθος* = truth, *λαθεία* = to be stealthily, *ἀλήθεια* = *ν*+*λαθεία* = nothing being hidden. It is also interesting that the modern Greek word for mistake (*λάθος*) comes from the same stem as *λαθεία*, so in modern Greek *ἀλήθεια* also implies infallibility.
saying something, the effects of the utterance, which do not necessarily coincide with the illocutionary act. For instance the utterance “Watch it!” could be perceived either as a warning or as a threat.

‘Actions’ are language games in which the claim to validity implicated in speech acts is tacitly recognised. By contrast, in ‘discourses’ claims to validity that have become problematic are made the subject-matter and are scrutinised as to their soundness. In the process of discourse new experiences cannot be acquired. Although experiences do enter in the realm of discourse, it is exclusively problematic validity claims that are being dealt with by means of argumentation (Habermas, 1995a:130-1).

Based on Austin’s distinction of speech-acts, the significance of which lies in the introduction of the illocutionary aspect of utterances, Habermas argues that assertions should be tested on the pragmatic rather on the semantic level. In other words the truth of what is being said should be tested according to the soundness of an utterance rather than vice versa. In that way it would be possible to ascribe truth value to normative sentences as well as to non-normative ones. On the illocutionary level, everything is translatable and comprehensible by all, as long as it is properly uttered. Each speaker aiming at reaching an understanding through discourse, incorporates three validity claims in his/her utterances: a claim to validity, a claim to rightness and a claim to truthfulness (ibid.:159ff). These claims correspond to the universal pragmatic functions of language, which a speaker must have mastered in order to partake in a discourse. Thus, we can form formal criteria in order to distinguish between sound assertions, valid arguments, and sound transitions from statement of fact to normative statements5.

According to consensus theory the potential agreement of all is the condition both of the truth of a non-normative statement and of the correctness of a normative statement. This criterion of truth suffers from two weaknesses: on the one hand it can never be satisfied and on the other hand, even if it could be, it would not be sufficient. Therefore, Habermas develops the argument that it is not an actual universal consensus but a well-grounded

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5 For details on universal pragmatics see Habermas 1995c. The theory of universal pragmatics is also strongly related to Apel’s ‘transcendental pragmatics’ (Apel 1971, 1976), to Austin’s theory of speech acts (1962) as well as Searle’s re-working of the latter (see mainly Searle 1969).
consensus that can serve as a criterion of truth (ibid.:160ff). A well grounded consensus, that is a consensus built on ‘the strength of the better argument’ (ibid.:161) can be guaranteed by working out a framework of the logic of discourse. An argument is designated as the justificatory ground of a validity claim implicit in an utterance. The problem with the justification of normative statements is the justification of second-order rules that justify the transition from statements of facts to normative statements. Habermas claims that the consensus achieving strength of this transition depends on the adequacy of the language system applied in the reasoning process. In order for arguments to be viewed as criteria for truth, these language systems, which are tied to specific cognitive schemata, must themselves be subjected to discourse.

The stages of practical discourse are the following: 1) entry into discourse, through the problematisation of a normative sentence. 2) Submission of an argument. 3) Discursive testing of the language-system. 4) The fourth level is where theoretical and practical discourse meet by the interpretation of needs and the possibility of their satisfaction with the means available.

The participation in discourse is in turn regulated by several rationality rules. A set of formal characteristics is required to serve as a framework of discourse and provide the necessary conditions for the four levels to be possible. He points out the need to eliminate factors, either external or internal to the discourse, that could undermine the necessary preconditions of discourse. Such a condition of unhampered discourse is designated as the ideal speech situation and the four requirements correspond to the four categories of speech acts (ibid.: 177ff.) Habermas’ formulation of the four rules is extremely detailed. They can nevertheless be briefly summarised in the following: Everyone, who can speak, can have access to discourse, s/he can problematise an assertion, express his/her attitudes or wishes. Furthermore, every kind of external or internal coercion should be excluded from the discourse. As for the obvious unrealisability problem6 of the ideal speech situation, Habermas claims that the latter is neither an empirical phenomenon nor a mere construction.

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Rescher (1993) criticises discourse theory on those grounds in fact overemphasising the unrealisability issue and argues a benign social order should be based on productive, controlled disagreement rather than consensus.
It is rather an inevitable presupposition of any discourse that the parties must reciprocally assume (ibid.:180).

From the above model of a theory of truth, Habermas draws his account of the principle of universalisation in practical discourse. Based on his ideal speech situation thesis, he argues that a justified norm is one that all want (1976a). In other words, a right norm is one the direct and indirect consequences of which everyone can accept taking into account not only their needs but also those of all the co-experiencing individuals. These needs can be determined and interpreted again by the discursive testing of the moral rules that underlie moral language. Practical discourse has to be constructed in such a way that the interplay between its different stages is possible, in order that the original language system can be re-tested whenever needed. But because cognitive schemata, concepts and predicates have no truth value, this testing has to be done through the statements, which are based on the language system.

THE EMPLOYMENTS OF PRACTICAL REASON AND THE JUSTIFICATION OF SANCTIONS
Let me expand more on the issue of the justification of sanctions, as it is central to this thesis.

Habermas draws on the Kantian tradition and seeks to creatively combine it with Aristotelian ethics and utilitarianism through the spectrum of discourse theory. He therefore proposes a distinction between the different employments of practical reason. Namely, he distinguishes between the pragmatic, the ethical and the moral (1995b).

Pragmatic reason refers, in short, to purposive rationality (ibid.:10ff). It provides utilitarianist answers to questions concerning action or reasons for action. Ethical rationality is different to purposive in that moral imperatives enter the reasoning. Nevertheless, they are not pure moral considerations. Ethical rationality (ibid.:12ff) is contextual. Individual life histories or the real conditions of existence of a specific community enter the discussion as catalysts. Pure moral rationality is employed in moral discourses. The contingencies of the real conditions of existence are irrelevant. Moral imperatives (ibid.:7) are beyond subjects.

7 For a good overview of Habermas’ work up to the Theory of communicative action, see White S. 1990.
or communities. The difference between moral and ethical employment of practical reason is obviously a little vague. To put it in other words, ethical reason refers to what is good for a particular society whereas moral reason is about what is just.

Each type of practical reason corresponds to a respective type of discourse. Pragmatic discourses

serve to relate empirical knowledge to hypothetical goal determination and preferences and to assess the consequences of (imperfectly informed) choices in the light of underlying maxims (ibid.:11).

Reason and volition are here connected only through the mediation of external circumstances, as it is factors beyond the control of the person that seem to play the decisive part in the decision-making process.

In ethical-existential discourses the participants filter their perception of themselves through their shared perception of the world. Reason and will are internally connected in the sense that collective values, which are deemed good, become reasons for the action of individuals.

Moral discourses concern the discovery of absolutely universalisable values. They are, to use Kantian terminology, about the moral point of view.

This distinction between the pragmatic, the ethical and the moral employments of practical reason is bound to give rise to objections. In particular the differentiation between the moral and the ethical seems rather artificial. Can moral discourses ever be anything but ethical? Is it possible for participants in real discourses to unburden themselves from their luggage (knowledge, experience, real conditions) and reach universalisable imperatives, which are beyond themselves? If that clashes with the circumstances or outcomes of other discourses, how can we ever confirm its transcendental validity? Taking this a step further, is intersubjectivity enough to overcome subjectivity?

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8 See Rasmussen 1990:57.
The distinction of the employments of practical reason has been put forth by discourse theorists in the context of the justification of punishment, which is a central topic in this thesis. Therefore I shall return to it in the second chapter.

**A DISCOURSE THEORY OF LAW**

HABERMAS ON LAW AND DISCURSIVE RATIONALITY

Habermas’ early work focused on the emergence and later demise of the public sphere (*Öffentlichkeit*). The public sphere developed as the realm in which reason could be formed discursively in a free and uncoerced manner and in turn exercise control on the state. However, it soon collapsed under capitalism as the state and civil society, between which the public sphere was supposed to mediate, were gradually merged. The demise of the public sphere happened to a large extent with the mediation of the law and the legal colonisation of the social lifeworld, which is also described as juridification, *Verrechtlichung*.

At a later stage though he began to see in the law the condition for the transformation of communicative power into administrative power. He tried to show how the tension between the facticity of the law and its validity can be relieved through the medium of law itself. This tension is both internal and external. The law’s facticity refers to the need for judgements, which will resolve conflicts in an increasingly pluralised and complex society. Validity is about the need of a particular political order to be legitimate and effective at the same time.

As far as the points of entry of general practical discourse in legal discourse are concerned, Habermas does not accept Alexy’s *Sonderfallthese* (see below) according to which law is a case of general practical discourse albeit a special one because of all the temporal, spatial and substantive constraints. He argues that such a thesis conceives of the law as subordinate

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9 Habermas 1989.
11 Up to *The philosophical discourse of modernity* (1987), Habermas was still eager for the ideal of the public sphere to be realised. But in *Between Facts and Norms* (1996) he seems to have regained full faith in the law.
to morality (1996:233) and still does not give an answer to the indeterminacy of general practical discourse. Habermas does not adopt Günther's theory of application discourses as a whole either. According to Günther's theory of appropriateness adjudication is an instance of application of rules governed by a weaker principle of universalisation that requires that all participants agree under unchanging circumstances. Habermas retains that legal discourse is an application discourse, that the normative content of norms is pre-given and that one of the tasks of the judge is to maintain the coherence of the legal system. His basic objection is that Günther's thesis includes the assumption that political legislation is rational according to moral reason.

But political legislation does not rely only, not even in the first instance, on moral reasons, but on reasons of another kind as well (ibid:232).

As a response to the problem of the combination of rationality, rightness and effectiveness at the level of adjudication Habermas counterproposes a procedural model, according to which the establishment of an institutionalised democratic procedural framework will set the necessary prerequisites for the accomplishment of communicative rationality within the law, and within which even strategic action will be accommodated.

Procedural law does not regulate normative-legal discourse as such but secures, in the temporal, social and substantive dimensions, the institutional framework that clears the way for processes of communication governed by the logic of application discourses (1996:235).

[...] One can say that codes of procedure provide relatively strict rules for the introduction of evidence regarding what took place. Such codes thus define the bounds within which parties can deal with the law strategically. The legal discourse of the court, on the other hand, is played out in a procedural-legal vacuum, so that reaching a judgement is left up to the judge's professional ability. [...] The aim is to preserve legal discourse from external influences by moving it outside the actual procedure (ibid:237)

As far as sanctions are concerned, Habermas follows the classical liberal paradigm. The justification of sanctions goes part and parcel with the justification of norms:

Sanctions (however much they are internalised) are not constitutive of normative validity; they are symptoms of an already felt, and thus antecedent, violation of a normatively regulated context of life (1995b:42).
We respect and abide by norms, because we feel that is what we ought to do rather than because we fear the imposition of the prescribed sanction upon us. Habermas moves along similar lines as far as enacted law is concerned as well:

Legitimate law is compatible only with a mode of legal coercion that does not destroy the rational motives for obeying the law; it must remain possible for everyone to obey the law on the basis of insight. In spite of its coercive character, therefore, law must not compel its addressees but must offer them the option, in each case, of foregoing the exercise of their communicative freedom and not taking a position on the legitimacy claim of law, that is, the option of giving up the performative attitude to law in a particular case in favour of the objectivating attitude of an actor who freely decides on the basis of utility calculations (1996:121).

Habermas associates the rightness and acceptance of sanctions with the substantive rightness of the norms that impose them. So does Alexy (1992a), when he argues that the imposition of sanctions does not constitute coercion, as long as the norms are not unjust. It is clear that Habermas’ extracts refer to the place of sanctions in the process of the acceptance of the validity of norms.

As I have already said, the relevance of the distinction between the pragmatic, the ethical and the moral employments of practical reason is aptly revealed in the context of the justification of sanctions. Discourse theorists have put forward the claim that to a large extent punishment is decided on a pragmatic level. It is Alexy who argues that:

[... if one conceives justice as comprising all questions of distribution and retribution, then problems like that of the welfare state and that of punishment have to be treated as questions of justice. The answers to these questions depend on many reasons. Among them arguments about how one should understand oneself and the community in which one lives play an essential role. By this the just depends on the good. Changing one’s self-understanding or one’s interpretation of the tradition in which one has been bred up can change one’s conception of justice. (1999:379)]

Alexy’s aim in the passage is to show the unity between the various aspects of practical reasoning. His argument is that practical reason is not simply a blending of its three aspects but rather the unity of their internal interconnections. Effectively, he claims that questions
such as the justification of punishment are inevitably decided on the ethical level but, at the same time, that discourse cannot violate the universalisable moral point of view.

Habermas (1996) puts forward a similar claim. He argues that pragmatic arguments are acceptable in lawmaking discourses as long as they are underpinned by existing values of the community and they do not violate universalisable moral norms.

A problem caused by this thesis is the extent to which ethics (in the narrower, discourse theoretical sense) is adequate for the justification of punishment. The answer to that is actually implicit in the thesis itself. There is always the safety mechanism of the moral point of view: a form of punishment which is ethically justified as good has to be morally acceptable as well. The objection to that is just another side of the broader objection which I have already mentioned and has to do with the practical and theoretical feasibility of the distinction between the ethical and the moral. But the objection concerning the absolute disjunction of the ethical and the moral is not the one I choose to employ against discourse theory. To that extent, it is not one that matters greatly to my line of reasoning.

THE SONDERFALLTHESE

Robert Alexy may base his theory of law on Habermas' theory of general practical discourse but he also qualifies it in substantive respects. The crux of Alexy’s legal theory is the Special Case Thesis (Sonderfallthese) (1989a), which addresses the problems of adapting a theory of general practical discourse in the context of a real discourse such as law.

The Sonderfallthese can be summed up in three basic points: 1) Legal discourse is practical discourse, that is it deals with practical questions, reasons for action. 2) Legal discourse, like all practical discourse, raises a claim to rightness; 3) but because of the institutional constraints inherent in the legal system, legal discourse is a special form of practical discourse (1989a:212-213). Legal disputes are not

to be viewed as discourse in the sense of non-coercive unfettered communication, but only that, in legal disputes, discussion proceeds under a claim to correctness and accordingly by reference to ideal conditions. (ibid:219-220).
Alexy discards the claim that the constraints of institutionalised legal discourse undermine its discursive character. He argues that this seeming tension between institutionalisation and discourse is relieved in the bond of legal discourse with general practical discourse. In his *Theorie der Grundrechte* (1985) (*Theory of Basic Rights*) he explains how these two instances of practical rationality are linked. He distinguishes between rules and principles in a way that is not altogether different from Dworkin's perception of the distinction (1977). The mode of existence of a rule is its validity. A rule can either be valid or not. On the other hand, principles are optimisation commands (*Optimierungsgebote*), which have a dimension of weight rather than one of validity. The use of principles in adjudication is the point of entry of general practical discourse in the law.

Alexy completes his discourse theory of law in his *Begriff und Geltung des Rechts* (1992a) (*The Concept and Validity of the Law*). There he also voices more clearly a thesis underpinning the Sonderfallthese, namely the Verbindungsthese, the thesis concerning the necessary connection between law and morality. This thesis is based on the claim that every law not raising a claim to correctness or even raising a claim to wrongness commits a fatal performative contradiction, which undermines its very legal character. He also discusses a number of positivist theories and definitions of the law and he concludes with a definition that he claims can accommodate the three basic characteristics of the law, namely its rightness, its social effectiveness and the inclusion of principles, according to which the claim to rightness will be judged:

The law is a system of norms, which (1) raises a claim to rightness, (2) consists of: a body of norms, which belong to a by and large socially effective constitution and which are not blatantly unjust; a body of norms, which have been set according to that constitution, show a minimum of social effectiveness or chance for effectiveness and are not blatantly unjust and to which (3) belong the principles and the various normative arguments upon which the procedure of law application is or should be based, for the claim to rightness to be fulfilled (1992a: 201).

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13 Here is the original text: "Das Recht ist ein Normensystem, das (1) ein Anspruch auf Richtigkeit erhebt. (2) aus der Gesamtheit der Normen besteht, die zu einer in großen und ganzen sozial wirksamen Verfassung gehören und nicht extrem ungerecht sind, sowie aus der Gesamtheit der Normen, die gemäß dieser Verfassung gesetzt sind, ein Minimum an sozialer Wirksamkeit oder Wirksamkeitschance aufweisen und nicht extrem ungerecht sind, und zu dem (3) die Prinzipien und die sonstigen normativen Argumente gehören, auf die sich die Prozedur der Rechtsanwendung stützt und/oder stützen muß, um den Anspruch auf Richtigkeit zu erfüllen." (1992: 201).
Alexy designates legal discourse as a special case of general practical discourse, because not all rules of the latter, particularly the procedural ones, can function within the legal system and especially in institutionalised legal discourses (as opposed to legal discourses within the academia for instance) in the way they do in general practical discourses. Therefore Alexy sets out to prove that, although the social, temporal and substantive constraints of legal discourse incline us to make it a special case, it nevertheless is closely linked with general practical discourse.

Alexy gives us the agenda of critique himself (1989a). He says that his theory falls if one or more of the following are proven: 1) legal discourse is not about practical questions or that 2) the law does not raise a claim to rightness or that 3) legal discourse is not discourse at all, because of the institutional constraints.

THE REAL CONSTRAINTS OF LEGAL DISCOURSE ACCORDING TO ALEXY

The constraints of legal discussion that Alexy seems to have in mind are those related to the behaviour of the parties in a trial rather than the conditions of the institutionalised legal dialogue. The problems that Alexy imagines might undermine the discursive character of the law are the involuntary participation of the defendant, the temporal limits of the trial, the strict regulation of the procedure, the interest of the parties in profiting as much as possible or in losing as little as possible, through which their interest in discovering the truth is filtered (1989a:212). It is the latter that concerns Alexy in particular. If that point were proven, then the earlier thesis by Habermas (1971), according to which the trial is an instance of strategic action rather than discourse would be correct and the Sonderfallthese would remain ungrounded.

Alexy claims that, although it is of course the case in certain occasions that the parties are concerned with their own interests especially in civil proceedings, the arguments exchanged in court do raise a claim to correctness irrespective of the intention of the parties. In such contexts it is impossible to draw a clear-cut distinction between strategic action and unfettered, uncoerced discourse. Nevertheless, all legal communicative interactions are
rational exchanges of arguments with reference to ideal conditions\textsuperscript{14}. In other words, the parties purport to convince any rational audience of their argumentation.

According to Habermas the strategic conduct of the parties during the course of a trial is neutralised by the procedural rules that exclude external hindrances to begin with (1996:237). Apart from that, and along the same lines as Alexy, he argues that it is crucial that the arguments brought forward by the parties are addressed to the judge, who is the guarantor of the application of the procedural rules and it is from his/her point of view that a decision will be reached.

When Alexy discusses (in a footnote, ibid.: 220) Hubert Rottleuthner’s thesis that the structure of the criminal process undermines the rationality of legal discourse\textsuperscript{15}, he suggests that it is a question of empirically looking for the kind of procedure, which would best meet the criteria of rationality. From that one thing becomes clear. In order to criticise the law on grounds of its discursiveness, one has to show that it is an inherent feature of the law, which hinders the development of discourse under the conditions which discourse theory sets. Only such an immanent flaw and not an external obstacle would account for a discursive deficit of the law, for there will be something to be learned about the nature of the law itself rather than the organisation of the institutions of justice. Therefore an empirical solution would not suffice.

In this thesis I take issue with the ‘real constraints’ of legal discourse. It is that concept that I shall try to clarify and put in a different perspective than Alexy’s. Associating real constraints with the parties’ behaviours conceals that discourse can also know constraints, which are equally real but are not mere by-products of the adversarial or inquisitorial systems of trial. These constraints are not parasitic on the law and legal procedure in the sense that they are not only associated with contingent factors, which could freely be otherwise. Therefore I propose a distinction between immanent and incidental constraints of legal discourse. The latter are the ones that can be addressed easily by discourse theory, or indeed by any theory claiming that the law is in a continuum with morality, by way of

\textsuperscript{14} These ideal conditions are defined in the manner of Habermas (see above) and Chaim Perelman. See mainly Perelman 1980.

\textsuperscript{15} See Rottleuthner 1971.
idealisation or abstraction. Such constraints would be the selfish behaviour of the parties, the abilities of the judge and so forth. However, the former cannot be accounted for. As I said the immanent constraints of the law do not cease to be utterly 'real' in the sense that they have to do with the pragmatic aspect of the law, the materiality of its practice and not merely as norms. They are deemed real compared to constraints referring to rules. In other words, they are real because they concern the possibility of discourse and the way it is carried out and not its substantive content. They are not linguistic or conceptual constraints of interpretation, they come at a stage prior to that and affect the real basis of interpretation, its very prerequisites. Hereafter, my argument will revolve around this central tenet: Because of the real constraints of communication within it (and not just in the courtroom), the law is marked by a low degree of discursiveness. To put it more forcefully, by its very nature the law does violence to discourse by not letting it develop freely. Thus legal discourse is severed from general practical discourse. I will expand on these immanent real constraints of interpretation later in this chapter and, indeed, the next three chapters.

**TWO CRITIQUES OF THE LAW ON GROUNDS OF ITS MATERIALITY**

I have already put forward a distinction between immanent and incidental constraints of legal discourse and argued that, whereas discourse theory may confront and remedy the latter, the former are inherent in the law and can therefore not be done away with without interfering with the very conceptual core of the law. It is now time to focus on these real constraints of legal discourse and clarify what I mean by 'material nature' of the law and by immanent real constraints. First let me go through two theoretical strands critical of the law on grounds of these real aspects of the law, which suspend justice.

**A REALIST CRITIQUE OF THE LAW (THE INADEQUACY OF RULES**

The big codifications of the 19th century were celebrated as a victory of rationality and a step towards substantive justice. Not without reason, as the law and legal institutions, in accordance to the way the authoritative regimes of the period were grounded, were founded on transcendental ideological constructions such as God and divine will. Justice had been

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16 In chapter 4 I give an account of the realist critique of judicial fact-finding.
distributed in a particularistic fashion impossible to be known in advance. Therefore, there was a need and a corresponding demand for stability and predictability, for the rule of abstract, universalisable and generalisable law. A set of known and determinate rules seemed to cover that need. This conception of the law prevailed in Europe and was also theoretically established as the paradigm of a just legal system beyond its geographical and historical context.

Nonetheless, it soon became clear that, once democracy or at least popular sovereignty was established and liberty and equality became guiding political ideals, a demand was placed on the law to be more sensitive to the particular and focusing on the appropriate. Formality was now being questioned as a hindrance to substantive justice rather than as its necessary prerequisite. That assertion is a common topos of numerous theories which very often share nothing else but that.

One of the criticisms of modern law on that account mainly came from practitioners in the USA in the first half of the of the 20th century. American legal realism came as a reaction to the world-forming idealisations upon which modern law is founded and with it formalisation as a guarantee of justice. The most central tenet of American legal realism is that it is a fallacy to regard the law as a system of rules, which can be and are applied infallibly by deduction in every case before the law. The part played by the rules in the distribution of justice is rather limited. There are numerous other factors alongside rules determining judicial decisions. Firstly, rules as well as precedents are too indeterminate. Irrespective of the degree of their standardisation, there is always a way of manipulating them so as to arrive to a decision which the judge has intuitively reached from the first reading of the facts. This is not necessarily a conspiracy theory. Judges are determined by their background to an extent that is beyond their control. Of course, judging on grounds other than justice might well be a conscious process. Judges very often employ implicit consequentialist arguments. Very often their main concern is public policy and not justice in the particular case. In other words, judges legislate much more often than the advocates of formalism would admit and mask the creation of new law with the use of some pre-existing rules as vehicles. The American legal realism movement particularly tried to draw attention to the social aspect of law-application and the practical significance of judicial decision-making in terms of social organisation and political stability.
Oliver Wendell Holmes\(^{17}\) saw a great danger in over-idealisations and fetishist conceptualisation of the law as well as in the confusion of law with morality. In order to achieve a correct understanding of the law, one has to think from the point of view of the ‘bad man’, he argued. There is an inevitable opposition between bad men and the law. They see it merely as a pragmatic obstacle and not as an internally binding set of rules. Their actions are not dictated by moral guidelines but rather by a calculation of gains and losses in the case of breach of the law.

So for American legal realists rules are inconclusive, for they are not necessarily connected to the decision in a logical manner\(^{18}\). Interpretation of rules can lead to any outcome, the content of rules is a social and not a metaphysical affair. Scandinavian legal realism made the same claim but in a more philosophical vein. A common denominator of the works of its representatives is the thesis that legal concepts such as property, duties and rights, and so on are mere conceptual artefacts with an ideological function. Law should be understood as a sociological fact of no metaphysical dimensions. They made sense of abstract legal categories only in their real dimensions as causes of actions or other consequences. The study of law thus became the study of causal relationships between events. Obviously, that puts the very concept of normativity into question. If all law is fact and jurisprudence is only the study of the behaviour of officials, then it is not clear how and why people obey the law. The answers the Scandinavian Realists have given to that vary from a complete rejection of the possibility of the normative power of rules\(^{19}\) to a weaker scepticism, according to which rules are “independent imperatives” with a psychological effect\(^{20}\) or have indeed a prescriptive character but what is important is their study, the assertions about the law, from which valid law is to be deduced.


\(^{18}\) See Llewellyn 1962; 1960a; 1960b. Also: Pound 1911 and (part II of the same paper) 1912; Also (in a manner critical of realism itself) Pound 1931 and Llewellynn’s response (1931).

\(^{19}\) Lundstedt 1956.

\(^{20}\) Olivecrona 1939. See also Hägerström (1953) for a realist critique of positivism, an account of rights and duties in terms of psychological reactions, and for the magical character of the institutions of law. Alf Ross challenged the representation of the nature of the law as dual, that is as both physical, empirical (as a phenomenon observable in the world of facts) and a priori, metaphysical (as binding norms in the world of morals). See: Ross 1946; 1959.
The legal realist critique of the inability to arrive at the right answer because of the law's inconclusiveness and the manipulability of rules by judges is perhaps helpful from a sociological point of view, as it shifts emphasis from the rules to the empirical issue of application and poses questions concerning the de facto politicisation of the law because of the social constitution of the judiciary. For the same reasons their critique reveals one aspect of the real constraints of the discursive discovery of the just answer. Political biases, the judges' educational and experiential background, their open-mindedness, the side of the bed they woke up on and the breakfast they had had the morning of the trial, are real aspects of the law as practice, which have to be taken into account.

However, there are fundamental problems with the realist critique of the law. Firstly, it does not go far enough. Their critique is rooted in their disappointed aspiration for an absolute rule of law\(^1\) and it departs from their faith in the law rather than their scepticism concerning the possibility of doing justice through the law. Their demand was the maintenance of universalisable standards, they believe in modern law and its ability to safeguard liberty and equality\(^2\). Secondly, the critique is too 'incidental'. Although American legal realists rightly see that there is a problem in the reality of the law, they concentrate on aspects of it that can be addressed empirically\(^3\). Discourse theorists would gladly take on board that critique and propose institutional solutions to the problems put forth by American realists. Indeed, Alexy does take such considerations into account (see above). Thus the American realists lose sight of much more significant problems, which are bound to the law’s materiality and are at the same time inherent in every legal order.

The Scandinavian Realists' critique is indeed philosophically much more tenable, as it concerns the essence of the law rather than its implementation. To a large extent it is right as well. For instance, they were justified in being suspicious of the metaphysical grounding of the law and in seeking the ideological function of rules. However, it is precisely in this that the main shortcoming of Scandinavian Realism lies. They exaggerated their argument

\(^1\) In the *Concept of Law* Hart describes the disappointed absolutist rule-sceptic: “He has found that rules are not all they would be in a formalist's heaven, or in a world where men were like gods and could anticipate all possible combinations of facts, so that open texture was not a necessary feature of rules” (1994:139)

\(^2\) After all, let us not forget that most of the American legal realists were speaking from within the law as judges or practitioners.

\(^3\) The Critical Legal Studies movement qualified the realist problematic and took the critique of the inconclusiveness of rules and principles much further by focusing on the political character of the law.
concerning the pointlessness and danger inherent in metaphysics so much that their critique slipped into a vulgar reductionism. As a result, they had to question the very autonomy of morality as a normative order claiming that even that can be reduced to the power of legal ideology. Therefore, when they did not undermine their own theses, they left unanswered important questions such as how the occurrence of law becomes probable if not possible, or the normative question of what kind of law can even approximate the ideal of justice.

A MARXIST CRITIQUE OF THE LAW; IDEOLOGY, VIOLENCE AND THE INSTITUTIONAL MATERIALITY OF THE STATE

Thus far I have rejected the rule-sceptical strand of legal realism as unable to provide a profound and tenable critique of the law and, in particular, its discourse-theoretical defence of the law. My intention is to drive the critique much further than that. I do not just want to prove the (rather obvious) tension between ideal and actual, between the ideal and the practice of the law. Such an observation would perhaps be sociologically interesting but it would definitely not pose any significant philosophical challenge. Therefore I seek to prove that the law itself authoritatively draws the boundaries of what can count as discourse for its purposes. The law interrupts discourse in a way that is not merely incidental; it is immanent and as such it cannot be argued away without losing sight of the nature of the law. These constraints, to adhere to Alexy’s terminology, are real not in the sense that they have to do only with the instance of practice, which is separate or at least separable to the law’s nature; they are real because they stem from within the material nature of the law.

I shall explain what I mean by that in the next section of this chapter. But before I do so there is a clearly more immediate need. A discussion concerning the materiality of the law would be incomplete without reference to Marxism. In what follows I shall give a brief account of some Marxist critiques of law. From these I shall draw some central insights, which, in the rest of this thesis I shall qualify in order to reach the conclusions I alluded to in the previous paragraph.

Marx and Engels did not formulate a general theory of law. In the architectural archetype of the basis and the superstructure, the law is placed in the latter. That has very commonly

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led to the economistic truism that the economy determines everything and that the whole of social life is an epiphenomenon of the mode of production. A typical example of that naive economism is Rusche and Kircheimer's (1968) sociology of punishment, according to which the form of punishment historically corresponds to the form of economic development. Similarly, that kind of economic determinism gives rise to matching theories of state and the law. The latter are nothing but instruments in the hands of the dominant class. In the class struggle not only is the working class alienated from the means of production and deprived of the surplus value of its labour but it is also subjected to an oppressive political power, which is beyond their reach with means other than revolution.

For the purpose of making sense of the law's materiality I will refer to three very important moments in Marxist thought, namely the works of E. Pashukanis, L. Althusser and N. Poulantzas.

Pashukanis' (1978) was the first Marxist thinker to focus specifically on law. He perceives the legal phenomenon in a capitalist context from the point of view of commercial exchange, which is of such critical significance in capitalism. Two interconnected theses are pivotal in Pashukanis' account. Firstly, he claims that capitalist law provides the necessary categorial background against which capitalism develops (ibid.:109ff). This thesis stems from the famous Marxian dictum about commodities not being able to go to the market and sell themselves:

It is plain that commodities cannot go to market and make exchange of their own account. We must therefore have recourse to their guardians who are also their owners. Commodities are things and therefore without the power of resistance against men. If they are wanting in docility he can use force. In other words he can take possession of them. In order that these objects can enter into relationship with each other as commodities, their guardians must place themselves into relation with each other as persons whose wills reside in these objects and must behave in such a way that each does not appropriate the commodity of the other, and part with his own except by means of an act done by mutual consent. They must therefore recognise in each other the rights of

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25 "In the social production of their life, men enter into definite relations that are indispensable and independent of their will, namely relations of production appropriate to a definite stage of development of their material forces of production. The totality of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness". Marx 1970a:20. Marx draws the connection between property, the capitalist State and the law in the German Ideology, 1970b:81ff.

26 See also Griffith 1977.

27 See also Beirne and Sharlet 1980.
personal proprietors. This juridical relation, which expresses itself in contract, whether such a contract be part of a developed legal system or not, is a relation between two wills, and is but a reflex of the real economic relation between the two. (quoted in Pashukanis 1978:112)

Liberal law is connected to capitalism conceptually, because it is it, which creates the institutions and the categories, which make capitalism possible. It builds the artificial conceptual link of property and all the attached rights and duties between the person and the commodity. That is what makes the law so central in a capitalist society. The latter develops around the market and and has a constitutive role in market exchange.

This fundamental first thesis is related strongly to the second, namely the thesis about the tension between formal equality and substantive inequality (ibid.:115ff). Since the formal categories of freedom, equality and so forth are established, then it is fair to be assumed by liberal, capitalist law that we are all equal subjects, capable of entering contractual relations and being responsible for our welfare and their wrongdoings. However, such an idealised impression of the world disregards the very real fact that not everybody shares the same material resources, which would make their formal equality meaningful. In other words, liberal capitalist law does not reflect social stratification, it silences the class struggle by denying the existence of classes altogether. In a socialist society, in which the aim is the good of the whole rather than solely that of individuals, the law is redundant except in the guise of administration of things. In fact, it will be detrimental, because of its inability to rid itself of generalisations and turn its attention to the specific and the unique.

Althusser suggested a different solution to the problems of economic determinism. He argued that the elements of the superstructure enjoy a relative autonomy (1984:9) and that they reciprocally act on the economic base. Processes within the superstructure take place independently of the economy. However, it is the latter, which determines social structure in the last instance. The capitalist State makes use of two sorts of mechanisms in the class struggle, repressive and ideological. The former (ibid.:18ff) operate mainly with violence. They are the army, the police and so forth. The latter (ibid.:17) operate with ideology. Althusser defines ideology as the representation of the imaginary relation of the person with
the real conditions of his/her existence (ibid.:36). So the ideological mechanisms of the state misrepresent the reality of one’s life, they attribute different meaning to social relations. In that way they reproduce the relations of production (ibid.:22), which is where their positive effect on the economy lies. They perpetuate the alienation of the working class from the means of production, thus facilitating the perpetuation of the capitalistic mode of production. Although all mechanisms operate to a certain extent with violence and ideology, the law stands out for having a dual nature. It is at the same time a repressive and an ideological mechanism of the State. It is an instrument of coercion, as it is organised around institutions of physical violence. Its ideological role is the one Pashukanis attributed it, that is the misrepresentation to the point of silencing of class differences.

In his “State, Power, Socialism” (1980) Poulantzas, who can be placed in the same structuralist strand as Althusser, argues that Althusser errs in assuming that domination is played out on the level of representation. He argues that making sense of the State and the law in terms of capitalist exchange conceals the real dimensions of these institutions of power. It is in that that he sees the value of Foucault’s analyses (ibid.:77ff). Poulantzas believes that Foucault grasped the explanatory inadequacy of ‘ideology’ or ‘internalisation’ and therefore tried to shift the focal point from mind to the body. His account of ‘disciplines’ and the thesis about normalisation through corporal control show that domination is not achieved by way of persuasion but by manipulating reality. In other words it does not suffice to change the representation of the people’s real conditions of existence but it is of primary importance that these real conditions are controlled as well. Nevertheless that does not make ideology redundant. The re-discovery of material domination defines and thus limits the role of ideology but does not discard it altogether. Poulantzas identifies that as the main shortcoming of Foucauldian theory. Namely he argues that Foucault insists too much on the body and overlooks the significance of ideology.

State-monopolised physical violence permanently underlies the techniques of power and mechanisms of consent: it is inscribed in the web of disciplinary and ideological devices; and even when it is not directly exercised, it shapes the materiality of the social body upon which domination is brought to bear. (ibid.:81)

28 Paul Hirst (1979) gives an excellent account of the difference of this understanding of ideology, which is based on a rejection of empiricism and the perception of ideology as false consciousness.
29 On this point Poulantzas changed his mind since his earlier work on law (1965).
So Poulantzas' fundamental premise is that the binary schema law-terror or violence-ideology should not be replaced by the schema violence-disciplinary imposition of rules-ideology. What has to be discovered is the way power is organised materially and how this materiality becomes the condition of all violence or ideology. Departing from that premise Poulantzas formulates his thesis concerning the institutional materiality of the state. The State remains relatively autonomous in relation to the economy, political power is separated from the relations of production. The State organises itself materially around certain institutions or theoretical constructs. Prominent amongst those are the distinction between intellectual and manual labour, the law, and the nation.

The greatest value of Poulantzas' work lies in the combination of the distinction between two kinds of labour on the one hand and the law on the other. Although he did not explicitly draw the connections between these notions, I think I can legitimately expand and then qualify the argument. Through the law the State monopolises the legitimate use and threat of violence and through the artificial separation of manual and intellectual labour it monopolises knowledge. Through the management of institutions of knowledge such as Universities it presents itself as the guardian of scientific rationality, as the official interpreter of the world (ibid.:89). That official knowledge lends itself as a complementary justification of the law's violence. The reasoning used for the justification of the law and the vindication of coercion or, in discourse-theoretical terms, the very bedrock, upon which discourse rests, the pragmatic presuppositions of discourse are set in an authoritative manner by the State. Thus consent is not imposed, it is not a product of coercion. It is genuine consent, in the sense that it is a product of free reasoning. However, it is rooted in the manipulation of reality and the monopolisation of its interpretation by the State through its material institutionalisation.

Despite its prima facie value this claim still needs to be qualified. Drawing such a strong link between the State and the law can undermine the critical force of the argument. In the following I shall try to show that the critique is not organically dependent on the vocabulary.

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30 See Hunt 1993, for an account of Poulantzas' insight concerning the central place of the law in juridico-political ideology.
of relations of production and class struggle. This does not mean that I am rejecting that language or that I am questioning its relevance and value. On the contrary my critical reconstruction of Poulantzas’ analysis is aimed at strengthening it against the objection that it is contingent on a certain form of political power. In other words, my argument is that the law does violence autonomously by colonising discourse and therefore justice can never be achieved through it irrespective of the form and the mode of organisation and operation of the State. Poulantzas hints that the law of socialist countries is not just, because it too is based on the artificial separation of political power from the relations of production. As a result socialist states became dictatorships over the proletariat instead of of the proletariat. What I want to prove in this thesis is that the law necessarily breaks away from the ideal of justice, not because it is dependent on a certain coercive State but because the authoritative, non-discursive manipulation of reality is a function inherent in it. Every and not just capitalist law or law dissociated from the relations of production is plagued by that inevitable materiality. Every law is inescapably violent to discourse as its materiality hinders discourse from the outset. In that light Pashukanis’ and Althusser’s theses concerning the law’s ideology can be qualified as well. If they are seen outwith the context of an class-instrumental analysis of the law, that is if they are detached from the analytical framework of classes and capitalist political power, they will show brilliantly how the law cannot but operate with ideology irrespective of the content of the latter. Although this will not be central in my thesis, I shall explain it as the effort of the law to adjust the people’s perception of reality to its own epistemology.

**The Real End Of Discourse; Epistemology And Action**

My conclusion so far has been that legal realism and Marxism correctly direct the critique towards the material character of the law. But they both suffer from different problems. The critique brought forward by Legal Realism is incidental to the extent that it concerns solely the moment of the trial and the interplay of contingent factors in the course of adjudication. On the other hand, Marxism is more successful in directing the critique towards the material essence of the law and not the circumstances of its application. But this critique still needs to be adapted by focusing on the law alone independently of its connection to a contingent mode of production or state order. So for different reasons Legal Realism and Marxism do not prove convincingly that the real constraints, which, according to Alexy, make legal
discourse a special case of general practical discourse, are bound to inherent features of the law and that they cannot simply be argued away. It is now time I explained what precisely I mean, as this is a pivotal argument in this thesis. I perceive of the real dimensions of the law in two ways; law as epistemology and law as action.

THE LAW SMUGGLES NORMATIVITY INTO ITS EPISTEMOLOGY

The law is an explanatory, an epistemological as well as a normative order. In fact its epistemological character precedes its normative one logically and actually. Something that is not known cannot be regulated! This does not necessarily mean that the one and only true essence of the regulated must be known with certainty nor am I going to broach on whether such a knowledge is possible. The regulating order must have at least a notion of what the regulated is, of its place and meaning in the world. This knowledge is not necessarily explicit, it does not have to be declared and become part of normative statements. It is a tacit knowledge. However, it is holistic and coherent. It is also there calling to be inferred from the norms. It is a comprehensive and consistent world theory, which underpins a consistent perception of justice.

Institutionalised normativity such as the law’s cannot offer anything short of certainty. Normative expectations must be solidified, the notions of legal right and wrong cannot change without an institutionalised decision-making procedure, which in turn will be subjected to a test of rightness. In order for that to happen, the cognitive bedrock, on which regulation rests must remain unchanged. The law must retain its epistemology, it must have a firm idea of the world. Legal disagreement can concern a judgement either on the nature of the situation or the right course of action in retrospect or in advance. To put it schematically, it can be firstly a question of whether and which operative facts are present. Secondly it concerns whether a certain behaviour was right and not what has to be done about it. However, legal discourse cannot be about whether the actual facts have a completely different meaning. The law must rely on one coherent interpretation of reality. Concurrent exegeses of the world would fatally undermine the law’s certainty. Discourse must lie on these safe epistemological grounds. To that extent, normativity is smuggled at a stage prior to normative judgements, that is at the epistemological stage. In that sense all law is natural law. The ought collapses into the is but in the sense that whatever naturally happens ought to happen and not be hindered as well. Moreover, the is and the ought are merged to the
extent that the content of the *ought* depends on the *is* and that the content of the latter must remain unaltered. Therefore it is the former, which must be adapted. All law then becomes natural law, for normativity is subjected to epistemology: the natural cosmos ought to be preserved the way the law perceives it, because without it normativity would be improbable, if not entirely impossible.

This official, definitive interpretation of the world becomes in turn a reality. This is where Poulantzas' notion of institutional materiality becomes relevant. Not only is the State organised around actual institutional practices, which are real and constitute the prerequisite of all violence and ideology, but these *also institutionally re-shape reality by forcefully imposing their interpretations of the world*. Amongst those, the institutional cosmos of the law is the most powerful and effective. The law's epistemology is materialised in two ways. Firstly, that an institution such as the law abides by a certain epistemology is a fact in itself, which ought to be taken into consideration, when one deals with the law. Secondly, the law's epistemology guides the law's action, it determines the content of the law's normativity, which also aims at the preservation of that epistemology!

**LAW IS ACTION IN AN INSTANT OF PRECIPITATION**

The second material aspect of the law has to do with what Habermas (1996) refers to as the tension between the 'facticity' (*Faktizität*) and the 'validity' (*Geltung*) of the law. Legal orders are not just rules providing tools for deciding on matters of rightness and the appropriate course of action. They comprise of rules providing rules for criticism for the breach of the rules and determining a real reaction in terms of both rightness and appropriateness in the form of legal sanctions.

The instant of *decision concerning action and that action* itself are what the law owes its autonomy as a normative order to. It is by *deciding and acting* with a claim to rightness that the law becomes meaningful and thereby draws its boundaries from other normative orders which limit themselves to providing rules for criticism without actual and institutionalised action. All instances of the law are haunted by the spectre of decision as action as the moments of decision and action belong to the very conceptual core of the law.

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31 In chapter two I deal with Hart's objection concerning the place of sanctions in the law (1994).
The need for decision and action is expressed in various instances. It can concern the standardisation of a rule by its official enactment or recognition by a court or it can be an actual intervention in one's life. In both cases it is an institutionalised form of real action with actual consequences.

Since decision belongs to the concept of the law, all the properties of the law rooted in the need for decision are not contingent. They do not depend on external circumstances. Pathologies that derive from decision as the end of communication are inherent and not merely incidental pathologies of the law. Before I go on to explain what I mean, I ought to make a detour and discuss Jacques Derrida's aporias of the law, which concern precisely this pressing need to act that haunts the law. In this thesis I shall I turn to these aporias often to systematise my critique of the law.

Derrida's aporias of the law

In his “Force of Law; The Mystical Foundation of Authority” (1992), Derrida comments on Benjamin’s “Critique of Violence” (1997) and attempts a deconstructionist approach to legal authority, legal violence and justice. From Derrida’s stream of a text I shall isolate one insight, which I believe goes to the very heart of the phenomenon of law. Namely, the three aporias of law, where aporia is understood as lack of resources and therefore inability to provide answers, bewilderment before the need for decision and firm resoluteness.

The first aporia is what Derrida calls the “épokhé of the rule”. Justice demands that rules be not merely followed but reconfirmed at each instance of decision. A judge must reinvent the law for each particular case, for each new decision. Passing of a just judgement presupposes freedom, independence from any kind of normative constraint. If judging is only an act of rule-following then it can at best be legal, but it will never be just. Although a decision is guided by the pre-existing rule, it calls for an act of re-interpretation, the law must be reset, it must conserve the law and also destroy it or suspend it enough to have to reinvent it in any case, rejustify it, at least reinvent it in the reaffirmation and the new and free confirmation of its principle (ibid:23).
Derrida detects a paradox in this need for simultaneous destruction and creation of the law: No decision can be just in the present tense.

For in the founding of law in its institution, the same problem of justice will have been posed and violently resolved, that is to say buried, dissimulated, repressed (ibid).

The second aporia of the law concerns the 'undecidable' (ibid:24).

The undecidable is not merely the oscillation or the tension between two decisions; it is the experience of that which, though heterogeneous, foreign to the order of the calculable and the rule, is still obliged - it is of obligation that we must speak - to give itself up to the impossible decision, while taking account of law and rules (ibid)

The law suffers yet another aporia: the spatial and temporal constraints, which dictate the need to make a decision, impose the urgency of a judgement. The amount of information that can be brought into legal discourse is and must be finite, because the instant of deciding interrupts the discourse, marks the end of communication. That moment of urgency can be understood in terms of speech acts. Constative utterances can only have a truth value. They can only be correct but never just. Justice remains exclusive to performative speech acts under the condition that they rest on other prior conventions and subsequently performative acts. Because every constative act relies on a performative one, the truth of the former depends on the justice of the latter. Justice can never be achieved by decision in the present. The instant of precipitation will always play its destructive role. Nevertheless justice is immanent in the law as avenir, it is always yet to come.

The realisation that justice is beyond and above the law does and should not provide one with an alibi for suspending juridico-political struggles. These should go on and indeed be constantly advanced to further stages.

Each advance in politicisation obliges one to reconsider, and so to reinterpret the very foundations of law such as they had previously been calculated or delimited (ibid:28).

My reference to Derrida might create a false impression about my argument concerning the instants of legal action, which I ought to address. My claim is not one about 'deferring the
undeniable’ or the impossibility to address the particular. This is not my reading of the Derridean aporias of the law. By sacrificing further knowledge and information for the sake of acting, the law does not just refuse to describe and deal with the particular, it does not just create categories in which it authoritatively classifies cases by singling out some aspects while silencing others. The moment of action is one that violently interrupts even the process of formulation of universalisable norms or their application to specific situations. The law takes action, not necessarily in the form of sanctions I should add, which inevitably interrupts discourse, it violently precludes any further input and irreversibly changes the conditions of dialogue.

THE CONFINED DIMENSIONS OF LEGAL DISCOURSE

These are the two claims my thesis pivots on: I argue against discourse theory on two combined grounds: firstly, the law’s adherence to an epistemology, which is normatively shielded the way I explained; secondly, the nature of the law as action so often overlooked by legal theory, which rushes discourse by blocking out informational input, whether that be rules or facts, and which sacrifices justice for the need to act. In the next three chapters of this thesis I shall try to demonstrate three instances, in which these inherent features of the law as a whole, that is both as norms and as institutions, are revealed and how, because of them, violence is done to discourse and justice. These three instances are: justification, time and truth.

The choice of these three instances is not random, as time, justification and truth are all dimensions of legal discourse (and indeed any other kind of practical discourse). Legal discourse is defined by four borders: its topology, its temporality, its mode of justification and its relevance in the world through the assessment of events and facts. These four dimensions I shall call topos, chronos, logos and aletheia. It is important to note that these dimensions combined constitute the mode of existence of legal discourse. It must also be noted that these four dimensions are not the only aspects of legal discourse. Nevertheless it
is the case that if any of these aspects is interfered with then discourse is fatally constrained and its outcomes compromised32.

a) Topos. The topos of discourse refers to the space, where it takes place; in legal terms: jurisdiction. Topology is the only one of the four dimensions that I do not expand on in a separate chapter in this thesis. That is because the constraints of legal discourse posed by the law’s epistemological paradigm and the need for action are not expressed in a particularly forceful way as they are in the dimensions of chronos, logos, and aletheia. However, this does not reduce the importance of the topos of legal discourse especially when one thinks of how the law manipulates it. The law creates or perpetuates national or even internal boundaries, within which it confines the question of justice. By distributing the state citizenship and associating further rights with it, the law creates the category of legal aliens thus rendering some people legally invisible. Refugees are silenced and excluded from legal discourse and that compromises the justice of the latter.

The topos of discourse is manipulated by the law in yet another way. Because it is the law that defines the space of discourse, it is always present thus not allowing discourse to develop freely even outwith an institutional context. The notion of the ubiquity of the law, the idea that the law is always and everywhere tacitly runs through the whole of this thesis. It is voiced in two points: In chapter three, when I discuss the ‘always’ of the existence of the law and in chapter six, when I talk in general about the imminence of the law’s violence to discourse and therefore to the participants in the discourse.

b) Logos. Legal discourse is all about logos in the dual sense of reason and reasons. Its aim is practical, that is the discovery of reasons for action. That can be in the form of justification of the selected norms either action already taken or action to be taken. It also concerns, on a second level, the norms selected for the assessment of actions. In that sense discourse theorists and in particular Alexy rightly argues that the law raises a claim to tightness. It must always be readily explained why one alternative is chosen over another.

32 I do not claim to have coined the terms describing the dimensions of practical discourse. My classification draws on the literature informing this thesis. For instance in his discussion of the institutional materiality of the state Poulantzas (1980) speaks of how the notion of the nation operates in the temporal and spatial matrix and also how the law provides a forged logos through ideology and violence. Luhmann (1985, 1995a)
Whether this justification is right or not, it must always be justifiable, it must be accompanied by the aspiration of correctness as well as reasonableness.

One of the manifestations, perhaps the most important one, of the inseparability of the law from decision is the prescription of sanctions. Sanctions are above all the means whereby the law operates in reality and becomes effective. They mark the moment of interference of the interference of the law in reality. They are also the instruments of re-characterisation of legal subjects thus safeguarding the systemic coherence of the law as well as the social determinacy of the legal system. Their inclusion in legal norms and their subsequent normativisation has one extremely significant implication. If a legal system is to raise a claim to rightness, this claim must cover the whole of a legal norm, that is it must include sanctions. In Chapter two I shall show that legal sanctions are necessarily of an instrumental nature. Because of their instrumentality they cannot be entirely justified. Therefore the law inevitably suffers a justification deficit, for the claim to rightness as a claim to justifiability cannot be defended. At the stage of enactment of norms prescribing sanctions, justification is the imaginary connection of the sanction with a result, which is deemed as right and good. At the stage of adjudication, the moral justification of sanctions stands out with and beyond discourse, for once the primary decision concerning the legality or not (or even rightness or wrongness) of a certain behaviour has been made, there can be no discussion concerning the sanction which ought to be imposed. In that sense, sanctions mark the end of legal discourse.

c) Chronos. The law exists in time in a variety of ways depending on which aspect of it one prefers to look at. In any case, it is certain that the law cannot exist and operate outwith time. One side of the law’s relation to time is, as I have already emphasised in the previous point concerning the logos of the law, that legal decisions are not just about the rightness or wrongness of an act committed in the past but also about the connection of outcomes with specific means, which can only be projected in an imaginary future. Legal decisions are not about instantaneous action. They concern long-term consequences, they are plans and wishes for the future. In that the connection of the law with time is already revealed.

explains his notion of the law as a congruent system of expectations in three dimensions: temporal, spatial, material. See also Christodoulidis (1998).
In Chapter 3 of the thesis I shall focus on the temporality of legal discourse and the ways in which the law manipulates it. My analysis will be organised around my central argument, namely that the law imposes insurmountable constraints on discourse because of its fixed epistemology and the necessity of action. I shall explain legal dogmatics as omni-temporal and thus a-temporal in order to show the temporal ubiquity of the law (within the –legally defined- territory). Precisely because it is temporally ubiquitous, the law never allows legal discourse to take place in its absence. Their temporalities are merged and the impression is created, and enhanced by ideologically powerful use of the language of time by the law, that law as institution and legal discourse are necessarily inseparable. The study of law in time also discloses the inherent contradiction of the rule of law expressed in the incompatibility of universalisation as constancy through time and the requirement of non-retroactivity.

d) Aletheia. Fact-finding, the discovery of the truth is what connects abstract and hypothetical rules with events and facts in the world. It is this connection that makes the law empirically relevant by materialising hypothetical syllogisms. Note that I am not talking about the discovery of the right rule, that is cases in which the facts are there waiting to be classified in a rule. The focus is on the actual facts rather than the operative facts of rules. How does one go about finding the relevant facts, how is their relevance to be determined? Prima facie this is an easy task. However, things with the discovery of truth are not as simple as they might appear. It has been suggested (and it is indeed a very popular opinion) that the fact-finding discourse before a court is biased for a number of reasons: the parties are selfishly motivated, the judges are influenced by their (usually middle-upper class) background, access to the institutions of justice is not fair and equal and so on and so forth. Legal fact-finding is also criticised as inherently biased, for it always involves an axiological judgement. After discussing some critiques of the judicial ascertainment of facts, I shall draw the connection of fact-finding to my main theses and argue that in law discourse concerning historical truth is inevitably constrained by the law’s epistemological presuppositions through which information is sifted and the relevance of background that the prospect of action imposes.
CONCLUSION

In all these ways I set the agenda of the following three chapters. The argument can be summarised as follows: two crucial aspects of the materiality of the law are the epistemological paradigm, upon which its normativity rests, and the need for action. These two aspects are inevitably detrimental of unfettered practical discourse. The former does not allow the introduction of certain issues into the discourse and the latter constitutes an authoritatively interruption of justificatory discourse. Those real constraints of discourse are immanent in the law as opposed to incidental, contingent constraints, which can be dealt with or redressed.

The combination of these two detrimental factors is revealed in numerous instances. In order to show that they haunt legal discourse, that they cannot be done away with without altering the very nature of legal discourse or the role reserved for the law, I chose to look for they ways they are manifested in the dimensions of legal discourse.
CHAPTER TWO

ΛΟΓΟΣ / LOGOS

THE HURRIED JUSTIFICATION OF SANCTIONS

INTRODUCTION

I now turn to logos, justification.

Jacques Derrida spoke of the épokhè of the rule as one of the aporias of the law: A just decision must be a free decision, one that is not constrained by a pre-existing rule, one that reaffirms the rule, creates rather than applies with a

reinstituting act of interpretation, as if nothing previously existed of the law, as if the judge invented the law in every case (1992:23).

This prerequisite of freedom for the justice of a decision leads to the paradox of the impossibility of a just decision in the present. A decision can claim to be legitimate, legal but non just. This connects to Derrida’s third aporia of the law, namely “the urgency that obstructs the horizon of knowledge” (ibid:26). Justice belongs to the future as avenir, it is always yet to come. This is not possible in the law. Legal decisions are urgent, they are a violent interruption of the process of deciding rather than its natural conclusion. Thus in law justice becomes a calculation of the incalculable.
The Derridean aporias of the law are revealed emphatically in the context of the justification of sentencing. The discussion concerning the substantive correctness of the law and in particular the possibility of employing substantive, moral arguments in legal reasoning usually takes place against an image of the law as judgement concerning merely the rightness of action. It is often disregarded that the law is also (and perhaps mainly) about taking positive action in the form of sanctions. My aim is to draw attention to the fact that legal decisions are purposive deeds as well as words and to show that these deeds cannot be proven right a priori; the judgement concerning their justness is always suspended. To that extent discourse is already disabled in law.

Nonetheless, the argument would be incomplete, if it were exhausted there. If it can be shown that the discursive justification of sanctions is not interrupted but completed, if it is proven that sentencing is the achievement of justice, then there is no ground for critique at all. For that reason I shall focus on whether this interruption of discourse is a just one or not and argue that it is not. Sanctions are means to the end of the chosen punishment. Because of their instrumental character their justification can only be based on quasi-scientific assumptions. As such they are contingent and, respectively depending on what has been promoted as the aim of punishment, they constitute either an aspiration or an authoritative calculation of incommensurable entities. Hence, absolute, moral justice is compromised; the law's justice becomes a prerequisite of functional effectiveness instead of a moral maxim.

In the context of sentencing legal discourse is constrained on the epistemological level as well. Not only is estimating the right punishment not possible but as far as its content is concerned it is also attempted in the authoritative way dictated by the epistemology underpinning the law. Thus, the prevalent methodology of social sciences becomes the criterion of justice, because the law endorses it. That justifies Poulantzas' scepticism of the close affinity between the state, law and institutions of knowledge.

Discourse theory is still my target. However, my critique can be raised against any theory that argues for the connection of law and morality, as none of them can account for the incomplete justification of sanctions. The morality of legal sanctions in general and sentencing in particular can never be fully established either by discourse or any other way,
because their justification depends on a decisive instance of pragmatic, purposive and therefore contingent rationality.

This is how this chapter is structured: Firstly I break legal norms down to their propositional constituents arguing that in order to prove that a norm or a decision can be justified discursively, rationally and morally, which are the three milestones of Alexy’s Sonderfallthese, all these constituents have to be so justified. Then I set out to examine the mode of justification. I briefly go through the most influential theories of punishment and conclude that they all concede an inability at the stage of implementation. The pivot of my argument is that sentencing cannot be justified fully, firstly because sanctions are necessarily instrumental and their connection to the aim of punishment or the offence is authoritative and inconclusive. But even if there were a way of establishing a certain connection between offence and sanction, it would still be determined in the law’s authoritative way, which is informed by its epistemological paradigm. Secondly, because the imposition of the sanction is action, it violently interrupts the justificatory discourse. Finally, I consider some possible objections from Habermas’ distinction between the pragmatic, ethical, and moral employments of practical reason, Günther’s notion of appropriateness, and objections concerning the place of sanctions in the law and conclude that in the last instance the justification deficit of legal sanctions remains unaddressed.

THE JUSTIFICATION OF SANCTIONS: ALWAYS SOMETHING MISSING

A legal norm (N) of the form “if O(ffence), then S(anction)” can be broken down into the following propositions, which are necessarily incorporated in it either explicitly or implicitly:

1) O is wrong.
2) wrongful acts ought to be punished

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33 It can be argued that my argument concerning the contingency of action the justification of which is suspended, can be extended to cover all instances of moral action. However my aim in this chapter is not to make a claim about moral action in general. Although I do refer to some differences between moral action and institutionalised legal action in the form of sanctions, it is the latter that interests me in this context.

34 Later in this chapter I shall defend my choice to break legal norms down to their elementary components.
2a) O ought to be punished.
3) S is the right punishment for O

In order to prove that the justification of legal norms is a practical task, one would have to show that the above propositions raise practical questions. On a second level, if one wants to prove that legal discourse is of a moral character, one also has to examine what kind of practical rationality is employed for their justification. If one of them appears not to be justified in a moral rational way, then the whole enterprise of proving that the justification of legal norms is a moral practical task will suffer a serious blow.

I don’t see any particular difficulty in grounding that (1) can be justified on moral grounds. The reasons offered in the process can only be reasons concerning values. If there is some doubt about the pure value character of those justificatory reasons it is because it is one of the cases, in which value- and purpose-rationality are being acceptably intertwined. As MacCormick points out this is not a worry:

Of course such values count as good ends or purposes both for particular acts and for the upholding of general principles of action. But precisely as good ends or purposes they belong within the scheme of value-rationality as well as within that of purpose-rationality. (1986: 197).

The practical character of (1) consists in that it is a rule giving reasons for action and preference between a plethora of alternatives. Moreover, the discourse concerning that rule, that is the discourse concerning its correctness, can only be grounded on values. We can say without hesitation that establishing that a certain behaviour is wrong is a practical question, which can be answered with the use of universalisable values as arguments.

THE JUSTIFICATION OF PUNISHMENT

The discourse for the justification of proposition 2 (“wrongful acts ought to be punished”) is not all that different. The instant question is whether it is right to punish the perpetrator of a wrongful act, so that the question becomes that of seeking the justification of punishment.

35 Ulfrid Neumann (1986) has criticised Alexy’s Sonderfallthese on the grounds that legal discourse is theoretical rather than practical. He argues that it depends on the cognitive ability of the judge to discover the relevant and appropriate norms and apply them to the instant situation. The value of that critique lies in that it concerns the practical character of legal discourse instead of its discursiveness. Nevertheless, it is
There is no shortage of theories, which try to both explain why wrongdoing should be followed by punishment and what that punishment should consist in. Precisely because they set themselves this dual task they sometimes unacceptably confuse the two levels.

In their effort to make sense of the morality of punishment, various theoretical strands range from extreme utilitarianism to an almost metaphysical rule-fetishism. For the purposes of this short exposition, these theories can be roughly distinguished in two basic strands: Utilitarianism and Retributivism. This distinction is not watertight, as sometimes the differences between various expressions of each strand are such that classification calls for re-evaluation of the original categories. However it can still serve as a working model of theoretical classification of penal practices.

Obviously, these justificatory paradigms and their variations go hand in hand with a broader social and political theory as well as specific perceptions of the person. For instance, many retributive approaches to punishment are based on notions of autonomy and responsibility without losing sight of the concepts of proportionality, mitigation and so forth. On the other hand for many utilitarian justifications of punishment the person is first and foremost a part of the group and subsequently they focus on the community instead of the individual. Thus they focus on the impact of crime and punishment on the group and in their more philosophically elaborate and morally sensitive forms they do not overlook the rights, moral status and actual needs of the person.

Furthermore, at the basis of all the attempts to justify punishment lies a certain concept of crime and its causes. For instance, rehabilitative ideals rest on an understanding of crime as the outcome of factors external to the person. It is precisely these factors that ought to be targeted by the criminal justice system with 'treatment'. On the other hand, retributivism clearly perceives crime as the outcome of rational choice.

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Considerations of space and time dictate that my account of the various rationales of legal punishment and the objections to them be brief. However, such an outline is still useful. Firstly, as this chapter is primarily about the justification of sentencing I must at least map that area of theory. Secondly, and more importantly, this brief account will show that the justificatory deficit, which I seek to point out in this chapter, has been preoccupying the theorists of punishment. However, it never seems to have been grasped entirely. It was always treated as an empirical problem, which would be dealt with by way of devising a more efficient and effective methodology.

For utilitarianism punishment is a means to an end rather than an end in itself. What has often been promoted within the project of maximising utility as the general objective of punishing is the reduction of crime rates. The general category of utilitarianism can accommodate various justificatory projects, which also correspond to punitive practices. The ultimate aim of punishment is achieved by disabling, ‘correcting’ them, or even closely monitoring known offenders so that they don’t commit more crimes in the future. Alternatively, offenders are punished in a paradigmatic way so that others are deterred. Let me briefly but more systematically go through these different rationales of punishment.

_Deterrence_ can be either individual or general. The former refers to the offender him/herself and it directs punishment towards preventing him/her from re-offending. Individual deterrence gives rise to pragmatic objections as well as ones from principle. On a practical level, argue the critics, there is no guarantee that tougher sentences will prevent recidivism. In terms of principle, there are numerous problems. Firstly, by dissociating the punishment from the act and by associating it with the offender and his criminal record while at the same time assuming an inversely proportional relation between punishment and re-offending, it paves the way for disproportionally severe penalties. Moreover, if individual deterrence is promoted as the _only_ rationale of punishment, there is no reason why a criminal justice system should stop short of punishing people, who have not offended yet but are likely to. H.L.A. Hart (1970) responded to that last criticism by resorting to the concept of punishment: crimes that have not been committed or people that have not yet offended cannot be _punished_ for punishment conceptually presupposes an already committed offence and an offender. I do not want to delve into that debate for much longer, as this is not the purpose of this chapter. However, I have to point out that opting for a consequentialist
rationale of punishment is already different to understanding the notion of punishment as merely a response to a crime. Therefore there is an incompatibility between Hart’s ‘definitional stop’ and utilitarianism in punishment. Unless of course one decides to combine different aims and justificatory grounds of punishment, which is precisely what Hart did. I talk about this kind of hybridisation of the justification of punishment later in this section.

General deterrence is achieved by punishing offenders in a way that symbolically emphasises that the price to pay is greater than the goods gained by the crime. That can be done either by imposing harsh penalties or by emphatically publicising the fact of punishment. Obviously, exemplary punishment is not unproblematic, to say the least. Hudson (1996) points out a self-evident problem. She says:

The immediately obvious difficulty with deterrence is how we can know how severe penalties have to be to make people decide against crime. (1996:21)

And

How can we ever assess the impact of policies, how can we theorize about social behaviour, how can we, indeed, interact with each other in everyday life, unless we can assume that, given the same circumstances, and biography, others would act as we do? (ibid.)

Incapacitation of offenders, in order to ensure that they will not re-offend, suffers from the same problem. The most common line of critique on empirical grounds, especially by proponents of retribution in punishment, is that incapacitation always rests on an unsure calculation of the risk of reoffending, which is very frequently blatantly overpredicted. Morris (1992) offers a defence of a mitigated version of incapacitation by defending the possibility of judging the dangerousness of an offender and by, at the same time, imposing limits on the extended penalties imposed on such dangerous offenders. The moral objection to incapacitation is the same as in deterrence. If punishment has nothing to do with crime and is solely linked to the character and the record of the offender, then the (upper) limits of justice can easily be transcended.
Hudson (ibid.) makes a historical distinction between reform and rehabilitation, although they are customarily used interchangeably and they share a conceptual core. She places the rationale and policy of reform in the nineteenth century, when the aim of penitentiaries was to develop the work ethic of inmates and enhance their socialisation, so that they would satisfy the need for labour after release. Rehabilitation is the development of the same rationale in the twentieth century. In the second part of the century it acquired a more individualistic character. Moreover, the idea that crime is the outcome of mainly psychological problems prevailed and along with it ‘treatment models’ became very popular.

Although reform/rehabilitation (hereafter I shall refer to both as reform) obviously has a deterrent effect, deterrence and reform do not coincide. Whereas the former aims at preventing the offender from reoffending, that is it has a negative goal, the latter has a more positive goal to the extent that it makes more productive and useful citizens. The aim is to help the offender realise the immorality of his actions and teach him/her to abide by the law on moral rather than utilitarian grounds. It is about the internalisation of the law as a normative order. Punishment is not only an imposition of a certain harm, it is all about forming morally better citizens.

Although reform was quite popular and it seemed rather humanistic as well for a long time, it is now questioned quite heavily especially on grounds of human rights. Reform is considered a violation of the moral autonomy of the person and a blatant attempt on behalf of the state to impose a dominant morality. The critique also has an empirical aspect, which seems to be the common denominator of the arguments against all justifications of punishment, namely that reform does not work, because it is impossible to know how to treat each offender so that s/he becomes a ‘better person’, how to respond to and deal with the problem that allegedly led him/her to crime. Defenders of reform put forth the argument that the truth is nothing like the Clockwork Orange or the Brave New World. Programmes of reform are offered not imposed; offenders are not subjected to inhumane experimental treatments, they freely decide to participate in these programmes. Precisely because reform is based on the co-operation of the offender with the system, it is effective as well.

Retributivism can be said to look backwards; it is concerned with the past, with the crime committed, unlike utilitarianism which focuses on the future and the outcome of punishment. Most retributivist theories revolve around Kant’s thesis that the duty to punish is a categorical imperative. We ought to punish offenders, because otherwise the shame of the breech of the moral law will be burdening the community. However, punishment is not to be treated as a means but rather as an end in itself. The most recent and one of the most influential retributivist theory is that of ‘just deserts’. Andrew von Hirsch argues that penalties should comport with the seriousness of the crime so that the punishment reflects the culpability of the wrongdoer’s conduct (1976). Once again the big problem is how to define the right punishment, how to estimate what is deserved. Desert theorists answer that with the notion of proportionality, which is distinguished in two kinds. Ordinal proportionality refers to the ranking of offences amongst themselves. Cardinal proportionality is the correlation of the ordinal column of crimes to the list of possible punishments. The notion of proportionality or ‘commensurate deserts’ as theorists of retributivism prefer to call it, and its correct calculation is primarily intuitive. Von Hirsch argues that:

The principle [of commensurate deserts] has its counterpart in commonsense notions of equity, which people apply in their everyday lives (1992:197)

However, this does not mean that it cannot be accurate. Von Hirsch responds to suggestions such as Morris’ that desert can only be a limiting principle by arguing that it is only desert that can positively guarantee the fairness and justice of a punishment:

Imposing only a slight penalty for a serious offence treats the offender as less blameworthy than he deserves. Understating the blame depreciates the values that are involved: disproportionally lenient punishment for murder implies that human life - the victim’s life - is not worthy of much concern; excessively mild penalties for official corruption denigrate the importance of an equitable political process. The commensurateness principle, in our view, bars disproportionate leniency as well as disproportionate severity (ibid: 198)

Combinations of these justifications of punishment have also been suggested. One of them was put forth by H.L.A. Hart (1970). He argued that the justification of punishment should cover both its general aims as an institution as well as issues of distribution. In the latter
belong the calculation of punishment for specific offences and the rightness of punishment in particular cases including that it is only the guilty who should be punished. The utilitarian side of his thesis is that the general justification of punishment should be a forward looking one.

Ashworth supports this hybridisation of the justification of punishment and subsequently the aims of the criminal justice system. He argues that there is no need, neither philosophical nor practical, to opt for one justification of punishment:

A preferable approach is to recognise that different stages may have their distinct aims and purposes, but to attempt to ensure that various decision-makers do not pull in opposite directions (1983: 57)

I am rather sceptical concerning the effectiveness and rightness of such a schizophrenic penal system. However, it is not what concerns me in this chapter. May I just mention that Ashworth’s view has found official corroboration in the form of a Council of Europe recommendation entitled “Consistency in Sentencing”.

As I mentioned in the beginning of this section, these theories of punishment offer answers to two separate questions: why ought wrongful acts be punished? And how ought wrongful acts to be punished? The former refers to the justification of punishment in general, whereas the latter concerns the concrete implementation of the answer to the first question, that is it refers to the justification of specific sanctions, of sentencing. In this chapter I am not interested in whether the first question is answered satisfactorily. It suffices that answers can be and indeed have been suggested, which are autonomous. Retribution does precisely that. It grounds punishment on moral grounds without depending it on any pragmatic considerations. On the other hand, utilitarianism in punishment, like indeed any kind of utilitarianism, seems to be collapsing the two problems into one by attributing punishment an instrumental character. The distinction between the justification was evidently clear to Hart. That is what led him to the combination of retribution and the maximisation of utility in his theory of punishment. The former provides the moral grounds and the latter the pragmatic aims.
But this seemingly unwarranted merging of justification and aim is not my concern now. I am more interested in one insurmountable problem, which appears to baffle all the theorists of punishment irrespective of the strand they belong to and undermines every effort to propose a firm justification of punishment. I am referring to the difficulty to establish with certainty a connection between punishment and offence. All such theories have been unable to suggest with certainty kinds of penalties or rates. In that respect they are all vulnerable and will always open to the critique of ineffectiveness. That has occasionally led to frustration, disappointment, and resignation but usually scholars and policy makers do not give up and seek solutions. But they seek them in all the wrong places. They try to do away with the problem by suggesting empirical methods of predicting the behaviour of once offenders, they devise psychological tests, which allegedly measure the effectiveness of punishment, they resort to the rule of law and formal equality or they turn to cost-effect estimates.

Despite these efforts to find a plausible and effective solution, the problem persists both in theory and in practice. The inability to wed moral soundness and practical effectiveness never ceases to haunt the justification of punishment. In the rest of this chapter I shall seek to prove that not only were answers sought in all the wrong places but they were sought in vain as well. The problem lies in the implementation of punishment, that is at the stage of action. On that level there is an inescapable moment of contingency, which tempers the rationality of discourse as well as the final decision and also disables the achievement of the final goal of justice.

THE JUSTIFICATION OF SANCTIONS

Let me then return to the justification of the remaining of the components of legal norms. From the justification of 2 (wrongful acts ought to be punished), one can arrive at the justification of 2a (Offence ought to be punished). The reasons are provided by propositions 1 (Offence is wrong) and 2 in conjunction. In fact it does not seem that the latter is any harder than a mere case of classification.

38 Martinson's famous "nothing works" (1974) and the uproar that followed in the world of criminologists and policy makers is indicative of the significance of the problem.
We arrive now at 3 (\textit{S is the right punishment for O}), the justification of which poses, as I stressed earlier, more problems than those created by the previous implicit and explicit components of legal norms. The question of whether a form of punishment is justified in general or appropriate for a particular conduct is completely different to questions such as “should wrongful acts be punished” or “should wrongful act x be punished”. That, I believe, becomes obvious at first sight. Saying that “murder ought to be punished” is distinctly different to “murder ought to be punished with imprisonment”, let alone “murder ought to be punished with life imprisonment”. The justification of a specific sanction does not logically derive from the justification of punishment as a whole, although this difference has been silenced by most theories of punishment.

The essential difference between the justification of punishment and that of specific sanctions has two sides. Its external manifestation is to be found in the reasons and arguments available to the discussants (to use discourse theoretical terms) examining the justification of those different normative propositions. The internal variance is due to the new \textit{material and moral parameters} introduced at this stage. The imposition of specific sanctions is, unlike judgement concerning the moral merit or demerit of an act, itself action. It constitutes a real intervention in the material conditions of the existence of a person. The moral parameter is, in certain respects, a side-effect of the material one. New moral milieus are being pervaded, because of the intervention in people’s materiality and those sides of it, which constitute expressions of inherent values such as freedom. To phrase it slightly differently: The justification of \textit{punishment} concerns \textit{whether} some harm ought to be inflicted upon the wrong-doer whereas the justification of \textit{sanctions} concerns \textit{what kind} of harm ought to be inflicted upon the wrong-doer.

The question concerning the rightness of specific sanctions is in the first instance answered only with \textit{negative arguments of value}. Moral arguments would be restricted to the examination of whether and to what extent sanction (S) either unacceptably or disproportionately violates the autonomy of the person and whether it clashes with other norms, principles or values. If the justificatory process were left here, the Derridean aporia of the law would already be proven correct. One would never be able to say that a sanction is just in any sense. The only claim that could be raised is that it is not wrong! However, this
is clearly not a sufficient guarantee of rightness. Justice must be positively established, it must be based on certitude, it cannot be exposed to contingency and uncertainty.

Such a certainty is pursued usually by recourse to *effectiveness*. The considerations that enter the equation are the safety and welfare of the general public, the reform of the perpetrator, the available punitive technologies, the political and economic implications of forms of punishment and so forth depending on the overall aim of punishment that has been opted for. In other words, the questions asked are: “will that punishment reform the perpetrator?”, “will the public be and feel safer if we punish the doer in such or such a way?”, “will social peace be safeguarded and guaranteed?”, “do we have the necessary financial and technological reserves to implement that punishment?” and so on, always in view of the crime and the assumed moral status of the perpetrator. In a word, the positive side of the justification of a penalty as a response to a wrongful act is in the last instance a *purpose-rational activity* attempting to connect the (proven or provable to be right) objective of punishment with the chosen practice. In any case it still cannot be said that “S is just”. The aporia has not been done away with. The sanction is a calculation, a connection of the desired outcome to the available means. It is an aspiration and aspirations as projections of desires in the future cannot be right or wrong.

It can be argued however that on second level the justification of sanctions does have a value character. The pragmatic considerations, which dictate the imposition of a specific sanction are accompanied by moral ones borrowed from the justification of punishment in general. For instance, deterrence is a moral end and a reason for punishing. What has to be examined now is whether the second order justification of sanctions on grounds of value can make up for the incomplete justification of the rightness of sanctions in themselves. I think the question comes down to whether the ends vindicate the means.

**THE INSTRUMENTALITY OF SANCTIONS**

Although a logical transition between actions cannot be established\(^{39}\), it can be said that in certain cases there is a closer conceptual proximity between means and ends. This

\(^{39}\) David Hume has shown that emphatically (1990): “[E]ven after we have experience of the operations of cause and effect, our conclusions from that experience are not founded on reasoning, or any process of the understanding” (§28). See also Ayer 1972.
Conceptual link between means and ends is the link between the interpretation of the prescribed action and the appropriate implementation. For instance, if one thinks that “it is right and therefore one ought to help the poor” is a valid moral claim, then one can justify giving money to the poor as an act of helping by interpreting “help” and “poor” and categorising “giving money” under “help”. There is an internal relation between giving money to the poor and helping them, because of the conceptual connection of money and poverty. Poverty (in our very literal example) is defined precisely as the lack of money (or any exchange value for that matter). Giving money is an action directed towards ameliorating poverty. To put it schematically, means which are conceptually connected to ends are a missing link of a long chain, a piece of a jigsaw puzzle. The case of transition from means to ends on conceptual grounds is the only one in which the means are vindicated by the ends, at least to a very large extent. The conceptual connection between means and ends significantly decreases complexity and contingency. Action is in a sense dictated by the needs of the instant situation and therefore the freedom of choice is restricted, given of course that the facts, the norms and the motivation are certain and unchangeable. Hence, the means borrow, so to speak, the rightness of the ends.

Cases of causal connection between conceptually distant means and ends are rather different. Here the means are not directly -that is conceptually- related to the ends. They are actions of a different kind, which are expected to bring about the desired outcome. The ultimate connection between means and ends depends upon an intermediate stage, a new event which will lead to the desired outcome. In the example of the poor, if one led him/her to a shelter, then one would expect and hope that to be of help although one can never be certain that it will. Therefore the causal transition from means to ends is always contingent, for it is a result of pragmatic, consequentialist reasoning.

The case of sanctions and punishment is one of a causal connection between means and ends. Let me refer to the example of imprisonment again. If the aim of imprisonment is not just the deprivation of liberty, but deterrence, reform and so on, then one has to concede that

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40 To be sure, things can go wrong in the case of the poor, when the rule is particularised. S/he might be alcoholic and spend all the money on drinks. But that is a circumstance that changes radically the parameters of the moral claim that “giving money to the poor is good”, because the category “poor” is enriched with the particularities of the instant case. The poor person is no longer just that. S/He is also an alcoholic so one has
the transition from imprisonment to deterrence or reform is causal, quasi-scientific and therefore highly contingent. Values do not enter the reasoning except as barriers in the first instance of justification. It is because of this secondary role reserved for values and principles that the justification of sanctions is incomplete. So, it can be said that: Because and as long as the law will have to depend on a causal link, which it cannot guarantee, it cannot fully and with the certainty required for justice, justify preference of one action alternative over another. The negative test of the moral rightness of sanctions does not and can not offer determinate guidance. What renders that test ineffective is the contingency of the causal instrumentality of sanctions, the complexity of cause-effect correlations, renders that test useless. It cannot be universalisable across time (even within a specific community) and it is always susceptible to constant change of real circumstances.

This is exactly what Walter Benjamin41 (1997) points out as the fallacy of natural law. Namely, the assumption that the means are vindicated by the ends is both wrong and dangerous. It is wrong, because it ignores the implications of action irrespective of the ends. Thus it completely disregards principles such as proportionality and consequently reduces justice to the achievement of predetermined aims regardless of the price that must be paid for these aims. For that it is also dangerous. Playing down the importance of means by reifying ends, conceals the existence and significance of other ends or consequences. The examination of the rightness of sanctions concerns the possibility of these hidden aspects of theirs and their moral implications.

One possible objection is that, if it has been decided that aim of punishment is retribution, then sanctions are no longer means to an end. They are punishment and nothing else beyond that. I have already said that there is indeed a significant difference between retribution and other aims of punishment, which have been put forth. Retributivism does not overlook the need to justify punishment morally before it. However, this difference does not suffice to render my critique invalid. Retributive sanctions are also grounded on a calculation that does not meet the criteria of justice. In fact this time the calculation is completely arbitrary as it is incommensurable entities that are being weighed up. How can it be shown that

41 I give a more detailed account of Benjamin’s “Critique of Violence” in chapter six.
inflicting pain or depriving someone of his/her freedom compensates for a wrong done by that person? Retribution reduces punishment to an exchange, which cannot possibly have any rules except for ones externally and authoritatively imposed.

Kant himself conceded this shortcoming of the *jus talionis*. He acknowledged that the “eye for an eye” equation cannot always be just. Although it would be acceptable to deprive a thief of as many goods as s/he stole\(^{42}\), how can one justly calculate the punishment for rape or murder? Norrie summarises this tension between ideal and actual:

> The strength of the retributive doctrine of equality of punishment is that it flows from the metaphysical justification of punishment, and sets an ideal limit on what may be done to a criminal. But that is also its weakness, for the *jus talionis* is an attempt to cash in the practical world the ideal cheque of metaphysical justice. Between the two currencies -the ideal and the concrete- there is no adequate point of contact, no workable exchange rate. The ideal principle of equality is incommensurable with a world of infinite practical variation (1991:61).

I mentioned earlier that von Hirsch, perhaps the most influential defender of retributivism, argues that the principle of proportionality can provide a secure and certain way of making this exchange. I think that in the light of my argument concerning the instrumentality of sanctions and the precipitation, with which the sentencing decision is made, this claim by von Hirsch seems untenable, to say the least. Von Hirsch himself resorts to intuition and common sense to justify his the project of ‘just deserts’. But that is clearly not enough. Law and, more importantly, legal punishment, cannot rest on an intuition of dubious source and content. Unfortunately, the mathematics of punishment do not work for retributivists. Their fallibility is already revealed at the stage of logical assessment\(^{43}\).

Nevertheless, let us assume that such a calculation is indeed possible, that a way of translating offences into sanctions is possible. Justice is still compromised, this time by the content of this calculation. Some kind of methodology must be followed in order for the

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\(^{42}\) Although I believe that even such a calculation cannot be proven just.

\(^{43}\) Not to mention all the empirical problems at the stage of implementation of the imposed sanction. See indicatively Rutherford 1993, where the author shows with empirical backing the axiological input by agents of the criminal justice system imported especially in the prison system. Rutherford believes that, especially because some of these imported values defiantly substitute the moral judgement embedded in the norms and the imposed sanctions, “in the absence of persons adhering to such [humane] values, criminal justice invariably descends into apathy and, ultimately, violence” (p.xii). It is rather dubious that retributivism or indeed any other theory of punishment can deal with all these empirical parameters without conceding that the moral justification of sanctions is an endless affair.
crime to punishment proportion to be determined. That methodology must be in line with the law's overall epistemology. Methods of calculation, which contradict other scientific methods endorsed by the law cannot even enter the discussion concerning the assessment of competing techniques, not to mention that the ability of legal institutions to assess such scientific techniques is questionable already. At the end of the day, what happens is this: the results of social sciences such as criminology, psychology and so on are institutionalised and even attributed a normative character. This brings the discussion back to Poulantzas' very aptly. Knowledge developed in universities (which, let us not forget, are funded either by the state or by big businesses) becomes the knowledge of the law. Thus it becomes the only authoritative knowledge, it sets the standards of truth and, subsequently, affects the content of right and wrong.

SENTENCING AND THE NOTION OF APPROPRIATENESS

In view of the above points would it be right to claim that the inability to foresee the future can be substituted with the ability to interpret the present as effectively and rightly as possible? In other words, might law application suffice for the satisfaction of the requirements of substantive justice? And, to return to the context of punishment, can the incomplete general justification of sanctions be covered at the stage of sentencing?

It is a common topos that it is extremely difficult for the law to respond to particular cases and treat them as such, for it can only operate with universalisation and generalisation. Thus it loses sight of the concrete circumstances of instant cases. The law's degree of institutionalisation limits its horizon of meaning and understanding. Additionally the flexibility of law is reduced even more because of the need to pass final judgements with actual consequences. On the other hand morality is more flexible and responsive. Moral judgement of a certain conduct is based upon the evaluation of situations as a whole and it is not necessarily followed by action. An answer to that criticism of law is the essential, intrinsic connection between morality and the law, which has been expressed in a immense variety of ways. Discourse theory, which I am dealing with in this chapter is one of them. All of these theories can be reduced to a single statement, according to which the law is connected with morality in a way that legal judgement can be legally correct and morally

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44 See chapter one for an account of a Marxian theory of law and the state.
right at the same time. Dworkin’s notion of integrity, Günther’s theory of appropriateness and indeed Alexy’s Sonderfall these are characteristic examples.

A closer look at all these suggested solutions will reveal that they concern judgement exclusively. However, the problem of the justness of legal action remains unresolved. Let us assume, albeit it is a rather generous concession to make, that in law a situation can indeed be seen as a whole and as an instance of moral reasoning. That will mean that legal judgement will be shielded with moral rightness or at least moral justifiability. Nevertheless, as I have already mentioned, the law has to be about taking action by punishing rather than just assessing acts as right or wrong. No ‘necessary link’ between law and morality has anything to offer, when it comes to punishment. Seeing the universe of norms as a whole cannot provide any solutions for the problem of the institutionalisation of punishment. The prescription of sanctions, of which it has to be noted that legal orders have very few compared to the immense variety of harm that can be inflicted upon human beings, is normatively clamped on legal norms. Norms and sanctions are not unconnected items in two separate lists, which judges can combine according to the circumstances of the particular case. When one is found guilty of violating a legal norm, and I am still drawing on the assumption that legal decisions can be morally correct, there is no separate discourse concerning which kind of punishment is appropriate. The connection between offence and sanction is normative and unchangeable. When discretion is granted to the judge, it concerns details. To make it more concrete: whether one ought to be imprisoned is not an issue; it is only for how long one ought to be punished that is left to be discussed. Therefore there is no guarantee of rightness of that part of legal decisions. At best it can lead to a kind of formally just distribution of penalties.

Klaus Günther’s theory of appropriateness (1993a&b), which is also a discourse-theoretical approach to law, cannot be of much help either. His theory of application discourses is an attempt to temper Kantian rigidity in norm application through recourse to the fluidity of Aristotelian phronesis and systems theory. Application discourses are based on a “weak universalisation principle”, according to which a norm is right, when its consequences will be accepted by everyone under unchanging circumstances. Discourses of application consist of taking into account all the relevant facts and valid norms. In the case of the law that means that a judge has the ability to evaluate both the situation as past and the decision as
future. But this does not solve the problem. Even if the judgement can be said to be right in the particular case, the judge has very few options concerning the pronouncement of a penalty. The choice is limited to the details of the sanction, namely its duration, the mode of its implementation and so on. To allow the judge to freely choose a sanction would obviously have severe repercussions for the rule of law.

Thus sanctions are always incompletely justified at the stage both of legislation and of sentencing. The judgement on their justness is always suspended, it belongs to the future, it remains to be proven. However, the law vests those decision with the assumption of rightness, it raises a claim to moral (that is substantive, extra-systemic) rightness without being able to substantiate it. To allude to the Derridean aporias: sanctions are hurriedly, urgently justified and yet the law cannot admit to that urgency, it cannot review the judgement. But even when it does, things are not the same any longer. The action which was taken following the urgently justified decision has altered reality forever in the way all action does. That instils a permanence, which the law cannot do away with.

It is exactly in the non-institutionalised nature of action towards moral ends that the difference between that and legal action lies. Morality does not compel us to impose sanctions. Even when some sort of harm is inflicted for the violation of a moral norm, it is judged as action in itself. It is not automatically vindicated as part of a norm or as a means to right ends. To be sure, that action can be related to the end causally. Then the value-indeterminacy, which I pointed out earlier, haunts morality as well. However, the fact that there is room to criticise instrumental action in itself is a guarantee of moral control not in a negative manner but in offering positive reasons concerning the instant situation. Therefore the factual contingency is being decreased as much as possible and its effect on moral determinacy is significantly reduced not least because the arsenal of reasons, arguments, facts, time and space is infinite.

This is not another way of saying that the law is a special instance of general practical discourse. It is a way of saying that the third point of the Sonderfall these that it is its real constraints that make legal discourse a special instance of general practical discourse fatally undermines it as a whole. The constraints, which mark legal discourse are not merely procedural or organisational. They have a definite substantive content, for they set a
normative limit to the action that can and must be taken. Therefore they cancel the law's ability to take all reasons and arguments into account.

THE LAW'S INSTANCE OF PURPOSIVE RATIONALITY IN A NEW LIGHT


In the first chapter I gave an account Habermas' distinction between the pragmatic, the ethical, and the moral employments of practical reason. Before I go on to examine whether that distinction poses any problem to my argument, let me briefly remind the reader of what it consists in. Pragmatic reason refers to purposive rationality. For instance, if one wants to secure a loan, then one has to go through all the stages of bank bureaucracy. Ethical reason is the adaptation of moral maxims to the real circumstances of existence of a community. Finally the moral employment of practical reason refers to the moral point of view, the transcendental categorical imperative.

For the sake of the argument let us assume that the ethical and the moral can and indeed are distinguished. Let us also assume that the justification of punishment is an ethical question permeated by some conception of justice. Let us finally take as given the unity of practical reason and the important role of pragmatic rationality in the formation of strategies and the weighing up of means and ends in a community.

I argued that the justification of sanctions and forms of punishment is marked by an incurable justificatory deficit. Sanctions are justified in the last instance on a purposive rational basis. The arguments employed in such a justificatory discourse can only refer to the weighing up of means and ends, which is an endeavour marked by a very high degree of contingency. Questions concerning values become relevant only in a negative way. More specifically, they concern the compatibility of sanctions with other values or principles. The justificatory deficit of the law has to do with the overriding presence of arguments of
purpose, which render the justification of sanctions (and sentencing) contingent at the expense of justice as certainty.

This differentiation within practical reason does not solve the problem of the contingency, of the constant suspension of the decision concerning the rightness of punishment. On the contrary, it confirms this inability of the law to vest its action with a claim to justice. The placement of the justification of sanctions in the realm of the ethical means that, because the members of a community cannot produce any moral arguments to justify sanctions, the negative test of morality suffices. Good, as opposed to right, means acceptable, sufficient, satisfactory and, crucially, not wrong. However, this does not meet the criteria of justice, as it does not guarantee certainty but leaves the judgement on rightness pending.

Let me approach the same issues from the point of view of the unity of practical reason which Alexy (1998) advocates and MacCormick (1986) hints at. Indeed we cannot distinguish clearly between different kinds of argument in practical reasoning in the sense that they are all bound to intermesh. Practical decisions are based on pragmatic and moral considerations. Although these do not stand in a strict hierarchical order, a decision which raises a claim to moral rightness must not lose sight of universalisable imperatives. MacCormick’s argument is not exhausted there. In his discussion of the requirements of practical reason he argues that

value rationality must [...] be at least second order rationality (1986, 194).

When we provide reasons for choosing one reason for action over another, that second order reason ought to be a value or principle “sustained consistently over time and universalisable over persons and cases”. Second order reasons have to be good reasons rather than merely strategies or means-ends calculations.

In the case of the justification of sanctions pragmatic arguments are employed in the last instance. One must of course concede that these arguments are placed under the canopy of community values at the first level and the imperative of universalisation on a second level. In the case of punishment the problem is that the connection between sanction and offence remains external in the sense that it depends on pragmatic considerations. These pragmatic
considerations are the last instance of justification of the appropriateness of a sanction to an offence. In other words, "S is right for O" does not derive from "it is just to punish" or even "S (independently of the context of its application) is right". The justness of punishment in general stands as a second order justification of the rightness of sanctions in connection with specific offences but it does not justify the latter exhaustively and conclusively. The ultimate judgement remains one of purpose.

My point can be illustrated in practice, when one thinks of cases, in which punishment goes wrong, i.e. when there is empirical evidence that a particular penalty does not bring about the desired effect or is not appropriate retribution for the offence. When we measure punishment up to the crime or its aim, the moral considerations change as well, because of the imbalance created as far as commensurability and proportionality are concerned. The moral side of the justification of punishment is contingent upon the pragmatic end of it.

One would say: Still, prescribed sanctions for specific offences are nevertheless universalisable norms. They are applied to all like cases. The distribution of formal justice compensates for the justificatory deficit of legal norms. Or does it? Claiming that formal justice or logical soundness are substitutes for substantive correctness is conceding that the latter is not feasible and that we therefore have to resort to equality as an ersatz of justice. But equality is in itself void when not coupled with rightness. One can abide by rules of universal application and still treat everybody badly. Equality or equality as fairness is of course a necessary counterpart of justice. But to the extent that the former concerns law-making and the latter law-applying, justice is logically prior to equality45.

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45 The difference between law-making and law-application is contested. There are theories of substantive legal reasoning that would argue that there is no distinction, for the judge does not apply creates law at the time of adjudication. Without going into much detail here, in order for my argument to be understood, one can have in mind a very positivistic and even formalistic archetype, in which powers are distinguished clearly: The legislative body make law and judges apply it. I do not need to defend this archetype. Its purpose is solely illustrative and any objection to it does not affect the rest of my argument. As law-making one should really understand any instance of the creation of a universalisable norm. Additionally I do not think this is the appropriate place to broach on the subject of the tension between universals and particulars in adjudication.
WRONG PREMISES ALTOGETHER?

Although throughout the chapter I have been focusing on sanctions referring to their justification deficit, a general critique of the law on grounds of that deficit is tacit. If sanctions suffer such a deficit, then of course consequently does the law. I shall show that by responding to some possible objections.

As I have already mentioned, Habermas treats sanctions as part of the norm as a whole. That is prima facie opposed to my analytical approach to legal norms. The antithesis can be best understood in the light of the problem of justification I am seeking to expose in this chapter. From a certain perspective, Habermas is indeed right that sanctions are an indispensable part of the norm in the sense that they cannot be effectively criticised, at least in institutionalised legal discourses, separately from the rest of the norm. That is not opposed to my argument though. On the contrary, it is exactly what I am seeking to prove; that the linking of sanctions to offences is a pragmatic activity marked by contingency and uncertainty. On the other hand, the imposition of sanctions can and should indeed be justified both as separate propositions in need of justification and as necessary complements of the norm. It has been argued by discourse theorists that, when the participants in a discourse accept a norm, they accept along with it the universalisability of the prescribed sanction. Thus their autonomy is defined by its restraints. In a sense, their autonomy is its restraints. I argue instead that this autonomy is still in need of an exhaustive rational definition and justification.

Additionally if one denies the possibility of the breakdown of legal norms, then one has to concede that the justificatory deficit, which I have been pointing out, is plaguing the norm as a whole and it is traceable in the first instance. Thus one must either discard it altogether as morally incurable, so to speak, or see what can be salvaged. In order to do the latter though, breaking it down into parts is inevitable.

There are another two objections that can be raised to my assumption that legal norms are of an "if O, then S" form. Can legal norms really be analysed into these constituents? What is the nature of S and does it really call for a rational justification in terms of values?
Obviously not all legal norms have such a structure. There are imperfect laws (and how telling their name indeed!), which do not prescribe sanctions at all. International law is brimming with them. Constitutional norms merely declare without attaching sanctions. Much administrative legislation gives guidelines rather than imposes duties. I am not ignoring the fact that not all laws prescribe their own enforcement. But I can also not ignore the fact that most do and that does not necessarily mean that I view the law as a set of coercive orders. My reduction of legal norms to the simple “if O, then S” formula does refer to a very large bulk of legislation.

The second question is relevant to this point.

Hart (1994) showed convincingly enough that sanctions are not necessarily coercive. The argument about nullity not being a sanction in the sense that it is not infliction of harm seems invincible. And in certain respects it is. Nullity is not a an act of coercion. A lot of the time it is hardly even an intervention in the real conditions of existence of a person. The rationality of sanctions such as nullity is exhausted in their intrasystemic justification. The ultimate test for them is their logical allocation within the legal system and their role in the maintenance of the latter’s coherence. In Alexy’s terms (1989a), such sanctions are justified internally, that is within the narrow boundaries of the law, rather than externally. They do not call for the employment of general practical discourse, they are not in need of categorical justification. In that sense they are morally irrelevant. They acquire moral significance on a different level. Their second order justification is the justification of that need for coherence in the law, which can be said to be a moral claim. The legal system transcends its own boundaries, when it starts interfering with entities and categories, which pre-exist it, which are not essentially constituted by their legal description. It is then that moral justification is necessary. New moral issues come into play, which cannot be done away with by reference to the legitimation of the legal system. So, the result is again the same. Some of the law needs only internal rational justification and some demands moral rational justification, which it does not get. Günther raises a similar point in his discussion of the differences between legal and moral norms:

All these norms [power conferring norms etc.] can be considered as ‘legal norms’, without them being a ‘practical question’ for a general practical discourse. For this reason, the feature of ‘legal validity’ can be ascribed to a lot of
different kinds of norms which are not the subject matter of general practical discourse-by definition (1993a, 147)

In the context of an application discourse theory of the law like Günther’s advocates, such norms are subject to a form of rationality that depends on open democratic participation for its justification.

CONCLUSION

In order to show that discourse concerning the discursive justification of punishment is always interrupted, I drew on two of Derrida’s aporias of the law, namely the urgency of the legal decision and the constant suspension of the justness of a decision. I argued that sentencing is a model context, in which this inability is revealed. At the stage of the imposition of sanctions discourse is interrupted abruptly, the exchange of arguments gives way to action. But the argument is not exhausted there. That interruption of discourse takes place to the detriment of justice, precisely because it is an interruption and not a completion. Sentencing can never be said to be just, as there is always one last instant of pragmatic reasoning, which compromises the justice of that decision. This is why theories of punishment have always felt and been vulnerable. They have persistently looked for an effective empirical way of overcoming this tension between effectiveness and justice without ever conceding that one of them has to be given up.

Finally, I tried not to lose sight of my argument that the law’s epistemological basis also sets insurmountable constraints to legal discourse. In this context that is manifested in the way, in which the law and its institutions choose to establish a connection between crime and punishment. Thus a circle opens, which perpetuates the political domination of the state and capital: Knowledge is produced by universities and supported by public or private funds. Then that knowledge is channelled into the law, it is institutionally sanctioned and ascribed a normative character.
CHAPTER THREE

ΧΡΟΝΟΣ/CHRONOS

LAW, TIME AND DISCOURSE

INTRODUCTION

The rule, Derrida tells us (1992), has an ἐποχή, it exists in its age and to this epoch it is bound. Thus legal decision is always and inevitably urgent, justice is suspended and it is always a-venir. In this chapter I look at how this aporia is revealed in the law’s temporality.

The discussion has to face up to a methodological burden from the start. The philosophical study of time is puzzling, difficult and at times it can become rather frustrating. How to dissociate oneself from time and examine it from an external epistemological point of view? How to wed physics and philosophy without trivialising either of them? Because the observer can never exist outwith time, observation and analysis get tangled in an infinite circle, where it is discourse about time that becomes the object of observation and then that discourse concerns the observation of itself. Thus, to say that the law exists in time is certainly a truism, because it amounts to seeing the law from within the time of the observer. It therefore amounts to saying that the law is being observed.

However, things become a lot easier, when one does not just talk about time as an autonomous concept but about the temporality of another entity. Then observation is to a certain extent detached from its object. The time of the observer does not get in the way of
observation; one does not have to opt for one definition of time and choose a theory, on the soundness of which will depend the soundness and cohesion of everything else.

In this chapter I look at the ways in which the law exists and defines itself in time. In view of the primary aims of this thesis, I shall examine that presence of the law in time in the light of how the law authoritatively manipulates and defines the time of discourse, in a way that the latter is either abruptly interrupted or is not allowed to develop freely at all. I still draw on the basic theme of this thesis, namely the real constraints of legal discourse, which are rooted in the law’s adherence to a fixed epistemological paradigm that cannot itself be subject to discourse but precedes it, and to the need to interrupt discourse in order to act.

I begin by examining what kind of epistemology the law seems to opt for and how it perceives the time of the discourse it regulates. I argue that the law can only make sense of time in past-present-future sequences, which translate into an end-regeneration sequence. Then I look at how the law exists in time and argue that the law is a-temporal, therefore diachronic. I argue that the law can only operate by maintaining this distance from the regulated, which enables it to administer their end. I shall back this argument a contrario by giving an account an epistemology of time as the lived and exclusively personal experience of the end. Then I go on to argue that this omni-temporality works in various ways in relation to discourse. Omnipresent law deprives the participants of the freedom necessary for doing justice to the situation and for developing their own moral predisposition and instinct. I then go on to argue that the rule of law suffers from a fundamental inherent contradiction, as it cannot wed the claim to temporally universal rightness with the need to act and maintain predictability and certainty concerning that action.

**LAW AND THE END**

**THE LAW ADMINISTERS THE END**

A central argument in this thesis is that the law is based on an epistemological paradigm, which itself escapes scrutiny and thus remains beyond legal discourse. In the following I try to reconstruct the law’s epistemology of time and how this underpins the law’s normativity and systemic existence.
I shall go about making these points in the context of a reconstruction of the theoretical foundations of the institution of the prison. While imprisonment is a contingent form of punishment in the sense that it could freely be otherwise, it is unquestionably historically connected to modern law. However that does not mean that imprisonment cannot serve as an example illustrating my argument, because, as I shall show, the justification of imprisonment is so closely linked to the concept of time.

Whether the prison works or not, the truth of the matter is that it is the second most widely used form of punishment after the fine. Therefore, from a sociological point of view, imprisonment is a most important part of our legal culture. Nonetheless, its scopes and functions as well as its connection with the overall aim of punishment are still not resolved. The official line seems to be in accordance with the dictum that we send people to prison as a punishment and not for punishment. From the Woolf Report, which is the outcome of the judicial inquiry conducted by Lord Justice Woolf in 1990-91, it can be deduced that the only aim of imprisonment is loss of liberty.

One cannot deny that there is a very strong connection between imprisonment and the concept of time. That is the case whether one considers time part of the conceptual core of deprivation or just a prerequisite of the effectiveness of imprisonment. From a sociological point of view, the turn to new forms of punishment is a turn from intensity to duration, from the cruel brevity of flogging to the, supposedly, more humane chronos of imprisonment. Punishment is now calculated in time units rather than whiplashes. In order for it to work, the prison needs to take over the management of all the dimensions of existence of the prisoner. In the words of Pashukanis:

Deprivation of freedom, for a period stipulated in the court sentence, is the specific form in which modern, that is to say bourgeois-capitalist, criminal law embodies the principle of equivalent recompense. This form is unconsciously yet deeply linked with the conception of man in the abstract, and abstract human labour measured in time. It is no coincidence that this form of punishment became established in the nineteenth century, and was considered natural. Prisons and dungeons did exist in ancient times and in the Middle Ages too, in

46 One cannot but refer to Foucault's analysis of the emergence of the prison in Discipline and Punish. See also how Garland qualifies Foucauldian insights (1985 and 1990).
47 Rod Morgan (1997) reconstructs the justification of that choice.
addition to other means of physical violence. But people were usually held there until their death, or until they bought themselves free. (1978:181)

This historical turn goes hand in hand with a modification of the justification of punishment. Some new factors that came into play and started determining the rationale of punishment are the concept of human rights such as equality and dignity, the move towards a secular, welfare society, the changed perception of crime and its causes.

The application of the principle of equality in the case of imprisonment means that penalties of the same duration will be imposed for like offences and circumstances. Once in prison already, equality will be safeguarded with a regime of uniform treatment of all inmates and so on. So, in the eyes of the law time becomes measurable, there is the assumption that time is of course calculable in a manner uniform for all. Time is a resource common to all in exactly the same way. The problematic concerning the fine is focused on whether it is just to impose the same monetary sanction on people of different financial status or whether considerations of proportionality should enter the reasoning process. It seems that with imprisonment such deliberations are deemed irrelevant. We all have the same amount of time irrespective of how it is culturally and individually experienced. So it becomes clear that a theory of the ontology of time becomes the bedrock upon which the justification of the legal institution rests.

From the above it appears that the law adopts a common sense of time. It understands the latter as an entity observable in an objective way, as an object the ontology of which can be grasped in a definitive way. The law uses the language of natural science in order to make sense of time. The law commits the same fallacy for which Wittgenstein (1958) criticised St. Augustine. The latter famously expressed his inability to define time, although he felt he knew what it is (1912). Wittgenstein explained this intuitive inability in terms of the use of the right language-game. He argued that Augustine found it so difficult to make sense of time because he was trying to define time in the way he would define a tangible object. Similarly, Waismann felt that reference to time as a noun can be rather misleading:

48 For discussion of the fine as a penal sanction see indicatively: Shaw 1989; Young 1989; Young 1994.
It is true, we can make a person understand the word ‘time’ by producing examples of its use: but what we cannot do is to present a fixed formula comprising as in a magic crystal the whole often so infinitely complicated and elusive meaning of the word (1968:58).

For the purposes of imprisonment, time is precisely that. It is conceived as an object with given dimensions, which can be defined, experienced and measured in authoritative ways. Moreover, we all have the ability to consciously perceive time in its real dimensions. Therefore, it is a requirement of justice, equality and universalisation that like offences must be punished with prison sentences of the same length. The assumption that time is objectively measurable becomes the vehicle with which the logic of tariff sentencing is smuggled into the reasoning concerning punishment.

As far as the form and structure of time are concerned, the law chooses to understand it in terms of the distinction between past, present and future. History is the flow of events and facts through these three points in time. This flow is linear and it is directed forward. The movement is from the past to the future in the way of the movement of an arrow. What was the future, becomes the present and is finally stored in the infinite database of the past. They are experienced respectively as a bundle of aspirations, plans or hopes, current experience through our senses and, finally, as memories.

The philosophical problems of that perception of time are endless. In large part the philosophy of time is concerned with the shortcomings of such a simplified and commonsensical epistemology of time. Most prominent amongst them is MacTaggart’s claim that time is unreal (1927). MacTaggart distinguished between two sequences with which we seem to be making sense of time. That of past-present and future (A series) and that of earlier and later relations between points in time (B series). On a first level he came to the analytical conclusion that time cannot exist without the presence of the A sequence.

49 Adam Czarnota (in Christodulidis, Veitch forthcoming) comes to the same conclusion about the law’s epistemology of time.
50 For McTaggart’s A and B temporal series see: Rankin 1981; Schlessinger 1983. Also on the same problem: Prior 1968; Essential reading for the reality of time is Mellor 1981; A more recent work: Z. Augustynm 1991.
52 On the directionality of time: Newton-Smith; see also Newton-Smith (1980) on time as not being linked to change. Excellent comprehensive collections of philosophical writings on time: Sherover (ed.) 1975 (including texts ranging from the the Bible to Heidegger); Gale (ed.) 1968: Le Poidevin and MacBeath (eds.), 1993 (mainly analytical texts included here). Also helpful: Teichmann 1995.
The predicates past-present-future are clearly incompatible, for nothing can be past-present and future at the same time. Nevertheless, MacTaggart points out, they are obviously attributed to the same event at a given time. Something (say an election) can be future, it becomes present and finally past. The alternative, which MacTaggart and other proponents of the thesis that time does not exist, have to offer is a different perception of temporal sequences. Namely, what is habitually referred to as the B sequence (as opposed to the A past-present-future sequence), according to which events are earlier or later in relation to each other. The opponents of MacTaggart's thesis that time does not actually exist, i.e. the advocates of the A series, sought to find a way out of the paradox that he introduced. But by claiming that time actually exists they created, and therefore had to give solutions to, other problems about time, such as its directionality, its dimensionality, the question of causation and so on.

I shall leave the substantive problems of the epistemology of time adopted by the law aside, because such a discussion is sooner or later bound to be tangled in the infinite circle of self-observations, against which I have already warned when introducing this chapter. But the way the law perceives time has one implication of great importance that must be pointed out.

By spatialising time, that is by perceiving it as a linear succession of causes and effects, the law tacitly accepts, or even creates one could argue, the category of the end. The passage from the past and the present to the future is marked by a closing moment, an instant of death.

*These fragments I have shored against my ruins*

says T.S. Eliot in *The Waste Land*. Frank O'Hara captures the same in *Death*:

6

I'm not dead. Nothing remains, let alone "to be said",
extcept that when I fall backwards
I am trying something new and shall succeed, as in the past.

The concept of the end is what the law bases all its operations on. In order for it to make action possible the law must mark the final and unquestionable end of the previous state, of
the ancien régime. In the light of that the succession of causes and effects, which is what time is for the law, can now be qualified as the succession of completed causes and their effects. In the law the past has been recorded and it becomes its recording, whether in the form of narratives or in normative meta-narratives, that is the history of the rules used to regulate a case.

So, the future begins in and from devastation. For a day to be the ‘first day of the rest of one’s life’, the day before must be the last day of one’s previous life. To that extent the future is not continuation, it is regeneration. But for something to be re-generated, something must have survived; ‘Nothing remains’ must always be followed by ‘except’ and ‘fragments’ must always rest on ‘ruins’. What survives the devastation of the passage from past/present to future automatically does not belong to either. It is not only past, because it is still there. It is not future, precisely for the same reason; it exists, therefore it is not an idea projected into the unknown any longer. That elusive element is unidimensional, it only exists in the present. Thus it becomes what the past collapses in and the future builds on. The question then is what this ever-present bridge is. I suspend this question until after the discussion of how the law exists in time.

ENDLESS LAW

One way of understanding law in time is to look for its historicity. One can talk in a Marxian political-theoretical vein and see how the law is history as a field of struggle (or domination) and at the same time (re)produces history. That political, historical role of the law as colonising and thus undermining political struggle is tacit in the whole of my thesis. When I talk of the law as violent interruption of discourse, it is implied that it is most importantly political discourse, which is being denied.

Alternatively, one can search for the time of the law as a system. Gerhart Husserl (1955) distinguishes between past-orientated, future-orientated and present-orientated times, which are used respectively by the judge, the legislator, and the executive. This distinction might have a certain explanatory value in terms of the formation and continuation of the legal system. However, it is not very enlightening as to the law’s operations and relations with its subjects. Ost (1994) also attempts to explain the emergence and perpetuation of the legal system by suggesting a different distinction between various temporalities of the law thus
qualifying Husserl’s categorisation. These times “can be related to the separate sources from which it [the law] is formed” (ibid:163). They are: i) the constitutional time of foundation, ii) the a-temporal time of doctrine, iii) the customary time of the *longue durée*, iv) the Promethean time of legislation, v) the time of case law or the “cyclical time of alternation between advance and lag” (ibid).

Under ii) Ost tells us that the law is designed in a way that it appears as omnitemporal so as to suggest the constant self-evidence of the principles appealed to and to shelter them from any historical context that could relativise their significance (ibid.:194).

This thesis can be read on two levels. I discuss the first one here and suspend the second for a while. Ost is suggesting that the law raises a claim to universality which transcends spatial and temporal boundaries. What is legally presented as both true and right is so for everybody and at all times.

There is another way of thinking about the time of legal dogmatics besides the claim to universality. Normativity exists always in the present, it regulates a constant now. The law’s mode of existence, that is its validity, is meaningful as such only in the present. A ‘past’ law is only one more factor taken into account in processes of historical explanation; from a source of regulation it is reduced to a source of knowledge. A ‘future’ law is a political aspiration, it can be a reason for a political discourse or struggle, it is a statement of political will. Because of this temporal unidimensionality the law becomes diachronic. It is ahead of us at all times. Ost is right to imply that a-temporality is omni-temporality. The *now* collapses into the *always* and the *already*, normativity is perpetual and therefore a-historical.

Note the extraordinary discrepancy between the law’s perception of time of other discourses and its own temporality. The law isolates itself from the discourses it regulates by placing itself differently in time. Recall how it treats time as an externally observable object. The law observes the time, that is the end and regeneration, of the discourses it regulates. Those discourses are finite, the law is infinite; their end is regulated by the law, it does not itself meet an end. In fact not only can it not foresee its own end but it cannot make sense of it at
all. Once the law’s validity expires, it is silenced and its form suddenly becomes something entirely different.

The question about what it is that makes the passage from past to future possible is clearly not suspended any longer. The law reserves for itself the privilege of being that which always survives the death that is the past and makes possible the regeneration that is the future. What connects the previous state of affairs to the avenir is that they are both described in and by the law. Thus the law assumes a godly quality. “Εστι δίκης ὁρθολμός, ὀς τὰ πανθ’ ὁρα”, “ἐστι δικαίων ὁρθολμός, ὀς τὰ πανθ’ ὁρα”, the law becomes a deus ex machina intervening to save our day, to release us from tragedy.

It cannot be overemphasised that the moment of devastation past does not actually have to occur. In fact, seen from within, the regulated discourses or systems probably maintain their continuity, as only total destruction or radical transformation would signify their end. The law projects that end onto the regulated discourses and therefore places them in the past-present-future continuum, precisely because it is only with such a linear and simplified picture of the world that it can deal. Violence is done to discourse already. In law everything becomes a subject, as its temporal limits are heteronomously, authoritatively and arbitrarily determined. By diagnosing all death but its own, the law seizes the boundaries of discourse.

TIME AND DEATH CONTAINED IN THE SELF AND THE END OF LAW

So far I have argued that for the law the time of the discourse it regulates is a sequence of events from past to present and future externally and objectively observable. I have also shown that the law itself is timeless. In this section I want to approach this dependency of the law on its understanding of time from a contrary perspective and also show that it is on the combination of these two perceptions of time that the law bases its operations on to such...

53 “Justice watches everything” and “the law watches everything”
54 Poulantzas approaches the close affinity between law, state and death in a slightly different vein: “For how is it possible not to see that the changing modes of prosaically dying in one’s bed, the veritable taboo on death in modern societies, and the loss of control by ‘private citizens’ over their own death actually converge with the state monopoly of legitimate public terror? Does the State no longer have any function with regard to death? Even when it does not execute people, kill them or threaten to do so, and even when it prevents them from dying, the modern State manages death in a number of different ways; and medical power is inscribed in present-day law.” (1980:81-82)
an extent that the construct of the legal institution would collapse if that epistemology of time were replaced.

Let me pre-emptively defend my choice of the alternative understanding of time that I offer. Firstly, it has to be made clear that it is not necessarily the perception of time that I endorse. My argument is a meta-theoretical one to the extent that it does not depend on a substantive argument about time but merely on the fact that there can be and indeed there are multiple epistemologies of time. However, the one I chose to give an account of does have an incidental substantive significance as well. As it views time as the *exclusively personal experience of the way towards death*, it is directly opposed to the law’s effort to see diagnose death or demise from its own viewpoint. The end is then contained in the subject and it cannot be accessed from outwith it.

Adolf Grünbaum has shown that

> becoming is mind-dependent because it is not an attribute of physical events per se but requires the occurrence of states of conceptualised awareness. (Gale, 1968:324).

So the suspicion arises already that time *is not* uniformly calculable, in precisely the same way that *pain* is not and should not be considered as uniformly calculable and that exchange values are not a resource common to all. Time and the sense of becoming might be *part of and as defined by our consciousness*\(^5\). The conventions of clocks and calendars can only serve as a point of reference to supplement the meaning of external events, precisely because of its nature as a convention. What if time is not an irreducible good and not everyone experiences time in the same way? In that case even if justice is calculable, the equation is proven wrong, for time is not calculable and its manipulation does not even meet the conditions of formal justice. The case of time is also of particular interest, because, unlike other scientific or philosophical issues, which have been popularised to the point of trivialisation, it still maintains a certain mystical character, it intimidates people and so its commonsensical understanding is taken for granted.

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\(^5\) See also Grünbaum 1973, which is standard reference in the philosophy as well as the physics of time.
One can show with reference to psychoanalytic theory that time is not felt and experienced in a way identical to all. Jacques (1982) adopts the distinction, the roots of which can be retraced back to Freud, between three categories of experience: the preconscious, the conscious and the unconscious. Preconscious experience is the peripheral awareness of the context. This form of awareness is dynamic, it is experience of motion. With conscious experience we become aware of changes in the world, of events taking place. It is the verbalised awareness of things. However, because conscious experience is focused, it is also static:

this focused perception is organised into a static, discontinuous, atomic world in which time phenomena are dominated by the spatialised notion of discontinuous ticks of a clock (1982:53).

Unconscious experience is not verbalised and comprises the world of desires, intentions and so on, which have not yet been acknowledged as such.

The manner in which we experience time is a combination of these three levels of awareness. There is, according to Jacques, much more to our perception of time than the discontinuous way of our direct, conscious experience. In fact the latter plays only a very limited part in the way we make sense of the world. If it were left to that level alone, then it would be impossible to have a spherical understanding of the world, of the continuity of events and the connections between them.

If that is true, if the experience of time in the sense of continuation and the connection between objects and events is only possible as the combination of the preconscious, conscious and unconscious levels of our awareness, then it must follow that every person’s way of experiencing time is unique and bound to the person and their personal stories, the combination of the three levels of awareness not being repeatable. This does not just mean the obvious fact that different people choose to focus on different things depending on their backgrounds. That would restrict the argument to the conscious side of awareness. What is

Note that in his first Critique Kant emphasised precisely this need for the continuity of the preservational, aspirational and reiterational aspects of consciousness, as the necessary condition of all knowledge and awareness.
argued is that we are aware of time in a way specific to us, a way which is indescribable, as it is not absolutely verbalisable.

Nevertheless, some might be sceptical about my recourse to a psychoanalytic model explaining our experience of time. For those unconvinced readers, I shall try to explain the same from a different point of view.

In Heideggerian terms being can never exist as a whole, while there is still something outstanding. The Dasein cannot rid itself of this 'not-yet', the a-venir. There is only one instant, in which nothing more is outstanding and therefore Being as a whole is achieved, and that instant is death. But then the Being has ceased to exist. The paradox is crippling: The only point, in which wholeness is achieved is one, which cannot be experienced. Obviously it has reached the end in existential terms, which is Heidegger’s as well as my interest in this section. In terms of physics, there is still being and, if we are to believe that there is a constant and unchangeable equilibrium of matter on the earth, then being never ceases, it is merely transformed into other forms of existence.

The Dasein cannot be replaced or represented in this being as a whole.

No one can take the Other’s dying away from him (Heidegger, ibid:284).

Because being as whole is inextricably linked to the end, and because in the end the Dasein is unique, even the possibility of Dasein to exist as whole cannot be assumed by the Other.

Lévinas (1987) qualifies the Heideggerian insights with the notions of the Other and the plurality of existence. Death is never in the present, he says, because nothingness is impossible, it is ungraspable. It follows that intentional self-annihilation is impossible. The act of suicide is meaningless, to the extent that it is aspiration for existential void. How can one ever desire what one cannot experience? Continuing this trail of thought, we can conclude that fear of death is also meaningless and pointless. Fear of death is either fear of the idea of nothingness, or fear before the endless boredom of eternity or the frustration in

57 Dasein, as being there, in relation to the Other, and not just Sein in isolation.
the suspicion that, even if our consciousness is transferred to subsequent lives, it will never be revealed as conscious knowledge, which is tantamount to not re-living at all. Finally, fear of death might be the inability to administer or even grasp this after-death contingency.

However, because death is the loss of mastery over one’s being, it is still an event, says Lévinas. Death is our relationship with

something that is absolutely other" (ibid:74);

d a plurality insinuates itself into the very existing of the existent, which until this point was jealously assumed by the subject alone and manifest through the suffering (ibid:75).

This alterity revealed in death is possible because of the possibility of existence without existent, which was of course first put forward by Heidegger in Being and Time. What it means is that there is a distinction, radical separation according to Lévinas, between the general, impersonal ‘there is’, ‘il y a’, ‘es gibt’ on one hand and the thing that exists on the other. Lévinas explains it with examples.

Let us imagine all things, beings and persons returning to nothingness. What remains after this imaginary destruction of everything is not something, but the fact that there is. The absence of everything returns as a presence, as the place where the bottom has dropped out of everything, an atmospheric density, a plenitude of the void or the murmur of silence (ibid:46).

And elsewhere:

Let us take insomnia. This time it is not a matter of an imagined experience. Insomnia is constituted by the consciousness that it will never finish […]. Vigilance without end (ibid:48).

This alterity of and in death as experienced in suffering is only comparable to the alterity to the social Other.
Therefore Lévinas differs to Heidegger in that he understands death as experienced in relation to the Other and not just as residing in the individual existence of Dasein. Based on this approach to death, Lévinas goes on to define time as well as relational to Dasein alone but in relation to the Other.

It seems to me impossible to speak of time in a subject alone, or to speak of a purely personal duration (ibid:77).

I believe that, despite their differences, Heidegger’s and Lévinas’ insights concerning death and time as death are essentially akin. It is true that the time of Being is determined to a certain extent in relation to the Other. I am arguing with Heidegger that the difference between existence and existents makes sense and is very useful as an analytical distinction but it is meaningless as a separation. Let me look at the example of the destruction to the point of nothingness used by Lévinas. In the situation he describes there are existents to match the impersonal existence. There are still objects in the physical world, if not a consciousness to realise the absence of all other consciousness. In Lévinas’ own terms, the fact that such a total destruction is imaginable, does not prove the separation between existence and existents but his own point about the impossibility of nothingness. Because he concedes that nothingness is ungraspable, he must concede that existence is inextricably linked, although distinct from, the existent, the Sein depends on the Seiend.

Back to time as alterity: It is sociality as movement, which Lévinas deems as time. If it is really movement he is looking for, then he does not have to go further that the Dasein. The relation to the Other is important for the placement of Dasein in social time, for Dasein’s ability to manage his/her time in relation to the specific Other. The Other is there to remind Dasein of the time of their relation, their standing opposite each other. However this is how Dasein realises his/her own time. For that, the decay towards death is enough.

Let me summarise this briefly. On one level, time is accessible by our consciousness. I am referring to the conventions of clocks and calendars, to the measurable time, which we can perceive by the observation of movement and change. But that is only a first level and if a theory of time were exhausted there it would be exposed to very heavy critique on all accounts as elementary and commonsensical. Therefore we are in need of a second-level
complementary time-perception. On that level, time becomes part of our existence as the unique experience of our being towards our own end. This combination of levels of perception of time is translatable in the language of psychoanalysis as the conscious, preconscious, and subconscious levels of experience58.

With such an understanding of time as lived experience legal regulation becomes impossible, because the possibility of generalised, universalisable legal action is undermined. The spatial, so to speak, perception of time as a passage from past to present and future and the belief that everything moves linearly forward is the only epistemology that can underpin the belief that ends exist even before our biological death. It is only with such an image of the world that action can be deemed certain and unquestionable. Thus justice becomes an achievable goal and every time a judicial decision is made, it brings an end, a just conclusion to a natural progression. My argument in chapter two concerning the justification of sanctions becomes relevant again. I called that justification ‘hurried’. It is now evident that from the point of view of the law it is far from hurried. It is an expected and irreversible end and an achievement of justice.

A different understanding of time and the world reveals the inconclusiveness and the hastiness of such decisions and shakes the very foundations of law as action. Containing time and death in the self takes away the law’s privilege of diagnosing and subsequently imposing the end on relations and discourses. Thus the law as a system of active regulation is disabled, for it loses its godly quality of being above and beyond time and the regulated subjects.

The interrelation of law and politics provides a good context explaining the way that the law administers the end of the discourses it regulates elevating itself beyond them in a divine distance. Christodoulidis (2000) gives a very interesting account of the incapacity of the law to regulate and promote political reconciliation. Reconciliation, Christodoulidis tells us, 58 My argument against the prison is not exhausted in the criminological triviality that a term in prison deprives the person of his/her time and space thus limiting his ability to plan for the future and subduing him/her physically and psychologically. Although this may to an extent be the case, it is only part of the truth. Such a critique implies that its presupposed perception of time is the one adopted by the law, that is as an object fully accessible by our consciousness. But if that were the case, no problem would be posed for the practice of imprisonment in terms of equality or the protection of the personality of the incarcerated. If time is consciousness, that is knowledge, then it can be administered externally and in a uniform way. But this becomes logically impossible, if time is one’s existence.
looks to the future; the law draws from the past. Apart from that, the law is about stilling, which is another way of looking at what I called the a-temporality of the law, its placement in an infinite present, as well as Derrida’s second aporia of the urgency of a decision. On the other hand, reconciliation, as every political discourse, is about motion towards the future. The forming and organisation of a political community is a condition always in the making, it meets no end. The law cannot make sense of this fluidity of politics. It needs a clearly defined horizon, within which it can operate. It creates this horizon by violently interrupting the community’s process of becoming, by setting the conditions of such processes, by violently imposing synchronisation. For the law, reconciliation begins where the conflict ends. In turn reconciliation meets its legal end as well and the law must assume that the new community takes the place of the temporary transitional phase of reconciliation.

**ENDLESS LAW AND THE END OF DISCOURSE**

So far I have argued that the law diagnoses and administers the end of the persons and the discourses that it regulates by placing itself beyond them in the plane of the a-temporal. In order to show that I also offered an *argumentum a contrario*: With a perception of time as the experience of the end within the self, legal regulation ceases to be feasible. Let me now look in more concrete ways at what other implications the law’s temporal ubiquity has for legal discourse.

**TIMELESS LAW AND THE FREEDOM TO REASON**

The freedom of decision is a prerequisite of justice, I have already argued with Derrida. That urgently calls for further explanation. Prima facie, saying that justice requires a free decision might mean that moral action is impossible without a preceding free choice. Conversely every action, which is not the product of choice, is necessarily a-moral, morally irrelevant or immoral. Derrida’s point is clearly a substantive and not merely a meta-ethical one. He speaks of justice and not just moral action as opposed to purposive or any other kind of action. So, one tentative way of reconstructing his claim is this: Justice cannot be done and one cannot be just⁵⁹, when one does not decide freely, when judgement or action are not

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⁵⁹ Note that Derrida himself draws this distinction: “[…] there is never a moment that we can say in the present that a decision is just (that is, free and responsible), or that someone is a just man – even less: ‘I am just’” (1992:23).
free, that is deliberate, unimpeded and conscious. Clearly a lot of objections can be raised against that claim.

I believe that the best interpretation of Derrida’s argument is one separating firstly the act of deciding from the action performed with the decision and, secondly the justice of the action performed and the justness of the person performing the action. As far as the first distinction is concerned, the difference can be shown more forcefully, when one thinks of the justice of making a decision as *justice done to the instant situation* as well as to the person making the decision. What is taken into account then are the available tools for deciding, that is rules, the physical state of affairs and so on. Whenever decision is pre-empted, whenever its freedom is denied, it cannot be just. However, the ultimate action can well be just, for there are other considerations and factors, which are contingent and might even enter the equation after the decision has been made. As for the difference between the justice of the action and the justness of the person performing it, I believe there can be no doubt that it can be sustained. This distinction is related to the previous one but it does not lose its autonomy. A person might perform the correct action for the completely wrong reasons, s/he can be morally lucky, s/he can have the wrong intentions but also the completely wrong strategy going about them. I cannot broach on these distinctions in this context. They call for a much lengthier and in depth analysis.

Let me now go back to Derrida to ask once again what it means that only a free decision can be just. In the light of the above distinctions between various aspects of justice it becomes clear that Derrida is not saying that a just action is impossible without a free decision. That would be a fallacy or, at least, a fatally incomplete claim. However, it can be said that the person has not become just and that the decision cannot be just either, as justice is not done to the situation. These two instances of injustice take place for the same reasons. In that sense the spatially and temporally ubiquitous law constrains justice.

It also encourages moral laziness. The pre-existing legal rules limit the horizon of practical reason, they do not allow the person to discover the rules, to imagine the consequences, to reason not only about what is to be done but also what is to be taken into account in the
process of reasoning\textsuperscript{61}. It is important to emphasise that this is not instigated only by the fact that rules exist. Practical discourse and subsequently practical wisdom are disabled by the knowledge that in the manner of the gods, the law perpetually watches everything from its Mount Olympus or its Heaven and will always be ready to intervene. It will not allow us to commit suicide or run any danger of harming ourselves at all. It will tell us to wear our seat belts or crash helmets when driving and not to engage in anything suspiciously dangerous. The godly, patronising over-protectiveness assumed by the law deprives us of the freedom of decision, which Derrida deems as an indispensable prerequisite of justice. The law does not and, if it wants to achieve efficiency, cannot, lose sight of its subjects either in space or time. The law can never stop being interested in one’s life. Seen from the other side, one can never outlive the law or hide away from its systemic closure.

But like all gods, the omnipresent law has its evil side too. Walter Benjamin (1987) spoke of law-preserving violence as fate\textsuperscript{62}. He saw a grave threat in the eventuality of punishment, in the gap between normativity and actuality. The law does indeed function in that manner of threatening imminence. I explain this as a result of the a-temporality / omni-temporality of the law. The law, as I said, is always in the present. I shall now slightly alter that statement by expanding it. The law is always in our present, in the time of our consciousness. Every moment of our lives is overshadowed by the law in the godly manner I described above. That becomes a horrible fear, when one does not know the law, when the rule of law has actually been invalidated by too much law or bad implementation, even though it still exists as an ideal. The law haunts our present in an even more frightful way, when we have breached a rule. Then it always follows us, marks our present and foreshadows the notion of our future by creating the threatening eventuality of death\textsuperscript{63}, by constraining hope, by directing our plans. The law becomes fate, because it is certain to befall upon you but you can never know its content. And the rule of law requirement of non-retroactivity, perhaps

\textsuperscript{60} In chapter two of this thesis I put this aspect of this aporia of the law in context by arguing that sanctions can never be morally defended, for their justification depends on a crucial instance of purposive rationality.

\textsuperscript{61} Zenon Bankowski’s forthcoming work Living Lawfully; Love in Law and Law in Love, Kluwer is precisely about why and how practical reasoning should always be a creative experience.

\textsuperscript{62} In chapter six, in which the discussion is about the violence of the law’s silencing of competing or just concurrent normative orders, I give a more detailed account of Benjamin’s Critique of Violence.

\textsuperscript{63} Here my critique of the law’s perception of time from the point of view of existential philosophy becomes relevant.
the most absurd in the list of formal features of the law, makes sure that the breached rule will never cease being a part of our existence\textsuperscript{64}.

Seen from a different point of view, the law’s omnipresence has yet another coercive aspect relevant to the previous one. I do not perceive coercion in the same way as H.L.A. Hart meant it in his gunman example. On the other hand it is not all that different. The difference might be lying in the distance between the source and the act of coercion. Stanley Fish shares the same suspicion:

Could it not be said that procedure rather than doing away with force merely masks it by attenuating it, by placing it behind a screen or series of screens? (1989:504).

This is an aspect of the problem, which Cover\textsuperscript{65} tried to tackle as well when talking in psychopathological terms about the formal distribution of violence in the legal hierarchical structure and how that disperses responsibility to an extent that the latter disappears altogether. Cover tried to make sense of how it is possible that human beings can commit such acts of violence upon others; he sought to come to terms with the ‘banality of evil’. My intent is to see how the law masks and organises its violence by doing away with direct responsibility.

The time gaps between legislation, decision and punishment and the distribution of responsibility among numerous agencies, including the legal subject him/herself, de-personifies the rule and consolidates its divine, metaphysical character. At the moment of its application the law is felt rather than rationally justified. The application of a rule does not, unlike the rule itself perhaps, have a concrete history. It is automated and hence neutral, numb. The history of the application of a rule and the implementation of a decision is the history of the distribution of faceless violence, \textit{gestaltlose Gewalt}. This \textit{Gewalt} is rendered possible precisely because of the a-temporality of legal normativity. The law’s diachronic justification is always assumed and its rightness is taken for granted. Once the institutionally defined moment of justification has gone by, whether that be the trial or any other instance

\textsuperscript{64} I shall expand more on the rule of law as a manipulation of the time of discourse and the participants by the law in the section about the law’s institutional lethargy.

\textsuperscript{65} See chapter six for more on Cover.
of justification, reasoning concerning the rightness of legal action cannot make any difference. One cannot plead with his/her executioner and change the decision concerning the wrongness of his/her action or his/her guilt.

The a-temporality/omni-temporality of the law can also be described, and in turn in a way it describes, Raz's thesis on exclusionary reasons (1990). To the extent that the law always is and cannot foresee or make sense of its own end, it constantly provides reasons to suspend reasoning before action. Christodoulidis (1998) sees the facilitative side of that: leaving some input out, opting for the reasons we value more highly does not necessarily compromise justice. To a large extent it makes decision-making possible (1998:228). This holds for the law as well. Decision and action can be based on reasoning on a formal level of legal rules without having to expand on their substantive justification.

The second level reading of Ost's thesis on the a-temporality of legal dogmatics becomes relevant here. Law is a-temporal in order to:

suggest the constant self-evidence of the principles appealed to and to shelter them from any historical context that could relativise their significance (ibid.:194).

Apart from colonising the conditions of practical discourse, the a-temporality of the law is also significant, because it is a crucial factor making legal action possible. It provides the substratum of assumed rightness, which does not and cannot be questioned. Without this bedrock action would always be arbitrary and uncertain as prior reasoning would inevitably exclude some reasons or facts. The normative temporal ubiquity of the law provides this confidence.

But, Christodoulidis rightly points out, there is a fundamental problem with exclusionary reasons: they are not revisable (ibid.). If first order reasons, that is the reasons that inform action, are silenced by second-order ones, the former cannot be employed for the revision of the latter, for they are excluded and not merely outweighed\(^6^6\). Let me now adapt this to the terminology of this thesis and show one more level, on which the law excludes. The law is
indeed connected to practical discourse at a pre-legal (but not necessarily extra-legal) stage. Moral and political considerations clearly inform legislation. But as soon as the law becomes a separate institutional entity, that connection is lost. The a-temporal law, which marks the end and facilitates the passage to the new, maps legal discourse temporally merging its limits with its own. In other words, the law not only excludes the reasons drawn from general practical discourse that informed its emergence, *it also precludes the possibility of revising those exclusionary reasons in the future.* Institutionalisation imposes its presence on legal discourse authoritatively and forcefully thus alienating from general practical discourse.

I said that the law provides the confidence necessary for action. It is a false confidence. The validity of legal norms does not coincide with their rightness. What the temporally ubiquitous law offers is not a *justificatory* bedrock but an *institutional framework* in which decisions and actions are contained so that they do not have to be questioned at all times. To the extent that this framework constitutes the outer limits of the law, it remains beyond discourse altogether. So, even if rules as exclusionary reasons were revisable, their revision would have to happen within the institution and be subordinated to the imperatives of the systems and its aims. In the next section I shall show this aspect of the unrevisable law by pointing out the contradiction between universalisation and the requirement of non-retroactivity.

Let me now show how the law's a-temporality/omni-temporality is expressed in the law's language. I argue that the omni-temporality of the law is revealed by the use of indicative, future tense instead of the more appropriate imperative. That grammatical choice also has an ideological function, as it creates an impression of factuality about the law thus blurring the boundaries between normativity and laws of nature.

Roman Law is an infinite source of good examples illustrating theoretical points:

"A father cannot kill his son without giving him a hearing but must accuse him before the prefect or the provincial governor."61 (Justinian's Digest, 48.9.5., my emphasis).

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66 Christodoulidis argues here against Atiyah, Bankowski and Schauer, who maintain that first order reasons can come to the fore and cast out second order reasons.

67 The examples of Roman Law are drawn from Borkowski 1994.
And a more amusing one:

“If a husband gives his wife money to buy perfumes and she pays the money to his creditor and then buys perfumes with her own money...she will not be held to have enriched by this” (Justinian’s Digest, 24.1.7.1., my emphasis)

Another random selection from contemporary law:

“...a person who supplies any product in which products are comprised, whether by virtue of being component parts or raw materials or otherwise, shall not be treated by reason only of his supply of that product as supplying any of the products so comprised” Consumer Protection Act 1987, 1(3) (my emphasis)

It is a commonplace to say that rules do not describe the future with prophetic accuracy. Theories, according to which normativity is prediction are, aside from their other shortcomings, wrong in that respect too. Law as prediction does not account for the actual contingency of implementation of rules. Prediction implies a certain factuality, which the law’s normativity itself cannot guarantee.

Nevertheless, this clear-cut distinction between the is and the ought seems to be collapsing within the law itself. The language of rules is misleading. Legal rules are typically structured in “if..., then...” conditionals. In the way of the Bible (Jackson, 1988:98) they syntactically describe rather than prescribe. The use of indicative and future tense over the more appropriate imperative creates the illusion of prediction: “a person who supplies... shall not be treated...” reads the third example. This wording does not convey the right meaning, which is that the supplier ought not to be treated. The normative clearly collapses into the descriptive.

At the same time, it has been proven that conditionals are a more authoritative way of imposing a rule. A study by Bethany Dumas (1990 as quoted in Jackson, 1995:54ff.) showed that hypothetical warnings (e.g. ‘if you smoke, you will develop heart disease’) are more powerful than categorical ones (e.g. ‘Smoking causes heart disease’). Jackson (ibid) explains that in terms of the social knowledge and the internalised behavioural patterns revoked by conditional warnings. The knowledge revoked is not conscious, rationally

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68 Of course the law does not deal solely with the future. A large bulk of rules describe the world as it is by giving it new, legal meaning and content.
processed knowledge. It is knowledge in confused symbols and images, a fantastic representation of the 'yet to come', a Cassandric prophecy, which causes fear and is indeed meant to cause fear in the manner of a threat of violence. At the same time, it reassures those who consider themselves good, decent and law-abiding citizens. If they are wronged, justice will be delivered, the culprits will be apprehended and punished, peace will be restored. Thus it strengthens their faith and along with that it establishes and expands its own dominance.

Let me translate the above observations in terms of linguistic philosophy. In chapter 1 I gave a very brief account of Austin’s theory of speech acts a propos of reconstructing Habermasian discourse theory. Austin drew a distinction between the three separate acts performed with every utterance: the locutionary act, i.e. the utterance itself, the illocutionary act, i.e. what is being done in speaking, and the perlocutionary act, i.e. the act performed by speaking, the effect of the utterance on the listener. A rule expressed in the way I have described potentially gives a different meaning to these speech acts. On the perlocutionary level, there is an utterance in indicative, future tense. The illocutionary, as meant by the sender of the utterance, is that of a constative act, a norm addressed to the receiver. However, this is not put properly across. Indicative introduces performative acts, it describes in a matter of fact way. The use of imperative on the locutionary level affects the perlocutionary act of the receiver. The rule is perceived as a warning; or a prediction; or a fact. In any case, it is threatening.

Normativity is not meaningful without the freedom of those, who are to follow the rule. Having the obligation to do something (to adhere to Hartian linguistic distinctions) only makes sense as limitation of one’s free will on grounds of reasons. On the other hand, the predictability and certainty implied by the statement of norms in indicative and future tense pushes free will and choice to the periphery. Once the preconditions of an occurrence have been met, there is nothing one can do in order to prevent the event. One’s powers are limited to managing the conditions. Deliberation and discourse concerning the law ceases being practical and becomes theoretical. Norms acquire a truth value rather than a rightness one.

69 See Jackson, 1995: 52 ff. concerning speech acts in the law in general.
70 In chapter 1 of this thesis I am referring to Derrida’s account of the overflowing of the performative, which is prior to and to the detriment of the constative and therefore justice.
Or this is the impression the law creates. Legal discourse does not really become theoretical. Legal norms and judicial decisions are still criticisable on grounds of *rightness* and *not truth*. However, they are ascribed this sense of natural inevitability and this feeling reduces one’s free will to the decision whether one will breach the law or not and not whether it is right or wrong to break or follow a rule or, in other words, to bring about the operative facts. As a result the assumed rightness of legal norms is being consolidated and discourse is being limited to the factual side of rules.

**THE INHERENT CONTRADICTIONS OF THE RULE OF LAW**

The law, unlike morality, is more than just a set of norms. It depends operationally on a whole cluster of norms, practices and agencies, which do not and cannot show the same sensitivity to change as language can. In other words, the enterprise of the law involves more than just interpretation. The law is also about what Cover (1986) calls the field of "*pain and death*". The obvious exaggeration draws nonetheless our attention to the pragmatic aspect of the law, the dependence of legal normativity upon the real functional conditions of the legal system. The law is not just a set of reasons facilitating judgement. It is also *action* and, moreover, action organised and carried out within a very complex structure.

Since the law is more than language, since it is deeds as well as words, interpretation itself does not suffice for the adjustment of the law to change. It must be coupled with institutional, co-ordinated action. This clearly gives rise to numerous problems. If act *O* is deemed wrong and illegal, action is taken in order to implement this decision. When the moral-political decision is made that *O* is *not* wrong and therefore *should not* be illegal, it takes an immense effort for legal institutions to adapt their action to the new judgement. The problem becomes crippling, when one thinks of the impossibility of undoing what has been done. In this section I relate this discrepancy between words and actions to the rule of law. In particular, I argue that certainty as non-retroactivity and universalisation as constancy through both time and space are conflicting ideals.

The law cannot and will not admit to being wrong. It can be handled mistakenly, but it does not itself err. One of its principal aims is to create an environment of predictability, a sense
of physical and normative stability, in which social life can develop efficiently and peacefully. Apart from that it also raises a claim to rightness\textsuperscript{71}. Such a claim is a necessary counterpart of the demand for stability. This equilibrium seems to be upset, whenever some change occurs in the way the law normatively perceives the world. Some formula must be found in order to make sense of that change. In other words, the law must justify what it has already done without conceding it was ever wrong.

Release from this paradox is provided by the invention of the rule of law. The temporal aspects of it are dictated by both the need to rationally and fairly organise expectations in time and by the pragmatic need for institutional co-ordination. The principle of "nulla poena sine lege" is the best example. It reveals the inability of the law to reconcile universalisation with predictability. When a political decision is made that a certain behaviour is morally wrong and is therefore deemed illegal, the principle of non-retroactivity does not allow the re-evaluation of past actions. The absurdity in that is revealed, when seen from the opposite point of view. When an act or behaviour is being decriminalised, those punished for it in the past have to withstand the rest of their punishment, because they are being punished for breaching the law rather than a particular rule, their lives are regulated by the rules of punishment rather than those concerning the original unlawful act.

The rule of law embodies both the needs for universalisation and predictability. Since universalisation is promoted as the decisive criterion of justice, its temporal dimension cannot be ignored. In other words, a substantive judgement must remain unchanged irrespective of one's point of view at a certain time and irrespective of any changes in the future. In other words, transcendental moral truths must transcend both space and time. Note that this is a conceptual requirement of universalisation. Any concession from that understanding of universalisation already relativises it. Günther does precisely that by introducing the weaker principle of universalisation, according to which that is right which would be followed by everyone under unchanging circumstances\textsuperscript{72}. My aim here is not to prove that justice cannot be done without absolute universalisation. What I am seeking to show is the inherent contradiction in the ideal of the rule of law by arguing that

\textsuperscript{71} The reader might be puzzled by the fact that I seem to be endorsing discourse-theoretical language (see chapter 1). What I mean here is that the law does indeed claim to be right without saying that it can actually substantiate this claim.

\textsuperscript{72}
predictability and universalisation are incompatible. Günther's weak version of
universalisation and his theory of application do not affect that relationship between
predictability and universality.

Back to the rule of law requirement of non-retroactivity, which can be reconstructed
schematically as follows: A was wrong at a point in time \( \chi \) but not wrong at time \( \omega \).
According to the concept of universalisation this is impossible. A must always and for
everyone be either right or wrong. As I have already said in the previous paragraph, I shall
overlook that difficulty and concentrate on another problem. Namely, let me see what
happens to action taken on the grounds of a norm, which changed in the course of time. I
shall once more use punishment as an example. Let us suppose that \( O \) was imprisoned for 10
years at time \( \chi \) for committing offence A. At time \( \omega < \chi + 10 \) A ceased being considered
wrong. However, the temporal features of the rule of law want \( O \) to remain in prison until
time \( \chi + 10 \). The reasoning can be reconstructed as follows: at time \( \chi \), \( O \) is being punished
for A. A is at time \( \omega \) no longer wrong. It logically follows that \( O \)'s punishment must be
ended. However, it is not, because the reason for his punishment has already changed. S/he
is no longer punished for A but rather for the maintenance of the systemic coherence of the
legal system, for the preservation of the sense of certainty and predictability, which the law
wants to establish. But then the law has lost view of the essence and the prerequisites of
discourse as well as justice. People are reduced to instruments for unjustified ends. More
importantly, non-retroactivity goes against its very aim, that of predictability. It is not
enough to know that one will be punished. It is vital that one knows what s/he is being
punished for! Even if the original justificatory discourse was just, its outcome has already
unilaterally, arbitrarily and authoritatively changed.

The inherent contradiction of the rule of law and its detrimental effect on discourse are
obvious. Universality and predictability can only be maintained at each other's expense. The
tension between law and justice, which translates into the tension between legal and general
practical discourse, is forcefully revealed in that contradiction. Endless and flexible justice
that is always deferred to the avenir and is embodied in the requirement of universalisation
through space and time, is compromised by the need of the law to diagnose an irreversible

\[ \text{See chapter two for a more detailed account.} \]
end and thus compartmentalise history; a need which is satisfied by non-retroactivity. Thus legal discourse is distanced even more from general practical discourse, as their temporalities are radically different.

CONCLUSION

Alexy (1989a) treats the temporal constraints of time as rather trivial and to a certain extent they are trivial indeed. The law obviously regulates the temporal dimensions of discourse. Deadlines must be set, the temporal limits of legal relations of people to things or other people or the time of discourse in the strict sense, like for instance the trial, must be somehow determined and so forth. At this stage one can still argue successfully that these are not immanent and insurmountable constraints of discourse; that the regulation of time is merely a functional prerequisite of the effective development of discourse.

In this chapter I tried to draw a stronger connection between law and time and put forth a more powerful critique of the confinement of legal discourse. I concluded that the law colonises the temporal boundaries of legal discourse by reserving for itself the divine privilege of determining the end of the discourses that it regulates from a distance, while it remains infinite and timeless. I also offered an alternative epistemology of time, which again relates time to the end but contains it in the self, under which the law’s operative ability would be cancelled. Under timeless law the conditions of discourse are distorted not least because the participants are deprived of the freedom to reason. I also argued that under the rule of law after action has been taken, it cannot be revised. That reveals an inherent contradiction between the requirements of universalisation and predictability as well as the subordination of legal discourse to the systemic imperatives of the legal institution.
CHAPTER FOUR

ΑΛΗΘΕΙΑ / ALETHEIA

FACT-FINDING AND LEGAL DISCOURSE

INTRODUCTION

I have defined aletheia as a dimension of legal discourse. Apart from rules, legal discourse is also about the world of facts and events. It is the dimension of aletheia that makes legal discourse socially relevant. It is also the crucial factor determining the popular assessment of the law. We customarily think of the law as practices rather than rules. Therefore it is important to us that the judged actions are described accurately, as it is an indispensable precondition of justice. For precisely that reason, it is on the level of fact-finding that the law is criticised the most heavily. Lawyers are slandered as liars, the police are elevated to the most central institution of justice and judicial decisions are appraised on the basis of whether the facts were successfully ascertained or not. But it is not only popular opinion condemning the law on these grounds. Numerous theories of diverse backgrounds and agendas are critical of judicial fact-finding.

In this chapter I offer a critique of legal fact-finding in the light of the general scope of this thesis. Namely, I want to show how the law’s adherence to an epistemological paradigm as well as its need to act are manifested as constraints of legal discourse on the level of fact-finding.
In the first part I critically examine three critiques of the judicial ascertainment of facts: Frank’s realistic fact-scepticism; Bankowski’s and Mungham’s critique of legal fact-finding as a substantive venture; Bennett and Feldman’s account of the obstacles of communication in the courtroom and Jackson’s related theory of adjudication as a comparison of narratives. I also give an account of MacCormick’s defence of legal fact-finding as a coherent and consistent venture in combination with a referential perception of historical truth. In the second part I develop two arguments against legal fact-finding from the point of view of the constraints of discourse combining arguments from Frank, Bennett and Feldman, and Bankowski as well as the literature I have already taken into account in the thesis. My first argument is that in order for the law to operate, it must rely on an epistemological presupposition, that is beyond scrutiny. Secondly I argue that because legal norms use the truth as an operative prerequisite, legal discourse is inevitably constrained.

THREE CRITIQUES AND ONE DEFENCE OF LEGAL FACT-FINDING

JEROME FRANK’S FACT-SCPTICISM

Amongst the American Legal Realists, fact sceptics drew attention to the fact that as well as an instance of rule following the trial purports also to be a process of discovering, ascertaining and establishing facts. The distribution of substantive justice depends on both the correct application of the appropriate and right rule and the correct and accurate diagnosis of the facts.

Prominent amongst fact sceptics, Jerome Frank based his critique of legal fact-finding on a general critique of formalistic legal culture. In his Law and the Modern Mind he challenges the demand for an impossible legal stability, resulting from an infantile longing to find a father-substitute in the law (1949:178)
He criticises the ‘basic myth’ that the law guarantees certainty and justice under all circumstances. Frank ridicules this childish longing for a fatherly presence, which is manifested in institutions “guaranteeing” generalisation, impartiality, and predictability, such as the big legal codifications, the jury and so on. According to Frank, the law far from offers such stability.

According to Frank, the certainty allegedly guaranteed by the law is only a product of ‘rationalisation’, that is the ex post facto justification of pre-taken positions with invented, so to speak, principles. Judges operate in the same manner. Depending on their biases, they form an idea of what the decision ought to be from a very early stage of trials. Legal reasoning is not of the ideal form “major premise → minor premise”. In reality, it works the other way around. Judges discover the ‘appropriate’ rules in retrospect and only after they have formed an idea of how they are going to decide, which is again a form of what Frank terms as rationalisation. It has to be noted that it is not necessarily a process that happens consciously, or that there is conspiracy panic in Frank’s arguments. His argument is, however, that it is a psychological fact that judges are not and cannot be the sound arbitrators, which the ‘basic myth’ must rely on.

Aside from the rationalisation of judicial decisions shrouded in the ideology that there are definitive rules for every case, the fundamental myth of the possibility of the harmonious combination of certainty and predictability with justice is also maintained on a different level, namely that of fact-finding. In his Courts on Trial, Frank criticises legal finding on various grounds, which have one common denominator: the ‘discovery’ of truth in the course of a trial is subjective and biased.

According to Frank, the process of adjudication has not (and I say has because very little has changed in the trial process over the past half century, therefore it is unlikely that Frank’s arguments would be different today) yet advanced from reliance to magic to rational order. In primitive societies, the truth was established by way of ordeal, be that of a material, corporal character or a spiritual one such as the oath (1950:37ff.). Only thus could those judging tell whether the witnesses were telling the truth. The ‘rationalisation’ of law, Frank argues, has not signified the end of the era of magic but merely the transition to a different kind of magic, one indeed much less square than the primitive one (ibid.:47) Processes of
fact-finding will always be haunted by subjectivity either because not enough information is available or because the judge or the jury are fallible and thus unable to ascertain the truth. Therefore, the final judgement always relies on a leap of faith, a magical moment of assuming that the judge or the jury are insightful enough to correctly evaluate the produced facts. That ‘modern legal magic’ is based on the faith that the rules have the power to filter the facts and lead the fact-finding procedure. Behind the faith that subjectivity does not affect substantively the decision-making process Frank finds the:

magical notion that uniformity in the use of precise legal rules must yield approximate uniformity in the decisions of specific cases, if only the judges conduct themselves properly (ibid.:61)

To make his point he uses a counterintuitive argument. For the sake of the argument he assumes that the judge or the jury can do their duty well and that they can assess the presented facts. Subjectivity infiltrates the process from its other end, that of input of information. Frank identifies numerous problems with the presentation of information before a court. He distinguishes between the ‘fight’ and the ‘truth’ theories of fact-finding (ibid.:80ff). He argues that modern legal systems are by and large based on the former. The discovery of the facts usually takes place in an adversarial way, which is, as Frank argues, a continuation of the private brawls that used to settle disputes in pre-modern periods. He claims that the trial system is always contentious even though often the official rhetoric is that the court is after the truth and the trial is not just a matter of which of the parties will win by presenting the better argument or by undermining the efforts of the opponent. The antagonistic form of the trial has a number of consequences, most of which can be reduced to the fact that the parties take strategic action73 in order to win their case and therefore the outcome is always biased by their subjective input. That subjectivity is manifested in a number of ways. Firstly, there is the manipulation of witnesses by the lawyers. (ibid.:81ff). The process of giving information to the court and especially cross-examination can be a particularly intimidating experience74. The theatrical placement of the witnesses in the box confronting wither the court of the lawyers and the parties; the ceremonial procedures; the confusing jargon inaccessible to laymen; the dramatic, aggressive or only suggestive way

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73 Compare Alexy’s (1989a) and Habermas’ (1971) account of the strategic action of the parties during a trial.
74 See Garfinkel 1956.
the lawyers address the witnesses or the preparation of questions and the ‘coaching’ of witnesses; these are but a few factors affecting the evidence given to court. Then things can be reversed. Even if we assume that we have the most conscientious of lawyers that do not wish to tamper with the truth in any way, the witnesses might still do so either consciously or not (ibid.:85ff). Firstly, there are very few and inconclusive ways of knowing when one is lying. Secondly, witnesses might change their testimonies even inadvertently. When they are questioned, they can discern what the aim of the lawyer or the judge is and accordingly direct their answers depending on whether they want to help or undermine the advocate’s effort. Moreover, the role of material inequality should not be underestimated (ibid.:94ff). Those, who cannot fund a battle in court are certain to lose, precisely because the outcome of their case depends on their efforts and input and not on the ability of the court or other legal institutions to discover the true facts. According to Frank, this inequality in access to legal justice apart from the inadequacy of judicial fact-finding that reality also reveals time a serious democratic deficit of modern states.

Frank analysed separately the institution of the jury (ibid. 108ff.) In a nutshell his argument is that even if the jury could confine itself to the ascertainment of the facts and did not assume the substantive role of defining the parties’ rights or interpreting/creating rules, it would still be unable to get to the truth of the matter for more or less the reasons I mention above75.

Frank’s critique of legal fact-finding revolves by and large around the previous points. However, it is worth mentioning another argument of his, which differs to the rest in the sense that it does not focus on the distortion of verbal communication or the inadequacy of the input of information in the courtroom but with the very form of communication; namely, a psychological argument76 from Gestalt theory (ibid.:165ff). Crudely, according to Gestalt theory perception is not always exhausted in language. There are ideas and thoughts that are two complex to be expressed propositionally in the linear and orderly way, in which

75 This view is not uncontested amongst American legal realists. Pound and Holmes were of the opinion that the institution of the jury was a mechanism testing the law against social standards. See Holmes 1889; Pound 1910. For more recent critical accounts of the jury see: Findlay and Duff (eds.). 1988; in the vein of Frank’s critique, Baldwin J. and McConville M. conducted an empirical research of verdicts juries’ against the views of experts, such as judges, the police and so forth (1979). Bankowski (1988) criticises this approach, precisely because it commits the fallacy of assuming the rightness of the official version of the truth.

76 For psychological accounts of the trial see indicatively: Lloyd-Bostock 1988; 1981.
language operates. Frank refers extensively to Susanne Langer’s work (ibid.:172ff). In her words:

“this restriction of discourse sets bounds to the complexity of speakable ideas. An idea that contains too many minute yet closely related parts, too many relations within relations, cannot be 'projected' into discursive form; it is too subtle for speech” (quoted by Frank ibid.:172)

In those cases, in which the object of perception is too complicated to be propositionalised, perception can only take place in wholes. Langer illustrates Gestalt with melody as an example: we do not perceive of the melody as each separate note and pause. We register it as a continuum, as a whole.

Frank applies Gestalt theory to the legal fact-finding process. The judge or the jury, he tells us, do not and indeed cannot verbalise all the information they are exposed to. Their reaction to evidence is a combination of rational assessment of data, emotions and intuitions. Precisely because the perception of facts as presented before the courts is to a large extent extra-linguistic, it cannot be compared to and described by rules. The containment of that Gestalt experience in rules can only be a selection of certain propositional elements of that experience. Therefore, the application of the rule is selective and it cannot do justice to the situation or the parties.

Frank’s use of Gestalt is insightful and promising, if incomplete. Bernard Jackson (1988:14) points out that Frank does not quite drive the argument from Gestalt theory home. According to Jackson Frank’s claims are exhausted in the claim that communication is also possible with means other than language and that external stimuli can cause decisions. This, Jackson argues, does not challenge the belief that external reality can be fully represented and communicated. Frank adheres to a referential understanding of the relationship between facts and statements thus disregarding the intensionality of processes of representation. Thus his critique of legal fact-finding is critically undermined.

Indeed, this is the most crucial shortcoming of Frank’s critique. He seems to assume the existence of an objective truth, even if its discovery is impaired by the ways, in which courts go about looking for it. This underpinning belief becomes evident by the fact that Frank
proposes some practical solutions to the fact-finding problem, such as improvement of legal education, the psychological screening of judges and jurors and so on. Thus he overlooks a logically prior question, namely whether there is a truth that can be objectively found and ascertained and what kind of a truth that is.

Despite its shortcomings and its at times rather crude character Frank’s scepticism should not be easily discarded. His critique is not exhausted in the truism that the truth cannot be found in court because our memory can easily fail us or because lawyers are liars, as seems to be a rather common view. Although he overemphasised such points and thus rendered his criticism ‘incidental’, if expanded many of his arguments can lead us to problems inherent in the law. To return to the terminology of this thesis: In Frank’s fact-scepticism there are tacit references to immanent constraints of legal discourse imposed by the law. Later on in this chapter I shall show that, although his reference to Gestalt fails in psychological terms, it is insightful in that it implicitly grasps the complex relations at play in legal discourse. Moreover, his critique of modern legal fact-finding as a different kind of magic alludes tacitly to the fact that, just like magic, the law operates with a distinct rationality of its own, an internal coherence, which cannot be accessed from outside.

**BANKOWSKI ON THE INEVITABLE AXILOGICAL SUBSTRATUM OF FACT-FINDING**

Bankowski (1981) puts Frank’s fact scepticism in perspective. He argues that Frank’s attack of the adversarial system of discovering the truth does not necessarily reveal a realistically critical attitude towards the trial process or the law as a whole. Implicit in Frank’s thesis is the assumption that the truth can be discovered and that the accurate reconstruction of true events is due only to a methodological problem of procedure. Therefore he trusts that it can be remedied with a few amendments in the organisation of legal institutions. In the terminology of the present chapter, the discovery of the truth is an incidental constraint of legal discourse. Bankowski then refers to MacCormick’s test of coherence and consistency in legal reasoning which is extended from reasons to facts. What is sought in the trial process is the construction of coherent stories, which accommodate plausibly the pieces of concrete evidence. As for the accusatorial, adversarial form of the process not only does it impede the discovery of the truth but it actually facilitates the testing of the stories presented before the court.
Bankowski puts forth an argument, which still revolves around the reconstruction of events in the courtroom and the role of the jury in deciding on the truth of the facts. However, his argument goes beyond the pragmatic aspect of the trial and draws attention to an immanent feature of legal fact-finding. He sees a flaw and a potential great danger in the epistemological claim that the truth of the matter can be discovered in a merely representational way, that is without any method and theory underpinning the process of discovery. In other words the truth of the matter cannot be seen disjointedly from justification. If the search for the truth is separated from any kind of normative basis, there will be no constraints in the collection of evidence. The reasons justifying the method vary between various instances of the discovery of truth. For instance, the police are not constrained by the same rules when acknowledging the probability of someone having breached the law by arresting him/her as the jury when actually convicting the accused. The problem according to Bankowski is that, since justification is inevitable in the discovery of truth, the jury have a clearly substantive role in the trial process. The danger lies not in their perception of the facts but to the extent to which the jurors have exceeded the (justificatory) powers allocated to them by procedural rules.

It is not a question of whether the jury, in some absolute way, get it right but whether they fulfil their allotted role in the system (ibid:266).

In Images of Law Bankowski and Mungham put forth a more militant and far-reaching critique of legal fact-finding (117ff). They criticise the dominant view that facts are a-historical and a-temporal, so they can be reported as they really took place. They subscribe to a relativistic epistemology, according to which the truth (or at least historical truth), is inevitably the product of the dialectic relationship between consciousness and the world. Facts are not radically separated from perception. In that respect Frank is wrong, according to Bankowski and Mungham (ibid.:118). He seems to be relying on science as the only way vehicle of rationality. State law and its institutions base their operations on precisely the same premise. Science guarantees objectivity and that, in turn, guarantees justice. However, Bankowski and Mungham tell us, the reductionism in the first part of that equation is already a fallacy. The outcome of scientific research is not infallible statements about the world as it really exists waiting to be described. These results are already social, they exist in the world and they are connected to a decision, which is to a large extent extra-scientific.
So mainstream, axiologically and socially laden science is utilised and perpetuated by courts thus precluding alternative understandings of the world and their political, social and moral substrata.

From a substantive point of view, Bankowski and Mungham’s critique of fact-finding on grounds of the necessary axiological character of that process is not entirely convincing. They are probably right to reject the reductionist understanding of the world as a correspondence between statements and actual events. However, the alternative they offer is not necessarily that powerful either. They enter a debate touching on epistemology and ontology without seeing it through.

Nevertheless, their critique is valuable on a meta-theoretical level to the extent that it concerns the structural inability of the law to make sense of other understandings of the world of objects and facts. This is indeed a main crux of this thesis as well: that the law must deploy a fixed epistemology in order for it to operate normatively. However, this is an analytically different question to whether that epistemological paradigm is correct or not. What is revealed in that is the rigidity and communicative inability of the law rather than its epistemological inadequacy. Bankowski’s analysis of the inevitable underpinning of substantive justification of fact-finding is also insightful. I shall refer back to it, when I speak of the normativisation of the picture of the world presented in the courts.

**SOCIOLINGUISTICS, SEMIOTICS AND THE LAW**

The sociolinguistic critique of the law is rooted in Frank’s fact-scepticism. Their difference lies in that Frank focuses mainly on the sociological problems of delivering justice through the medium of law whereas sociolinguistic realism concentrates on the problem of the language of the law.

The focus of sociolinguistic legal critique is the development of narrative in the courtroom and the way that affects substantively the effort to reach right decisions. According to Bennett and Feldman (1981), whose *Reconstructing reality in the courtroom* is prominent amongst sociolinguistic treatises on courtroom interactions⁷⁷, the rightness of judicial

⁷⁷ See also Atkinson and Drew 1979.
decisions depends, amongst other factors, on the representation of events and the reception of that perception by the judge and the jury. That representation is an instance of storytelling.

Stories are systematic means of storing, bringing up to date, rearranging, comparing, testing and interpreting available information about social behaviour (ibid:5).

The jury, as the main audience of courtroom storytelling, operate

much like someone reading a detective novel or watching a mystery movie replete with multiple points of view, subplots, time lapses, missing information, and ambiguous clues (ibid).

It depends on the interpretative ability of the jurors whether they will be able to decipher correctly the various symbols used in courtroom narrative and show the analytic capacity to evaluate the elements of the story without being influenced by the way events are being reconstructed. As for social and other biases, they come into play indirectly in the sense that they are triggered by the narrative, when there is a discrepancy of cognitive or axiological backgrounds of the two communicating parties78.

Bernard Jackson (1988) recognises the value of Bennett’s and Feldman’s work, especially because they transcended without ignoring mere sociological or anthropological critique of judicial fact-finding and focused on the narrativisation of the truth. However, he also points out an important shortcoming. Bennett and Feldman show an ambivalence as to whether they opt for an explanation of courtroom interactions in terms of discursive, intensional frameworks or whether they resort to a understanding of truth as correspondence between utterances and events. Because of their reluctance to perceive the pragmatics of courtroom interactions in terms of narrative, their project of shifting focus from semantics to narrative is undermined. Jackson believes this weakness can be overcome with recourse to semiotics

78 Bennett and Feldman explain the processing of information through the listener’s cognitive and normative background with reference to the concept of “symbolic triangulation”: “Certain symbols are placed in structural proximity, their mutual relationships are established in light of the central action, and these relationships in turn clarify the general significance of the central action.” (ibid:49)
This is to a large extent informed by the ethnomethodology of Garfinkel and Cicourel. See Garfinkel 1967; Cicourel 1964 and 1972.
and the assessment of the narrative coherence of stories told in the courtroom. This will be achieved by rejecting any correspondence theory of truth and by adhering to an intensional model of narrative semiotics and by completing the narrative with reference to psychological processes in the course of the trial.

Jackson takes his analysis even further and draws a strong connection between rules and facts, and subsequently narrative and justification. He looks at Biblical and older law examples (ibid.:97) and concludes that the distinction between norms and facts is only a by-product of the codification of laws and the professionalisation of legal practice. The emergence of law as a separate profession and discipline led to an increasing abstraction of rules and their categorial separation from facts.

The difference between the modern, abstract legal rule, and the ancient narrative model has a sociological as well as a formal dimension. The abstract model requires specialisation and training; one has to know how and what to abstract, before one can deduce. (ibid.:98)

However, Jackson argues, this separation is neither universal nor necessary (ibid.:90). Apart from facts norms too are narratives. Therefore, adjudication is not a question of inference from a major and a minor premise, as the positivist school of deductive justification want it. This is in fact impossible according to Jackson, because abstract and diachronic rules can only relate abstract and diachronic conditions to universal consequences. But they cannot refer to real cases, there can be no inference from the combination of a rule/major premise and a set of facts/minor premise (ibid.:37ff.). Decision-making is rather a process of structural comparison of two separate narratives: that of the norm and that of the facts. In other words, the justification of decision-making is a case of narrative pattern-matching. The frequent difficulties in this matching of narratives explain the existence of ‘easy’ and ‘hard’ cases in legal reasoning.

Bennett and Feldman’s research is indeed notable to the extent that it revealed the substantive importance of the presentation of facts in court for the final outcome of institutionalised legal discourse. However, I think that Jackson’s critique of their theses as self-undermining -because in the last instance they still adhere to a referential theory of truth- holds. The assumption that the problem is one of communicating the objective
confines the critique of the law in intra-systemic arguments, in suggestions of how the law can become better both in the sense of effectiveness and justice. However, the prior question is whether the law can become better in the first place. In this context, it is a matter of whether a genuine and undistorted connection of the law with facts can be drawn at all. So, especially when viewed and assessed from the point of view of the relationship of the law with legal discourse, which is the main crux of this thesis, Bennett and Feldman’s analyses are not very helpful, albeit extremely insightful, if they are not expanded.

Jackson’s critique on the other hand comes closer to the problem. By collapsing the distinction between norms and facts on the level of narrative, Jackson voices the suspicion that the law is a primarily pragmatic order, which can only operate by means of interacting with the world. That interaction takes place either as an understanding and description of the world or as actual, active intervention. The fact that norms can take a narrative form means that the law already has a story to tell. That story is predetermined and it necessarily biases the outcome of legal discourse.

In the following section I give an account of Neil MacCormick’s defence of legal fact-finding on grounds of coherence. As MacCormick’s arguments were developed to a large extent in the course of a debate with Jackson, I shall refer to the latter again.

**NEIL MACCORMICK AND THE DEFENCE OF LEGAL FACT-FINDING AS A COHERENT VENTURE**

As I have already said, when discussing Bankowski’s critique of legal fact-finding, MacCormick extends his thesis on coherence as a prerequisite of legal reasoning (1978) to fact-finding. He claims that we can safely draw conclusions about the truth of historical facts based on a theory of coherence,

> coherence being presented not as a theory about the meaning of ‘truth’, but as a theory about procedures for proof of all such statements as cannot be directly checked for their present correspondence with present facts (1980:47)

However, coherence comes into play only when there is no direct evidence concerning the facts. MacCormick places his argument firmly within a correspondence theory of truth. Skeptical of relativistic scepticism that rejects the law as having nothing to do with the truth
(1995:116), he maintains that objectivity is possible and that there is a reality accessible by our senses (1991). Albeit that narratives are important and indeed inevitable, the truth is not exhausted in them. As far as facts produced in court are concerned, it is of course true that our only access to them is by way of interpreting narratives. And assessing those narratives is already an evaluative affair. Moreover, most of the truisms about the fallibility of perception, memory and so forth are true. Nevertheless there are mechanisms capable of successfully testing stories, coherence being the most prominent and important amongst them.

As far as the possibility of the normative coherence is concerned, MacCormick insists that application/instantiation and classification are indeed possible. Although there is indeed a problem with the inference of conclusions from major and minor premises, that problem is not one of reference (1991), it is one of universal instantiation. Reasoning is a combination of interpretation and classification. And he concludes that:

[T]he problem of matching major and minor premises in a normative syllogism is the problem of securing sameness of sense of the predicates deployed in both. Narrative modes of argumentation can have real value here, but not to the exclusion of other modes. That it is only in minor premises that predicates are used referentially, with reference to particular features of particular concrete cases, while their use in major premises is non-referential, poses no difficulty for this theory (1991:174)

To conclude, for MacCormick narrative coherence can guarantee the success of the ascertainment of facts and in combination with normative coherence, it can guarantee the justice and fairness of the outcome.

William Twining (1983) subscribes, rather militantly indeed and by vehemently rejecting most kinds of scepticism, to what he terms the rationalist theories of evidence and proof and summarises the fundamental assumptions of such theories (ibid.:141). Such theories pivot on these theses amongst others: partial objective knowledge of the world is possible; the ascertainment of facts is to a large extent a question of probability falling short of absolute certainty; judgements about these probabilities is largely a matter of common sense; the importance of the discovery of truth can be overridden by other considerations; aside from accuracy in fact-finding there are also normative factors, such as human rights that ought to
be taken into account. Twining claims that going about discovering the truth in such a rational manner can guarantee the justice and fairness of the outcome.

I said in the second chapter of this thesis that a logical link between facts cannot be established albeit that there can be a conceptual proximity between events facilitating the transition from means to ends. Moreover, I argued that causal links between events projected in the future are necessarily inconclusive and contingent. The same can be said about facts that took place in the past. We have no way of establishing a logical connection between facts. This and the fact that past events can never be represented fully and must always be in narrative form is precisely what makes MacCormick turn to the concept of coherence. But MacCormick does not seem to take into account that this concept is not substantive. Coherence does not offer us any way of ascertaining the truth of a narrative. Coherence is still in need of a substantive content. A cohesive element is urgently required. Jackson also contests the conclusion at which MacCormick arrives. Although he relies on a kind of coherence himself in the sense of the integrity of the narrative and the narrator, he argues that MacCormick fails to account for the cohesive element of these stories (1988:18ff). In order to assess the coherence of a referential narrative, an evaluative decision has already been made. Whether that be 'common sense' or 'science', there is a presupposed paradigm underpinning the judgement as for the coherence and plausibility or truth of a story.

**LEGAL FACT-FINDING AND DISCOURSE**

So far I have given short critical accounts of some prominent critiques of legal fact-finding and one powerful and adamant defence of it. They can be summarised in the following three theses:

1. It seems that legal fact-finding is biased either due to the strategic manipulation of evidence or in a more immanent way with the inevitable filtering of the representation of facts in court.
2. Apart from it not being safe, legal fact-finding is not a value-free venture either. It is laden with evaluative judgements from the very outset.
3. The counter-argument to these theses goes: not all truth is inaccessible and the combination of evidence with the concept of coherence can help complete the jigsaw puzzle of the past.

Let me now approach legal fact-finding from the point of view of the relationship between law and legal discourse. I shall begin by discussing the last of these three theses. By way of analysing and criticising it, I put forward a critique of legal fact-finding informed by the first two theses and by my general argument concerning the constraints to which legal discourse is subjected by the law's adherence to an epistemological paradigm and the need for action.

THE LAW'S COMMON SENSE

Let me use an example introduced by MacCormick, namely that of Burke and Hare (1980:47ff). According to the report of the police the dead body of a woman was found in William Burke's house and it bore bruises, which, according to the coroner, could have been caused either before or after the death of the woman. Other witnesses testified that Burke was seen drinking in a public house with the woman the day before her body was found. It is impossible for one not to suspect that Burke did indeed murder the woman. MacCormick finds the story plausible, because it is coherent:

(i) all the propositions of fact stated are mutually consistent there being no contradictions between any of them, (ii) general principles of causation indicate that the death of the body could have been caused by a violent act, (iii) general principles of motivation indicate that the accused had reason to wish her dead, viz. the price her corpse would fetch him (1980:48)

The obviously weaker link under (ii) was relieved by Hare, who obliged (after having been promised immunity from prosecution) by testifying that he saw Burke killing the old woman. To cut a long story short, Burke's guilt was proved beyond reasonable doubt.

The story put together by the Crown in the Burke case is indeed coherent. Its coherence makes it more plausible than an incoherent story. An incoherent story is less likely to be believed, not least because it raises suspicions about the credibility of the narrator. Nonetheless the fact that a story is coherent does not suffice. One also needs to justify or explain this coherence, one has to produce a theory bringing all the evidence together in a coherent whole. There is no logical connection between the fact that Burke was seen
drinking with the woman and the fact that her corpse was found in his house on the one hand and the conclusion that he murdered her on the other.

The story of Burke’s guilt becomes plausible only after Hare’s direct testimony. Without his evidence, even if the credibility of the witnesses is established and all the reported details are somehow proven, Burke’s guilt is still not ascertained. Nevertheless it seems true and one would be very reluctant to object to the court’s decision. I maintain that this has to do with reasons entirely unrelated to the story itself. Firstly, one would never today question that Burke’s conviction was a miscarriage of justice. That would amount to questioning a whole legend and with it a large part of our literature, let alone that it would seriously shake the tourist industry in Edinburgh! For us it is already proven that Burke did kill people and provide them to Dr. Knox for experiments. There is no question whether Burke is guilty or not, because Burke has ceased to be a real person altogether. Burke is Burke because he is guilty of these crimes. Secondly, even if we manage to mentally project ourselves at the actual trial, the biases at play would be shocking. Dr. Knox was involved in that trading of corpses and thus in one way or another instigated or at least encouraged the murders. This is a fact and it also affects the applicable rules, as it can freely be argued that the doctor took advantage of Burke’s poverty and perhaps his moral weakness, which was of course due not to his moral predisposition but to his upbringing and his exposure to a particular social surrounding.

His story thus told, Burke becomes a folk hero. Whether the decisive bias is inherent in the narrative or is bound to the listener is of minor importance here. What must be emphasised is that the element lending coherence to the story thus making it sound true is external to it. It must also be pointed out that that cohesive element is of paramount significance, because not only does it cover the pragmatic aspects of the story, it also has a bearing on their substantive evaluation. In my version of the story Burke might have killed the woman but he did not do so cold-bloodedly but with remorse and only because he was forced by his need.

So, we can conclude that what makes stories coherent is still elusive and magical, to allude to Frank. Jackson argues that MacCormick explains the ‘general principles of causation and
motivation’ by reference to common sense\textsuperscript{79} but at the same time he turns to science looking for help with problems of probability (1988:19). So there are already some strong candidates: common sense, science, the pre-understanding of the case and a respective decision as to what questions will be asked (note how in my story I asked why Burke is innocent or at least less liable rather why he is guilty and ought to be hanged). One could think of a lot more elements lending coherence to stories told in court.

I shall not look at the substantive viability of these epistemological models. What I am interested in is whether they can be put to the test in the course of legal discourse. I begin by examining common sense and I argue that all law embodies a certain amount of ‘common sense’ in the sense that it is based on discursively unredeemable presuppositions.

To be sure some stories make sense precisely because they are coherent and consistent, even when we lack all the necessary information. When someone is seen standing by a dead body, which has just been stabbed to death brutally, holding a knife in blood-stained hands still screaming abuses to the corpse, one would be right to suspect that that person committed the murder. Although it is still not entirely certain and it is up to a good defence lawyer to ask different questions and shed light to different aspects of the story or add prior or future events that change it altogether, let us assume that there is such a thing as common sense that make the story coherent and therefore plausible. Then we have to ask what precisely common sense is.

Common sense is a picture of the world shared by everyone or at least by an overwhelming majority. The other meaning of ‘common’ reveals something equally crucial: common sense is not elaborate. It is average, ordinary. Therefore it is always vulnerable and exposed to criticism. After it is put to the test, it ceases to be ‘common’, it becomes specialised; from presupposition of research it becomes knowledge itself. Because common sense cannot be talked about, because it must remain in silence, once a commonsensical view is questioned and problematised, the commonality or ordinariness of it cannot be deployed for its

\textsuperscript{79} The fact that some kind of magical common sense is at play in the course of a trial was noticed as early as 1914 by Paul Vinogradoff. Indeed Bennett’s and Feldman’s study is to a large extent an effort to understand how this common sense is formed and triggered during the trial (Bennett and Feldman, 1981:26). My argument differs to those studies in that I want to show that the activation of such a ‘common sense’ is inevitable, as it is inherent in the law.
justification any longer. In other words, common sense is a tacitly presupposed shared knowledge, which lies on the basis of all other knowledge to the extent that not everything can be discussed and questioned at all times. However, it is void of content in the sense that its nature as a presupposition cannot outweigh objections against it.

To return to the context of legal fact-finding: Allowing arguments from common sense as tacit unquestioned knowledge in fact-finding already constrains discourse. From an epistemological point of view, alternative paradigms are precluded and the justification of the decision must rely on the facts ascertained in a way embedded in the law\textsuperscript{80}.

Because common sense cannot be justified and because it is not knowledge but a presupposition of the search for knowledge, it cannot provide the necessary cohesive element of narratives in court. So, we should look for substantive theories of historical truth, which can fill the gaps left by the lack of evidence.

Perhaps the commonsensical tautology "this is true, because this is true" can be redeemed by being rephrased into "this is true, because everybody believes it to be true". In other words, perhaps the truth can be arrived at discursively\textsuperscript{81}. Or perhaps it is scientific knowledge, which can come to the rescue. I do not intend to broach on a substantive discussion of competing epistemological paradigms. What I want to show is that irrespective of its content, whichever epistemological model is used cannot be discursively tested in the course of legal discourse.

By suggesting that rules are narratives, Jackson showed that they imply a certain coherent understanding of the world. Telling a story automatically means that one incorporates one's beliefs about the world in it. Following on from Jackson's argument, it can be said that, if adjudication is indeed a comparison of narratives, these narratives must be compatible. In

\textsuperscript{80} Twining (1983) finds no problem with the use of common sense or generalised cognitive competence, as he prefers to call it: "Suffice to say here that showing that people from different backgrounds may draw quite different inferences from the fact of a youth running away from a policeman hardly goes any further in undermining assumptions about cognitive consensus than showing that few people believe that buses have square wheels supports them" (sic) (1983:endnote 36:165) What else does Twining do in this extract but a priori exclude from cognitive consensus whomever does not meet certain predetermined requirements? For a defence of common sense as cognitive consensus see also Cohen 1983.

\textsuperscript{81} Aleksander Peczenik (1994) suggests that the notions of coherence and discursive redeemability of truth be combined.
order for that to happen, narratives must share an epistemological basis. It is not necessary to subscribe to Jackson’s legal theory in order to argue that. However, thinking of rules as narratives just facilitates the realisation that rules are a description and way of understanding the world and that application cases are already imagined in the rule.

Therefore the facts produced in court must be gathered or interpreted in accordance to the epistemology embedded in the rules in order for adjudication to be possible in the first place. Legal discourse can accommodate disagreement on questions firmly based on that paradigm but its fundamental elements must be presupposed and remain unchanged.

Modern western law seems to be based on a referential conception of truth, which is complemented by science so it can serve as a good example to illustrate my point. Accordingly the debate concerning facts in law often revolves around where questions of fact end and questions of law begin therefore implying a clear-cut distinction between those two categories. This demarcation is of great practical significance, as it determines the acceptable content of appeals. Brown (1943) argues that:

The questions of fact in a given controversy are those questions which may be determined without reference to any rule or standard prescribed by the state—that is without reference to law. They are those phenomena in the universe which do not depend upon organized political society—upon legislatures, executives and courts for their existence (1943:901)

Wilson (1963) corroborates this view of the separation between law and facts. He distinguishes between three kinds of questions concerning facts in adjudication: truth, probability, and description questions. The former are, according to Wilson, clearly a question of fact, for they concern the truth of the sub-propositions constituting the

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82 Packer (1968) distinguishes between two ideal types of pre-judicial fact-finding in criminal justice: the Crime Control Model, which is an administrative process relying on the correctness of informal pre-judicial fact-finding; and the Due Process model, which is based on the principle of the presumption of innocence and the respect for the rights of the suspects. The distinction has been questioned on various grounds. For instance, Griffiths (1967) argues that the two models are essentially similar, as they both describe an adversarial system of fact-finding. McFarland’s objection is that the Crime Control Model is also inextricably linked with legality (see McFarland 1978: 1979. Albeit not explicitly, Packer seems to favour the Due Process Model as the one guaranteeing the justice and fairness of the gathering of evidence. Indeed the evidence that pre-judicial fact-finding practices seem to often lose sight of legality. For instance, in McConville and Baldwin 1981, the authors provide overwhelming data to support their argument that the principles of adversary trial and due process are de facto eroded by the practices of the police and prosecution. Nonetheless the reinforcement of Due Process does not broaden the cognitive horizon of the law. Perhaps it
'particular propositions', that is the minor premise of a legal syllogism. Probability questions also refer to fact alone. Description questions on the other hand are in principle a question of law, if they refer to a 'term of the art'. If the disagreement is one concerning ordinary language, then there are four kinds of inference available to the judge (by reference to universal propositions, by way of exclusion, by a more complex reference to universal propositions that takes into account more than one features, and by way of determining degree).

This strict separation of law and fact relies on the faith that facts can be ascertained without question with the help of the objective cognitive paradigm of science. Thus science is imported in legal discourse as given and unquestionable knowledge. In the same way that common sense remains beyond discourse, science too cannot be problematised in the course of legal discourse. The law as a system intervening in the world by taking justified action must rely on a fixed interpretation of reality. Therefore scientific disagreement cannot take place in legal discourse. Scientific paradigms cannot be allowed to compete in the courtroom. One of them must have prevailed already before it can be adopted by the legal institution. And that paradigm must remain unchanged for as long as possible. To put it schematically, legal discourse can concern a particular causal relationship between facts and events. For instance, in the Burke case it is possible to contest the coroner's testimony that the bruises could have been caused by battering after the death of the woman. In some cases even disagreement within the prevalent epistemological paradigm is precluded. The degree of causation is a good example. The decision concerning at which point the relevance of causes ends is a substantive epistemological decision. In any case though one cannot under any circumstances object to the epistemological basis of that paradigm. In our example, one cannot question causation itself. Otherwise, rules would cease to make sense and judging would be rendered impossible.

Thus far I have been arguing from within a correspondence theory of truth complemented by justified coherence, because that is the theoretical model that MacCormick subscribes to and, more crucially, it seems to underpin the law as well. However, the substantive content of the selected theory does not have a significant bearing to the problem I point out. To that
extent my argument is not a substantive one. I claim that any epistemology incorporated in the law is inevitably in a continuum with the law’s normativity. Aspirations about the world are necessarily built on an understanding of it as well as on a notion of what is possible. Therefore norms embody a specific epistemology, which becomes normativised, as it makes norms possible and meaningful in the first place. Thus law, which is necessarily self-preserving, must exclude any other epistemological paradigm in order to safeguard its very validity. That incompatibility of alternative epistemologies and the existence and continuation of a legal system is revealed in various instances. But it becomes evident in the most forceful of ways when the law openly interferes with the world of objects and events, namely in the process of fact-finding and, as I argued in chapter two, in punishment.

Twining (1983) does not take that into account when he adamantly claims that rationality suffices for the fair and just evaluation of the evidence. Bankowski (1988) contests that. He argues that, plainly, all these rational methods are relevant in the evaluation of evidence but the final whole cannot be said to be objective:

> The choice of the procedure is ours and not determined solely by ‘the truth of the matter’ (1988:18)

The law’s common sense are these pragmatic presuppositions, which must remain beyond discourse, in order for it to be possible for the law to operate freely and effectively. This undisputed reality marks the end of legal discourse on that dimension.

Poulantzas’ theses (1980) become relevant here, when one takes into account the concrete way, in which modern capitalist law operates. In the first chapter I spoke about his insight that the law and scientific knowledge are in a continuum and that their combination gives rise and perpetuates the dominant ideology as well as the conditions of real repression. This interdependence is now revealed on the level of fact-finding as well. Through the law the state monopolises the interpretation of the world by stealthily ascribing it a normative character. The wheel comes full circle as the law bases its regulatory operations on that already unquestionable interpretation of reality. As I showed in the first part, Bankowski and Mungham raise a similar claim. They argue that the law is based on the assumption that reality can be objectively accessed by way of scientific study. Since the science informing
the law is also administered by the state or big corporations, a nexus arises that both the normative and epistemological aspects of social co-existence.

THE ALETHEIA OF LAW AND THE ALETHEIA OF DISCOURSE

Besides the other problems with the discovery of truth (what counts as true? what alternative explanations can be allowed in legal discourse? and so forth) there is one more way, in which the law imposes constraints on discourse. In this thesis I argue that, as well as its epistemological rigidity, the urgency to act is the other main source of constraints for legal discourse. I draw attention to the fact that, aside from being a system of reasons for action, the law is also an order of active intervention. This need to act, which constrains the horizon of decision, to refer to Derrida once more, is to be found in the context of fact-finding as well.

The problem comes down to the fact that aletheia has a different significance in law and legal discourse. In law, aletheia is an operative prerequisite, it has a finite function. When expressed in the hypothetical "if..., then..." form, norms set their own goals and boundaries. In order for the apodosis of the norm to take place, the operative facts must be proven. I showed in chapter two that the goal is to take action as quickly as possible so as to maintain the certainty and predictability, which the law purports to deliver. In chapter three I showed that this anxiety to act is also proven by the conditions set by the ideal of the rule of law. The law is primarily interested in the maintenance of its systemic integrity. That explains its inability to admit to mistakes and its clamping onto non-retroactivity. This precipitation dictates that decisions be made, whenever the operative prerequisites have been met. Therefore, as soon the operative facts of a norm have been proven, the decision must be made.

A process of exclusion begins there. In judicial fact-finding, the search is for actual facts that can be interpreted as operative facts, so that norms can be activated. I showed in the first section that some facts, or some representation of facts, are thus excluded as irrelevant or meaningless. Once the ‘relevant’ facts have been ‘discovered’, the process ends thus excluding other information, which has not been presented yet, or alternative readings of this information.
On the other hand, for legal discourse aletheia is a *dimension*. It being separate from albeit accommodated in legal institutions, legal discourse exists in aletheia. Firstly, it is itself a fact. Secondly, it is related to history in a different way than the law. Legal discourse does not need history, in order to operate; it exists in history, it is a product of it, and it becomes history itself. The law has a material dimension in the sense that it intervenes in the material world. On the other hand, legal discourse is *part* of that material world. Therefore, its aletheia is much broader than the law’s. The latter reduces the truth to an operative condition and its goal is achieved when the part of the truth, that activates its norms, is proven.

Csaba Varga raises a similar claim. He examines the admissibility of evidence in legal discourse from the point of view of relevancy:

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In law [...] all kinds of operation with facts have to start from the search after and with the identification of what is relevant. But in contrast to non-legal fields, relevancy is pre-codified here: [...] formally defined in a normative way, it is given to each and every kind of, and situation in, legal processes. Accordingly, legal relevancy canalizes any business directed to gaining [...] facts in a given path from the very start; at the same time, it closes any other path [...] (1995:68)
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He employs systems theory\(^\text{83}\) (ibid.:147ff) and describes the law as a normatively closed system. As the main function of the law is the maintenance of its systemic integrity, it does not need to get to the actual truth of the matter, in order for a decision to be made. An “unassailed assertion referring to truth” (1995:153) is enough. Then the sanction can be meted out and the operations of the legal system will be self-reflexively perpetuated\(^\text{84}\).

It could be counterargued that it is of course impossible for the law to register all the possible information and that at some point a line *must* be drawn, a boundary of relevance *must* be raised in order for regulation to become possible. Selectivity is impossible to avoid in any context, let alone a regulatory one. Therefore the law does not do injustice by focusing on facts, the relevance of which has been pre-determined. Moreover, it is up to a good legislation or a good judge to direct and control that selectivity by discovering the

\(^\text{83}\) For a more detailed account of the systems-theoretical approach to the law as a normatively closed system, see chapter six.

\(^\text{84}\) For Varga’s of the judicial establishment of the truth see also Varga 1981; 1990.
appropriate norms and by sufficiently justifying the choice of relevant facts. Such an objection can be grounded on a diverse variety of legal theories: from MacCormick’s normative and narrative coherence to Habermasian discourse theory and Dworkinian integrity.

There are at least two responses to that counterargument. Firstly, I showed in the previous section that such a justification of the selection of certain facts or aspects of the ‘instant case’ can only happen in silence by reference to the law’s ‘common sense’, the presupposed knowledge of the world. If the law does not rely on its common sense, it will automatically lose its ability to regulate actuality by taking action. In that sense, all law is positive law, because it has an inescapable pedigree, from which it draws arguments for the justification of the exclusive selection of certain facts as well as the justification of ultimate decisions.

Secondly, there is a substantive difference between the law and other systems operating by way of screening of information. The law ascribes normative value to the selection of information and its connection to norms. Thus the content of rules is determined in a binding manner for the future. Furthermore, the connection of certain facts with specific rules feeds back into epistemological discourse thus indirectly manipulating it. In turn, when those epistemological assumptions are fed back into the law, the process of artificial integration has already taken place.

To a certain extent, my argument that the aletheia of the law is narrower than the aletheia of discourse is more specific than Vargas’ to the extent that I argue that the law not only cannot make sense of the whole of the world but not even of the dynamics of discourse before a court. In a way this claim is related to Bennett and Feldman’s critique of fact-finding. The communication of information is filtered through the presupposition of the law thus excluding not only aspects of the historical truth, that is facts located in the past (to use the geographical way of talking about time preferred by the law), but facts as they take place in court, the real dimensions of the discourse. It is also connected to Jackson’s re-working of Bennett and Feldman’s research and his argument concerning the importance of the pragmatics of narratives in court. I see the same problem from the point of view of the separation of law as institution from legal discourse and argue that the latter has dimensions of its own and that the law needs to colonise them in order for it to be effective.
The discrepancy between law and discourse and the silencing of competing perceptions of reality and the exclusion of facts as irrelevant is particularly evident, when the law attempts to accommodate political discourse. In politics there are no relevant facts in the way of the law. The aletheia of political discourse is the very state of the parties; truth in such cases is not the correctness or accuracy of the statements of the parties about historical facts but everything the people say, it is what they are and the very fact that they speak. The way they perceive events and reconstruct the past is an indication of their being. In order for that to be achieved, in order for the parties to perceive and expose themselves as wholes, their diction must be freed. It cannot be constrained and limited to ‘relevant facts’. It is from the interpretation (not hermeneutic interpretation but psychoanalytic or deconstructive interpretation) of all their communicative offers that their being will emerge and will make possible their being-in-common. As it pre-sets itself a specific goal, which is to shape reality in a way that is interpretable in its terms, the law cannot but subordinate the facts to that goal. Thus it automatically silences aspects of political discourse and does violence to the parties and the situation.

**CONCLUSION**

In this chapter I examined the last of the dimensions of legal discourse and the ways in which its freedom is constrained by features inherent in the law. I argued that legal discourse meets its end where the law’s common sense begins. The law’s common sense is a tacit epistemological presupposition that as such must remain undiscussed, because if it were problematised, the very basis of the law’s normativity would be put into question. I also argued that the law has a horizon of aletheia, that is much narrower than that of legal discourse. For the law, the truth is an operative prerequisite whereas for discourse it is a dimension. This discrepancy is manifested both as the background of relevance against which all informational input is assessed and as the normativisation of the admissible truth.
My point of departure in this thesis was a critique of a discourse theory of law. It is now time to complete this critique. Let me briefly remind the reader of the basic premises of a discourse theory of law, which I analysed in more detail in the first chapter. Habermas formulated a theory of justice based on a theory of truth. He extended Austin's theory of speech acts to argue that normative utterances can also have a truth value, which depends on the correct or incorrect use of language. Then, drawing heavily on the work of Perelman concerning the universal audience, he formulated rules, which should govern discourse, so that it is uncoerced and unfettered (ideal speech situation), which in combination with the correct use of language would help a community arrive at right decisions. Since *Wahrheitstheorien*, where the theory of discourse ethics was first formulated, the notion of the ideal speech situation as a presupposition of discourse on behalf of the parties has been abandoned. However, the groundwork of discourse theory remains basically unaltered. Alexy was the first jurist to apply the theory of general practical discourse to a 'real' context, namely the law. His basic thesis is that because of the real institutional constraints legal discourse is a *special case* of general practical discourse. Legal discourse is still a practical discourse raising a claim to rightness. Therefore, since legal discourse is in a continuum with general practical discourse, moral argumentation is relevant in the law and its point of entry are principles, which unlike rules have a dimension of weight rather than validity. Klaus Günther proposes a different way of fitting the law in a discourse theoretical context. He argues that the law is an instance of rule-application rather than rule-making. Therefore the task of the judge is to take into account all the relevant facts and norms. Habermas' also latterly rejected Alexy's *Sonderfallthese* and moved towards Günther

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85 For a defence of the *Sonderfallthese* against Günther's Sinn der Angemessenheit see Dowars 1992.
arguing that moral and legal discourse cannot be merged and that legal norm-justification takes place in the realm of the political with the guaranteed political participation of the community.

I then set out to show that the Sonderfallthese fails, because the ‘real constraints’ of legal discourse are so strong and so firmly embedded in the law that they undermine the main point of the Sonderfallthese, namely that legal discourse is inherently and structurally connected to general practical discourse. The primary constraints of legal discourse are the law’s epistemology and the fact that discourse must be finite and lead to a decision and accordant action. These two facts about the law undermine discourse in different ways. The former does not allow discourse to develop freely, as it predetermines its content and, to a large extent, its form from the very outset. The latter arbitrarily interrupts discourse before everything is said and done. These two constraints share a very important aspect. They both result from the material dimension of the law.

In order for normativity to emerge, let alone be sustained, it needs to rest on a knowledge of what is being regulated. Even if that knowledge is eventually falsified, it still gives rise to a reasonable belief that it is correct and that it will always be correct. The need for certainty and predictability, which is supposed to be satisfied by norms, must first be satisfied on the level of first order meaning, that is on the level of experiencing and making sense of the world. Before legal, normative meaning can be ascribed to events, that is simultaneous combination of states or simpler events, these states must already have a meaning. Apart from that, the law must assume certain causal connections between events and facts. Such an epistemological basis is indispensable for two reasons. Without it neither judgement nor action would be feasible. The former, because it would be impossible to know with certainty what the problem is before solving it, and the latter, because in order to decide on a course of action, one has to calculate the consequences, which can only be done with the help of a cognitive theory.

This epistemology must also be coherent and have duration. Otherwise the law’s normative character, in which duration and certainty are implicit, will be undermined as well. A vicious circle starts here. The epistemological paradigm underpinning the law is in turn protected normatively by the law, as the latter protects its systemic coherence. To that
extent, all law is natural law, it normatively defends the is so that the integrity of the ought is not lost. In that respect, all law is conservative as well.

The second constraint of legal discourse is the need for decision and action. There is an obvious objection waiting to be raised to that. Of course there is a need for decision and action! Action is what practical reason is about. Naturally, legal discourse must lead to a decision and corresponding action, for the law does not merely form normative expectations, it also safeguards them and perpetuates them by restoring disrupted states of affairs. Such an objection is clearly supported by faith in the law as a vehicle of justice and projects elements of morality onto the law. Thus it blurs the boundaries between legal and practical discourse. My argument is certainly not that action is always unjust or that, in any case, a claim to rightness can never be defended. My claim is that decision and action in the law take place to the detriment of discourse in a dual way. Firstly, the horizons of discourse are already limited from the outset by the law’s adherence to an epistemological paradigm. Moreover, the horizon of discourse is never broadened, because in the course of legal discourse final decisions have to be made constantly (one only has to think of the impressively large number of decisions in the process of a trial aside of the final judgement). Thus the censorship is perpetuated and renewed. Secondly, these decisions are coded in a very specific way. They are always answers to dilemmas, and they determine the relevance of informational input in legal discourse according to a pre-given guide. The final judgement is also a solution to a dilemma concerning the situation as a whole. This pre-coded possible content of decisions haunts discourse from the beginning. The content of communicative offers is dictated by the code, which the law can decipher. Therefore discourse is guided, manipulated before it even kicks off. On the contrary, in general practical discourse there is no limit to the communicative input imposed by a guide of relevance.

These two constraints of legal discourse are functionally intertwined, that is they coincide in various instances of legal discourse, while maintaining their autonomy. What allows this interrelation is the fact that they both refer to the law’s materiality. What I mean by the term ‘materiality’ is the connection of the law with facts and events. I am interested in the transformation of norms into action, words into deeds as well as the translation of deeds into words. This transition from word to deed only becomes possible because the law follows a
specific epistemological paradigm and because in order to act it curtails discourse. In that respect, these two constraints are real.

In order to structure my discussion of the ways, in which the law violently interrupts or censors discourse from the outset I identified the four dimensions of legal discourse.

*Topos* refers to the spatial dimension of legal discourse. The law blatantly, arbitrarily and authoritatively interferes with that geography. It defines it from the very outset on a grand scale by creating and perpetuating legal ‘national’ boundaries and on a micro-level by spatially organising the discourse within the same country. Albeit indispensable for the operational effectiveness of the law, the concept of *jurisdiction* is directly limiting of the freedom of discourse. By defining its own universe and the universe of discourse, which is by and large an act of exclusion, the law destructively limits the horizons of justice. More importantly, the law excludes *people* by distributing citizenship and silencing those that are deemed alien.

*Chronos* is the dimension of time. The law presents itself as a-temporal, therefore it is omni-temporal: the language of legal dogmatics is the language of a continuous present, which embodies and voices the hope of stability and permanence. The law places itself apart from the regulated discourses reserving for itself the power to determine their beginning and end and classify them as past, present or future. Thus the law arbitrarily takes over the temporal dimension of legal discourse. As law and discourse are temporally merged, the latter can never be relieved from the presence of the law, it cannot exist outwith it. This has the dual destructive effect of already biasing its outcome and limiting the freedom of the participants to speak and to be heard. The law bases its operations as a system of action on this epistemology of time. Therefore this epistemology is not negotiable. I showed that under an epistemology according to which time is also related to the end but contains that relation within the self, the law as a system guaranteeing predictability and generality would collapse.

The fact that legal discourse is entrenched in the institutions of the law is also revealed by the inherent contradiction between universalisation and predictability as expressed in the tension between universalisation and the requirement of ‘non-retroactivity’ (Fuller, 1969). In
order for it to be logically consistent universalisation must refer to both space and time. When something is deemed right or wrong, it is so for everybody and for everybody at all times. But things change and with them rules change as well. However, the law is unable to admit to being wrong. It can only raise the claim that a judgement was right *at the time* and that *now* the new judgement is right too, albeit the contents of the two decisions might be entirely contradictory. Thus the original decision and its consequences must be upheld. Obviously universalisation is already compromised. It is also an instance, in which the possibility of discourse is discarded altogether for the sake of general predictability and the facilitation of legal decision-making. In other words, legal discourse is manipulated by the functional imperatives of the legal system.

*Logos* refers both to reason and reasons. Legal discourse is all about reasons and justification and so is the law itself. It cannot exist beyond the reasons that justify it, it must abide by the rules of rationality. Not only must it be justified but this justification must also be universalisable and applicable in a uniform, consistent, and coherent way. Furthermore, the law must remain within the boundaries of reason, it must be reasonable. However, what lends coherence to these formal criteria of justice, which underpin the law, and also determines their content is again an epistemological paradigm as well as the prospect of the decision. In chapter two I sought to show how discourse is undermined by precisely those functional prerequisites of the law in the context of the justification of sanctions. I showed that the latter is always marked by a deficit, because there is always a calculation involved, a crucial instance of contingency, which cannot be done away with without altering the conceptual core of the law. In that instance, discourse is violently suspended and the decision is necessarily arbitrary. There can be no further exchange of arguments, as the final judgement concerning the appropriate sentence will always depend on one critical calculation, which can offer no guarantee of certainty or rightness.

Finally, there is *aletheia*, the truth, that is the connection of norms with events and facts, with the world of objects. The violence done to discourse by the law’s rigid adherence to an epistemological paradigm is here revealed in the most forceful way. In order for decisions to be made in law, the historical truth must be clear and coded in such a way that it will be reducible to the code of the decision. Therefore the discovery of that historical truth must be guided by a theory, which determines the criteria of relevance accordingly. That theory
plays a very substantive role in two ways. Firstly, it steers the truth-finding discourse and excludes all information that does not seem relevant. Secondly, it is formed in view of the coding of the final decision and also perpetuates that coding.

Since my argument is not only that legal discourse does not communicate with general practical discourse but also that in law free and unfettered discourse is not possible at all, it can be raised against all the versions of discourse theory, the common denominator of which is the discursive character of the law irrespective of its substantive content. The problems caused by the constraints of legal discourse rooted in the law’s epistemology and the need for action cannot be addressed by discourse theory. The Sonderfallthese is already weakened by the fact that it is proven that the ‘real’ constraints of legal discourse are much more pernicious to the discursive character of legal process. As I said in chapter one, the ‘real’ nature of these consists in the law’s connection with the world of events, facts and objects. Therefore they are bound to the very conceptual and functional core of the law. Without that connection with reality, which is made possible only with the law’s epistemology and action, the law cannot exist. Hence the constraints are inherent in the law, although some of their manifestations are only incidental. The justification deficit, the law’s temporal ubiquity and the inherent contradiction of the rule of law, the stealthily normative process of the discovery of truth are all immanent in the law. On the other hand, the law’s ideologically laden language and the manipulation of fear are only incidental albeit of paramount importance.

One possible counterargument from discourse theory that can be raised against my critique is whether there are any differences between the law and other real discourse and whether general practical discourse can ever take place out of a constraint-imposing context.

I too maintain that the law is indeed not different to other real discourses. But notice how this admission throws the burden of proof back to discourse theory! If the law is just another real discourse, then it must be shown much more convincingly that there is something inherent in the law that makes it different and more important than other real discourses, that there is indeed something special, something besonderes about the law. It must be proven that there is a greater affinity between legal and general practical discourse than any other discourse concerning practical questions.
In view of my arguments about the constraints of legal discourse I do not think that the claim that there is a special connection between legal and moral discourse can be raised. On the contrary, I believe to have shown that their bond is even looser than that of general practical discourse with other social discourses. The constraints imposed on legal discourse by the law as institution are more numerous and more rigid than those in non-institutionalised discourses to the extent that in the latter there is no pressing need for action or that the action taken is at least revisable at all times, and that nothing, or at least less, is precluded from the discourse. Therefore substantive justice can be pursued much more freely in non-legal contexts. Acknowledging the freedom and justice of other social discourses is at the same time a critique of the law as a vehicle of justice and it must be accompanied by the will to do away with law as we know it altogether.

Discourse theorists seem to be departing from the opposite point though. Instead of examining whether the law can accommodate emancipatory demands and whether it can deliver substantive justice in the first place, they intuitively take for granted not only *the inevitability* of having a central legal system but also *its inherent value* and they try to rationalise the latter by forcing a connection with moral discourse through language. I think that in the light of my critique this endeavour, of which Günther’s appropriateness thesis and Habermas’ defence of it are the best expressions, seems critically self-undermining. Because they cannot turn a blind eye to the institutional rigidity of the law, they try to adjust the prerequisite of universalisation to the reality of the law instead of doing the exact opposite, that is to suggest ways in which the law might come closer to the prerequisites of justice. But admitting to the fact that in law it is only possible to take into account the ‘relevant’ facts and norms is tantamount to admitting to the law’s fundamental difference to morality, namely that it is a functional institution with specific aims. For now it suffices to say that, even if justification is taking place at a stage prior to legal discourse and that the latter is only an instance of norm-application, the low degree of discursiveness of the law will still hinder the application of the norm according to its previous justification, as the criteria of relevance of input in the discourse depend on the real constraints of discourse as much as on the process of justification in politics.
It is also important to show that my critique is not only directed against discourse theory but that it concerns the law as such and can therefore be raised against all theories that are confident that in and through the law justice can be delivered in a holistic and conclusive way.

Very often in this thesis I have spoken about the constraints of discourse and justice. It is now time to clarify that. I am not using discourse and justice interchangeably as synonyms. I do not even argue that free and uncoerced discourse necessarily leads to just decisions. In fact I have not touched this important premise of discourse theory, namely that free participation in discourse is a guarantee of justice. However, I do not disregard the connection between discourse and justice but look at whether denial of discourse affects justice delivered by the law and I try to prove that indeed it does in at least two ways.

Derrida tells us that justice is not specific, it cannot be ‘done’. Justice is all-inclusive, it refers to the whole and cannot be ‘delivered’ on specific occasions, one can never claim that one’s action was just, for justice cannot have an end. It is not even a process, because implicit in the notion of the process is the prospect of the end, the achievable goal and justice is not a state that can be achieved or be recognised. Action can perhaps be directed towards the possibility of justice or the avoidance of injustice, but it can never ‘deliver’ justice. Therefore, if one engages in a discourse about justice, that is, if the aim is not just to solve a practical, functional problem but something much broader, then discourse itself becomes part of not just the project but the very concept of justice. As such it must be all-inclusive and the notion of the telos in the dual meaning of the end must be discarded. Therefore, one may not just assume the other’s point of view in order to arrive at a ‘just’ decision. Such an exclusion from discourse is already unjust.

Discourse theory does not seem to address, or even acknowledge, that problem. If one admits that justice is dependent on discourse, then one cannot stop short of admitting that discourse itself is justice and that its denial is already an injustice. Unless of course the whole argument is reduced to a much more modest claim, namely that discourse helps to avoid injustice in a problem-solving process. As I mentioned above, in chapter eight I shall show that I have no objection to such an understanding of the law. Then I shall also explain the difference between doing justice and not committing injustice to the instant case. For now
let me just hint that I shall argue that only the former consists in a comparison of a given state of affairs to an ideal state. However, this is not possible because that imaginary state of perfection is still contingent and could easily and unexpectedly be changed. In other words, the law's justice is nothing more than a kind of functional correctness and not a holistic delivery of justice. As such, that is as a problem-solving system, which cannot take everything into account, the law does not enjoy normative monopoly and it should not try to permeate areas, which are beyond its reach.

I hope to have made clear that what I put forward is not merely an argument against discourse theory. It is the law itself, which stands indefensible. In the first part of this thesis I showed how the law excludes persons and issues from discourse. Thus it limits the horizon of justice. In fact it might not even be correct to be talking about horizon, as a horizon horizei, it defines as well as promises a continuance beyond it. Nevertheless, even if one decides to perceive justice as feasible and rooted in the past rather than what has not yet happened, the constraints of discourse are constraints of the information imported in the process of delivering justice. As a result, the need for a judge Hercules becomes much more literal than Dworkin ever meant it and, of course, the law is distanced even more from the goal of justice.

I shall return to these arguments in the concluding stages of this thesis. Let me now outline what I talk about in the next three chapters.

In chapter six I turn to the bigger picture to look at how the law's low degree of discursiveness affects its ability to make sense of other normative orders as such. Thus it will also be shown that the law reserves normative exclusivity for itself and how it violently safeguards that monopoly by both the use of physical force and the ideological use of language. In chapter seven, I look for possible solutions to that violence of the law. In particular, I turn to the project of legal pluralism, which is closely related to my thesis, as it is based on a critique of the law on the grounds of its epistemology and its strategy of excluding, in order to secure its decision-making ability and to preserve its regulatory monopoly. Finally, in chapter eight I round up the critique of the law and make suggestions about the role of legal theory in the project reconciling emancipation, justice and regulation.
CHAPTER SIX

THE IMMINENT VIOLENCE OF SILENCING

INTRODUCTION

In this part of the thesis I look at how the interruption of discourse is translated on a macro-level. My analysis starts from the same basic premises, namely, that the law is an epistemological as well as a normative order and that it is about action as well as judgement but this time I look at it from a different point of view. Whereas so far I have been talking about the law in the singular referring to state law, now this vocabulary must change and I must voice the suspicion implicit in the first part of this thesis that, as there are epistemologies or views of justice, which are suppressed by state law, so are there different sources of legal normativity, which are silenced by state law in the latter's effort to preserve its exclusivity. This strategy of silencing I deem violent.

The relationship between law and violence is customarily seen as an antithetic one: Violence is denial of the law, it cannot exist but outwith the law. On the other hand, the law is a response to violence. If the latter is a deviation from legitimacy and the former is there for an efficient recovery. However, something always seems to be wrong with this formula. In this chapter I shall try to put this predominant impression of law and violence as conceptual and practical opposites to the test and show that there is indeed something wrong. My claim is that state law can be and, indeed, does violence by silencing other normative orders, which are legal in character. This violence starts already from the use of language. Even the ‘official’ meaning attributed to the very word violence is problematic. It is a part of an ideological language game, in which legitimacy and rightness is associated with and only with the state and its law and to that extent it can too be deemed violent.
Firstly I shall refer to two theorists, who spoke of the law as violence: Robert Cover and Walter Benjamin. The former spoke of legality as the outcome of the material conditions of a people’s existence and the way that people understand and represent these conditions. He also diagnosed state law’s inability to follow the normative vocabularies of other legal orders, to make sense of the cultural symbols and the acts of commitment upon these orders are based. He revealed the violence in this incommunicability of the law. Benjamin addressed another aspect of the connection of law and violence: its inevitability. The law cannot but be based on violence and violence cannot but have a law. In Benjamin the discussion is about law-making and law-preserving violence, mythical and divine power, means and ends. Then I give a short exposition of systems theory as developed by Niklas Luhmann, which provides a sufficient theoretical framework for an analysis of the interrelation of law and violence as a condition of non-communication.

Neither Cover nor Benjamin will please the analytical sceptic, because they are not precise as to what violence exactly is. In fact, their analyses are sometimes rather confusing. I address that problem by arguing with R.P.Wolff (1969) that violence is an inherently confused concept. I try to show that an analytical approach to the concept of violence can only lead us to a vicious circle of mind games. Additionally, I try to show how the definition of violence as illegitimacy has prevailed and why it is wrong. My final thesis is that the pragmatic aspect of violence can be perceived very loosely but on the moral side of it ought to be associated with justification of action rather than legitimacy.

Finally, I qualify and combine the theses of the above three theorists in order to show how the law, every law, organises its silencing of other normative orders.

**R. COVER AND LAW AS VIOLENCE**

Robert Cover’s work is marked by the author’s strong anti-state thought. It is in his "Nomos and Narrative" (1983) and " Violence and the Word" (1986) that he tried to establish the inherent connection between state law and violence. The pivot of his argument is that state law operates with violence in order to establish itself as the sole legitimate normative system in contrast to other normative orders that develop within communities in the margins of state
law. In addition to that he gives his account of how the state institutionally and hierarchically organises its violence. His final argument is that legal interpretation and the enrichment of legal meaning meets an insurmountable barrier raised by the state with the use of violence.

In "Nomos and Narrative" Cover begins by establishing that the Nomos we all inhabit is unavoidably related to a narrative in which it is embodied.

Narratives are models through which we study and experience transformations that result when a given simplified state of affairs is made to pass through the force field of a similarly simplified set of norms (1983:10).

The normative world, which determines our lives, is created by predominantly cultural means and is constituted by a bulk of symbols; rituals, traditions, texts, objects. Therefore the richness of legal meaning is inevitable. Cover makes clear that he is neither interested in the legal, technical term of legal meaning nor in the distinction between living law and law in action. What he arguing is that within the same legal universe there is place to accommodate an enormous number of interpretations, Nomoi and narratives, that seem to be incompatible with each other because one of them is bound to be predominant by the use of means other than interpretation and commitment, namely by violence.

Cover distinguishes between two types of law, the paideic and the imperial. His intention is not so much to form a typology that could accommodate all the historical legal paradigms but rather to comment upon two fundamental functions of the normative, i.e. the world-creating and world-maintaining functions, that can co-exist, as indeed they do, even in late modern legal systems of advanced capitalist states. The former is achieved by what he terms as "paideic law". It implies the existence of a community, the members of which acknowledge a set of common needs and obligations, base their life and world-views upon these and their "obedience is correlative to understanding" (1983:13). On the other hand, in the model of imperial law "norms are universal and enforced by institutions. They need not be taught as well, as long as they are effective" (ibid). In this paradigm social relations are not determined by the commonality of needs and obligations and the unity that this commonality establishes but rather by the principle of peaceful co-existence set up by the aforementioned institutionally enforced norms.
The ever-expanding social differentiation and the subsequent proliferation of various kinds of social bonds, groups and discourses lead inevitably to the proliferation of interpretations and legal meanings. Different communities share different narratives, which are the outcome, to a great extent, of the materiality of the bonds that hold communities together. What safeguards these narratives and at the same time consecrates them is their objectification and the degree of personal commitment to them (Cover, 1983:45). "To know the law - and certainly to live the law - is to know not only the objectified dimension of validation but also the commitments that warrant interpretations" (ibid.: 46). The reality that the law creates and the alternatives to reality it offers would simply exist in the world of ideas, if it weren't for the personal commitment of those who share the nomos. It is the strength of that commitment that determines the extent of law's hegemony. "Law is the projection of an imagined future upon reality" (1983:1604). This alternity designed by the law is being substantiated through the transformation of word into action on behalf of the people.

'Law' is never just a mental or spiritual act. A legal world is built only to the extent that there are commitments that place bodies on the line (1986:1605).

At the stage of jurisgenesis, that is at the stage of the creation of a Nomos, commitment is a sine qua non condition of the outset of the new normative world. Social bonds, common beliefs and cultural possessions are embodied in the commitment to the common objectified value, that will become the fundamental norm of the new Nomos. Commitment can urge people to shield their normative universe with their own bodies; it makes martyrs and murderers at the same time, depending on the normative dogma, of the community or the individual. The importance of commitment is not exhausted in the jurisgenerative stage. Normative world-maintaining would not be feasible without acts of commitment. But this time the commitment is towards the normative word instead of the law-generating idea. As long as there are distinct cultural media, that give birth to common worlds shared by a number of people, that subsequently form communities, where they share beliefs, shrines and weapons and are prepared to defend them irrespective of the undesirable consequences of their struggle, there will be a plethora of legal interpretations and legal meaning will have a bulk of different properties.
The question is how state law responds to this plurality of legal meaning. Cover argues that state law, being the only interpretation that can establish itself with institutionalised means, resorts to violence. He does not seem to accept that sanctions, violence and the law are internalised. What he argues is that communities are seeking either to maintain their own normative world, like for instance communities living in insular autonomy such as the Amish and the Mennonites (ibid.: 26), or more politicised communities, struggle against the state and question the legal interpretation of the latter (a project which Cover terms "redemptive constitutionalism"), for instance the civil rights movement (ibid.: 31). But the state and its institutions oversee this multiplicity of legal meanings by usually stating "the problem not as one of too much law, but as one of unclear law". In this way the state denies the legitimacy of any other interpretation, Nomos and narrative. Therefore, from a number of equally legitimate legal meanings, state law is bound to prevail.

An already established Nomos - a normative world that managed to impose itself after the clash of the multiple interpretative communities and that assumes universal legitimacy - does not need acts of commitment for its maintenance and perpetuation. What substitutes commitment is institutionalisation and the formulation of hierarchical structures. An institutionalised normative order protects itself by hiding behind the legal meaning, to which it has attributed the privilege of exclusivity in legitimation and behind its apparatuses and institutions. When the judge resolves disputes by silencing one of the demands produced before her/him or when s/he deals with pain and death as for instance in the course of a criminal trial (Cover, 1986), s/he is never alone. S/he shares the responsibility of his/her actions and words with a number of people. The legal system invents its mechanisms of depersonifying its operations and thus making them more flexible and effective. And, as I already mentioned, these operations sit comfortably with legitimacy, because they are carried out with the vocabulary formed in reference to the predominant legal meaning.

Nevertheless, Cover does not emphasise that this vocabulary and the ideology that it materialises are only the way, in which the legal system, that thinks and acts violently, justifies its violence to itself. At the end of the day, the law's system is utterly real. Naturally, the significance of the ideological function of the law as a violent order is to be acknowledged. At the same time though, one has to recognise that what the judge and the
individual, upon whom pain or even death will be inflicted, share only a temporally and spatially limited world, which is absolutely material. In fact it is meaningful precisely and only because it is tangible. As Cover eloquently puts it:

[I] do not wish to pretend that we talk our prisoners into jail. The 'interpretations' or 'conversations' that are the preconditions for violent incarceration are themselves implements of violence (1983:1608).

The language, argumentation and ideology of the law serve only as ways for the law to convince itself. The defendant and the judge can only communicate because they find themselves in the same room and the former's future is contingent upon the latter's reading of the legal texts. It is completely irrelevant whether they share the same opinions concerning the law or the justice system in general. Cover argues that the interpretative acts of judges are acts of material violence in four ways: a) Legal interpretation is a practical activity, for "the judicial word is a mandate for the deeds of others" (1983:1611). b) legal interpretation takes place "within a system designated to generate violence" (ibid.:1613). What we expect from the judge is to materially resolve either a dispute or a breach of our expectational system. Her/his actions have to be orientated towards the formation of a new, restitutive reality. c) Following on from the last point, Cover argues that legal interpretation is what guarantees the effective organisation of violence. In his own words:

The law must come over time to bear only an uncertain relation to the institutionally implemented deeds it authorises. Some systems, especially religious ones, can perpetuate and even profit from a dichotomy between an ideal law and a realisable one. But such a dichotomy has immense implications if built into the law. In our own secular legal system, one must assume this to be an undesirable development (1983:1617).

d) All the above points can be finally summarised into one: that legal interpretation is, at the end of the day,

"[a] form of bonded interpretation, bound at once to practical application (to the deeds of violence) and to the ecology of jurisdictional roles (the conditions of effective domination)" (ibid:1617).
The conceptual connection between law and violence does not lead Cover to the rejection of law altogether. He conceded that the alternative, that is complete lawlessness or deregulation of the conflict of the various legal cultures, would be a horrible perspective.

Let loose, unfettered, the worlds created would be unstable and sectarian in their social organisation, dissociative and incoherent in their discourse, wary and violent in their interactions (1986:16)

Thus the law's violence is being excused to a certain degree. The law generates peace by centralising violence. Although Cover originally seems to be unfolding a profoundly anarchistic argument, he does not quite drive it home. He stops short of the provocatively defiant thesis that all law is to be discarded as violent thus tempering his argument making sound like an alternative liberal thesis: It is good that all nomoi be heard but a certain degree of central regulation has to be maintained. Analysts of Cover's work have protested against this concession of his to liberalism. Sarat and Kearns (1995) assert that law and violence are irreconcilable. In their own words, the law cannot be "homicidal" without being "jurispathic" (1995:241). Cover, they argue, cannot have it both ways. I shall not expand on that in this context. In the next chapter on legal pluralism I shall return to examine whether the plurality of legal meanings can develop under a centralised law or, at least, not be suppressed by it. I shall also examine the possibility of a central law, which would restrain itself in setting the framework of co-existence of concurrent legal orders. For now it suffices to note that Sarat and Kearns are right in pointing out that a central law can only exist to the detriment of other nomoi. Cover indeed does not address that with clarity. On the other hand, they too slip into a form of extreme liberalism, as they seem to assume that alternative legal orders are unquestionably good and they are not critical enough towards them. Because they are anxious to prove the jurispathic nature of state law, they seem to be oblivious to the fact that other legal orders share the same nature.

Cover's theses on law and violence do leave some unanswered questions. One of them is the possibility of justified violence. Firstly one must examine whether the justification of violence is feasible or whether the two concepts are defined as opposites and therefore incompatible. Cover explains the social organisation of institutional violence in terms of psychological reactions to orders, of the psychology of hierarchy. Both he and his
commentators do not leave much room for any other exegesis of the organised performance of violence.

There is of course another story that might be told, not a causal account as the others are, but one that sounds in the language of justification, moral or otherwise. Surely it is just such a story that officers and agents of the law tell themselves and one another; they believe or appear to believe that they are justified in what they do, and it is this conviction that explains their capacity to set aside the customary inhibitions against doing violence. Presumably they believe that acts of the kind that they perform are, indeed, necessary and that they, unlike others, are specifically authorised to carry out (Sarat and Kearns ibid:244)

Sarat and Kearns go on to reject that explanation of violence by discarding the possibility of justifying the action of an agent through the justification of the original decision. I believe that the denial of indirect justification is certainly fruitful. Nevertheless it needs to be elaborated much more, for the counterarguments can easily overpower such an assertion. The ‘story that might be told’ may be just a story but still a very plausible one.

Secondly, Cover fails to make clear what exactly he means by violence. He urges us to "go and see" the pain and death in our local prison. At the same time he talks of violence as silencing, as the destruction of meaning. If his definition of violence is merely physical, his whole thesis is starting to ring a little more trivial though more difficult to prove. On the other hand, if violence is understood as state law's denial to communicate with other legal orders, the argument has a lot more implications, for the circle of violence can then include many more practices, which under different definitions would be otherwise termed.

Despite the shortcomings, which I shall argue can be overcome, there is something very important to be learned from Cover's analyses. The law raises a claim to exclusivity: it is totalitarian to the extent that it cannot tolerate the existence of other sources of legality. Therefore it rejects them, it does not acknowledge them as such. That rejection is disguised as a problem of interpretation of existing law ('unclear law') instead of as a need to register the existence of a different law ('too much law'), which cannot be interpreted with the same hermeneutical tools.
W. BENJAMIN AND THE COUPLINGS OF VIOLENCE

Walter Benjamin’s Critique of Violence ("Zur Kritik der Gewalt" first published in 1921) is considered as an exemplary text concerning the intimate relationship between law and violence. Not without a reason. The Benjaminian critique of violence might lack analytical clarity but it is still a very important treatise, which opens new horizons in the discussion.

Benjamin argues that violence cannot be seen as means to an end, because then a practice would be vindicated by the justness of its ends. This is the fallacy committed by natural law theories. By justifying violence indirectly one loses sight of the autonomy of the concept. Violence must be comprehended and justified independently of the just, natural ends that it may serve. Positivism does the exact opposite. It looks at the historical origins of violence; it seeks justification in the past rather than the future. Although this approach also misperceives violence as a category contingent upon external factors, Benjamin finds it more appropriate as a starting point. He opts for the distinction between sanctioned and unsanctioned violence, because his intention is to talk about violence as inherent in the law as a mechanism of both genesis and preservation.

This distinction is the crux of Benjamin’s argument and also the one that interests me the most in this chapter. He maintains that all law revolves around the concept and practice of violence. Firstly, he reiterates the Weberian thesis concerning the monopolisation of violence by the state from a different point of view. The law intervenes to prevent the use of violence by individuals. Legally vindicated ends can only be reached with legally vindicated means.

This means: this legal system tries to erect, in all areas where individual end could be usefully pursued by violence, legal ends that can only be realised by legal power. (1997:135)

From this one can conclude, argues Benjamin, that the law is scared of the subversive power of violence in the hands of the individuals. It fears that the distribution of the possibility of violence will fundamentally undermine it. Violence outwith the law is threatening,
dangerous; not because it is directed towards illegal ends, but because it questions the exclusive authority of the law.

[V]iolence, when not in the hands of the law, threatens it not by the ends that it may pursue but by its mere existence outside the law (ibid:136)

The law uses violence for its self-preservation. It is its method of shielding itself and hiding in the barracks of self-sufficiency. "Law-preserving violence is threatening", Benjamin tells us (1997:140). Punishment might be normatively founded but its actual implementation remains only probable. Law-preserving violence does not achieve deterrence because of the uncertainty of its imposition. It threatens in the manner of fate by imposing the fear of probability. But the interconnection of law and violence does no stop there. Violence has a law-making character as well, which is exactly the reason why the law as an actual institution fears it. Every war ends with the establishment of a certain peace, it is sealed with rituals of the founding of a new legal order. The law does not dread the overturning of this or that law; it is apprehensive of violence, which introduces new Law, a new legal vocabulary for understanding the world. For, asks Benjamin, what else is a general strike but the questioning of the foundations of the law? Violence is inherent in the right to strike but it is perceived as such only whenever it becomes disproportional, when it leaves the realm of the legal and enters that of violence with a view to a new law. The combination of law-preserving and law-making violence can be witnessed in two institutions of the modern state (although Benjamin did not have the chance to experience the development and transformations of modernity fully, as he took his own life in 1940): the death penalty and the police. The former is at the same time punishment and a reaffirmation of the law as a whole. The latter is

law-making, for its characteristic function is not the promulgation of laws but assertion of legal claims for any decree, and law-preserving, because it is at the disposal of those ends (ibid:141).

Benjamin then goes on to elaborate Georges Sorel’s distinction between political and proletarian strikes. According to Sorel, the former aims at reform. The objective is to change the constellation of political power within a state without radically changing the existing structures. The latter is destructive. It aims at abolishing the state, it rejects the very concept

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of reform. Proletarian general strikes are, according to Benjamin, not violent in contrast to political strikes. Strikes directed against the state as such are permeated by a “deep, moral and genuinely revolutionary conception” (ibid:146).

The Benjaminian game of distinctions ends with that between _mythical_ and _divine_ violence.

> If mythical violence is law-making, divine violence is law-destroying; if the former sets boundaries, the latter boundlessly destroys them; if mythical violence brings at once guilt and retribution, divine power only expiates; if the former threatens, the latter strikes; if the former is threatening, the latter is lethal without spilling blood (ibid:150-1)

Benjamin still does not enlighten us at all as to what violence is. He acquits proletarian destructive strikes of the reproach of violence because of the reasons lying behind it but at the same time he does not clearly relate violence to moral, or any other sort of, justification. That I shall address later in the section concerning the ideological function of the term violence and its official state interpretation.

Later on in this chapter I shall show that the value of Benjamin’s account of legal violence lies mainly in his insight that this violence is always imminent. That begins to reveal the totalitarian ubiquity of the law, which occupies all the dimensions of legal discourse thus pre-empting its outcome.

**SYSTEMS THEORY AND LAW AS EXPECTATIONS**

Systems theory provides a suitable theoretical framework, which can accommodate both Benjamin’s and Cover’s theses on the communicative inability of the law and the substitution of communication by violence and lend them theoretical coherence. It provides us with an explanatory schema of how the law thinks, functions, and perceives the world. In what follows I shall give a brief account of the systems theoretical approach to the law. Nevertheless, in order to make its sociology of law understood, reference to the general theoretical basis of systems theory cannot be avoided.

In a meaningfully constituted world people have numerous possibilities of experience and action (Luhmann, 1985). Luhmann (ibid.) notes that within a differentiated world two
primary problems are these of complexity and contingency. The former refers to the fact that there are always more possibilities of action than the ones that are actually being realised. The latter refers to the possibility of disappointment of expectation, irrespective of any arrangements or hopes invested. Central in Luhmann’s systems theory is also the problem of double contingency. In order to grasp that one has to be familiar with and assume the necessary analytical precondition of the self-referentiality of systems, in this case of psychic systems, persons (Luhmann, 1995). Every person involved in a communication is at the same time an observer and the subject of an observation. So each of the participants can only determine their behaviour and communicative offers within their own boundaries. But that causes inevitably indeterminacy and uncertainty. As Luhmann puts it:

[T]he radicalisation of the problem of double contingency (...) articulates the question ‘How is social order possible?’ in a way that presents this possibility as above all improbable (1995:116).

In a simple example: A expects B to behave in a certain way (expectation). At the same time A expects B to be expecting a certain behaviour from A (expectation of expectation). Contingency becomes even more complex, when we consider that in social interactions between two parties, the respective expectations of one of the parties concern not only the behaviour of the other but also his/her expectations. This could go on for many levels depending on the form of social interaction.

In this simple explanatory schema of communication between two parties the problem of double contingency is solved automatically the moment it manifests itself. With the articulation of communicative offers and when the hurdle of contingency is sufficiently overcome, a system is eventually built, a common context that enables meaningful communication. But in broader social systems this mechanism is not so easily energised. So, in respect to the need of some stability and predictability a way has to be found to overcome the problems caused by the factors of complexity and double contingency and in some way regulate not behaviours but expectations (Luhmann, 1995). Luhmann (1985:26) argues that this is exactly the function of the normative: to integrate both of these levels.86 In

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86 For an account of the law as a self-referential system of expectations see Luhmann N. 1988b; in Teubner G. (ed.) 1986. For a critique of positive law and ideology from a systems-theoretical point of view: Luhmann
generalised normative systems, such as the law, this regulation of expectations is made possible with institutionalisation. Luhmann defines the later as

the extent to which expectations are based on the presupposed expectations of expectation on the part of a third party (1985:49).

The third party is not just the immediate observer, but all the anonymous co-experiencing individuals. In order to involve the third parties in a certain dispute, which was originally caused by the disappointment of a specific institutionalised expectation, the disappointed individual has to arouse their interest and communicate the problem to them. That is precisely what makes the role of the judges so central: That their presence can be expected with certainty, i.e. that they will be there to play the role of the third party (Luhmann, 1985).

Institutionalisation does not necessarily mean stated consensus. It doesn't have to be perfectly certain that all the potential observers share the same expectations or expectations of expectations. The impression or the hope that things are so is enough. Thus the law manages to congruently generalise expectations and establish a fairly stable and predictable order. Institutionalisation is in other words the property that H. Kelsen attributed to valid norms, the objective ought as opposed to the subjective ought ("subjektives Sollen"), which refers to the motivation of the individual for action (Kelsen 1962:10-11).

What now is the role of sanctions in the congruent system of expectations that the law establishes? In the simple model of interaction between two parties I drew above, the continuity and permanence of the system and therefore the generalisation and stabilisation of expectations is not guaranteed.

The connection between double contingency and system formation (...) enables the evolution of a specifically social order - so that evolution means only the construction and destruction of structured orderings on an emergent level of reality (Luhmann 1995:121).

1982. See also Luhmann 1991, where he explains the transformation of the notion of the validity of the legal system in the light of its self-referentiality.
Even so though, the disappointment of an expectation of one of the parts has to be dealt with. If A has disappointed B's expectations, it is very likely that B will seek the punishment of A for his inappropriate behaviour by appealing to co-expecting third parties. B can impose some kind of sanction on A, in order to restitute what s/he has suffered.

But the law cannot afford the continuous transformation of the expectations it organises or even originally introduces and which are bound to be disappointed. Luhmann argues that sanctions are the way every system of expectations invents in order to deal with this problem. In fact, the existence of sanctions is what makes these expectations normative differentiating them from mere cognitive expectations like the ones of the example I used. The certainty that a disappointed expectation will find other ways of fulfilment through the intervention of the law, the fact that the perturbed condition will be eventually restituted attributes the law its very validity. A legal order is of course alterable. But only on its own terms, both substantive and procedural. Legal orders are prepared to impose sanctions in order to maintain their validity. The primary scope is not to suppress but to secure the solidity of the expectational system (Luhmann 1995). Therefore legal sanctions are included in the project of institutionalisation, they are shielded by Kelsen's 'objektives Sollen'. The law cannot allow the normative expectations that it establishes to be de facto replaced by cognitive expectations, for it is seeking to monopolise the regulation of social behaviour and the determination of the properties of the normative.

Legal norms are typically structured as twofold propositions of an "If..., then..." form. The first part of this proposition refers to the original expectation (E1) and the second to the expectation that emerges when E1 is disappointed. If a third party is addressed with the problem, s/he would justifiably argue that since E1 has been disappointed E2 has rightly enough come about. But what is important is that, in the eyes of the legal system that prescribes so, only E2 can come about. Any other way of relieving the disappointment of a normative expectation is a priori excluded. Before a judge, the arguments that will be exchanged can only be relevant to the law and have to be reducible to the basic binary code that determines the operations of the legal system, that is 'legal-illegal'87. All functional subsystems of society are, according to systems theory, reducible to a binary code, which
constitutes the guiding element of the function of the system. The transformation of that binary code brings about inevitably the transformation of the system as a whole into something new.

**SILENCING AND LEGAL EXCLUSIVITY**

In the first part of this thesis I argued against the discourse theory of law and put forth the claim that legal discourse is subjected to insurmountable constraints, because of the law's fixed and unquestionable epistemology as well as the inevitability of legal action, which haunt all the dimensions of legal discourse. Let me reprocess this idea using a different vocabulary. As a result of these constraints of legal discourse the law functions as a communicatively closed system. As such it safeguards itself by repelling any attempt to violate its foundations. This censoring does not happen consciously or by way of conspiracy. Sooner or later the process of informational input in legal discourse will be interrupted either because there is a pressing need for decision, or because the new information is, from the point of view of the law, irrelevant and therefore unacceptable, as for instance is any attempt to question the law's perception of the world. In the following I shall look at how this incommunicability is the way, in which the totalitarian nature of the law is expressed, the means, with which the law tries to establish its exclusivity.

According to systems theory the law is unable to respond communicatively to whatever transcends the legal binary code 'legal-illegal', because it cannot make sense of anything beyond this code. Thus, the law, as indeed any other social system, translates and assimilates all occurrences of its environment into its own language in order to make them meaningful. Cover's thesis about the spatial and temporal coexistence of different legal orders can be read in the same way. The binary coding is a guide of relevance and at the same time it has a substantive value. Concurrent legal orders such as state law and normative orders of a legal quality adopted by insular communities in the margins, so to speak, of a state structure, attribute different content to the code 'legal-illegal'. To return to the vocabulary of this thesis: Different perceptions of the world along with the commitment

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87 Luhmann gives an account of legal argumentation from the point of view of the autopoiesis of the legal system in Luhmann 1995b.
on behalf of the people that share these perceptions lead to the emergence of a different sort of normativity, a new legality, which has different pragmatic bases, and is rooted in a unique epistemology.

Such separate forms of legality are bound to clash sooner or later. Then will the distance between them be revealed. The opposition will not be merely a political, moral disagreement as to whether a certain conduct should be deemed illegal, whether a law is correct and just or not. Strictly speaking it is not even a disagreement at all, because dissent exists always in the shadow of the eventuality of consent; it implies that there exist grounds for agreement, there is a common basis of reference. When different legal orders clash, there is no such point of reference. The terms legal and illegal or right and wrong acquire different properties. The only commonality is the form of the code. The formation or amendment of that however is beyond the competence of the participants of the legal cultures in question. The clash of two different legal codings is the clash of two different worlds. The law tries to assimilate communicative offers, which abide by a different coding. This is already an act of violence, because appropriation is not communication but rather a blatant denial of communication.

Earlier I pointed out that Cover does not address the anti-relativistic objection that as long as the law is justified, then no violence or injustice is done. Neither he nor the analysts of his work explain why the silencing of non-State legal orders is violent. My analysis of the ways in which the law constrains legal discourse in the first part of this thesis as well as the systems-theoretical approach to the limits of communication come to complement Cover’s claims and remedy that shortcoming. The fact that the law interrupts communication or does not allow it to develop freely by screening some off issues, such as the epistemological paradigm, already constitutes injustice. As I have already emphasised, this does not necessarily mean that discourse leads to justice without fail. However, depriving one of the possibility to speak is unjust and will most probably lead to a final injustice.

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88 Luhmann tells us that: "[l]aw emerges only if, and only in so far as, the need is communicated to distinguish between legal and illegal." Luhmann 1988a.

89 For an account of the law as silencing and expropriation of the political see Christodoulidis 1998 (also an excellent systems-theoretical treatment of law and politics); Christodoulidis and Veitch 1997.
Benjamin recognised, along with Cover, that the law needs violence at the point of its genesis. A new legal order can only arise from the ashes of an *ancien regime*, a defeated order. The former does not derive from within the latter. It is external to it, it comes about not as misinterpretation but as a new set of symbols, texts and beliefs. The new legal order cannot be accommodated within any other law. Its emergence presupposes only history. To be precise, it is not a recent legal past that is needed. It is only *the intergenerational experience of time*[^90^], which is necessary for the formation of the new normative culture. When a new legal order has emerged, it means that it has escaped the silencing of the dominant legal culture that it developed autonomously. Therefore, the collision of the two legal cosmoi can only be extra-legal. It can take place only in the realm of the political either with real, physical confrontation, if communication on the political is impossible too or, if there are still arguments to be exchanged and compromises to be struck, with political discourse. While the pre-existing legal order is still hanging on to its means of coercion, violence is inevitable. In Benjamin's words, the law activates its self-preserving mechanisms to defend its integrity against the threatening emergence of a new law. In Kelsenian terms one would say that the institutionally recognised and fixed Grundnorm forms a defensive shield around it and against other possible basic norms, that tend to become prominent.

Obviously, instances of jurisgenetic violence are limited. Their historical context is inevitably periods of revolutionary turmoil. It is under such conditions that it is possible to do away with traditional structures, to discard the law's ability to motivate with coercion, to jettison legal validity. It is only in such eras of transition that conflict stops being regulated by state law and the focus is shifted to the political, because the instruments of the state fail to overpower the opposition.

However, the law as such can be challenged at any point of its history. But when it must deal with separate instances it is quite effective in maintaining its overall validity and re-asserting, or re-imposing according to a different reading, the degree of faith of its participants in it. In order to do that, it needs to be prepared to employ its self-preserving violence at all times. Its re-affirmation means that it can never allow anyone to just leave it. A convicted criminal, for instance, does not become a person outwith the law, s/he is not

rejected. S/he is still part of the legal culture but with a different identity. A sentence becomes the point of transition from one legal character to another. The law does not exclude. It redistributes roles, so that everyone appears to remain part of it. This is the godly side of the law, which I identified in my chapter about the manipulation of time. Both the righteous and the sinners are still god’s children without them being able to do otherwise. The way God cannot reconcile with the idea that someone might not reject or accept him but instead not acknowledge him at all, the law cannot recognise anarchists as such. It makes itself the only point of reference.

Because the law is and needs to be ubiquitous in that way, its self-preserving violence is always imminent. Any attempt to exclude oneself from the law and become part of a different legal order or even decide to become the Aristotelian beast, which lives outwith political society, is not even meaningful in the law. let alone permitted. The law’s imminent self-preserving violence is disclosed in all four of its dimensions, which I identified in the very beginning of this thesis in chapter one. The law never loses sight of its subjects. We are constantly in its map, we are parts of its topology. There are no ‘law-havens’, no place of seclusion and self-exclusion. There is a wonderful Greek saying91: “Όσπον γῆς καὶ παρις”, which can be translated as “every land, our motherland”. The proverb can have a lot of readings. Perhaps it is a celebration of imperialistic violent conquests, although Greek history renders this understanding rather arbitrary. Maybe it is the exact opposite and it describes the need to find resources in order to live and how survival is logically prior to anything else, including identity. Perhaps it is about the liberation from the ideological construct of the nation as a cultural and political entity. Or perhaps it is the exact opposite of that. Wherever there is land, there is a country prepared to appropriate us, to turn us into her and to take our image, to mark us not as members of a collective but as bearers of an identity and all the obligations, and artificial rights, attached to it. I find that last reading rather telling for the case of the law. Spatial isolation is not accompanied by legal emancipation. One is always a subject and is never left in the borders of law. Then comes the dimension of time. I described in chapter three how the law is temporally ubiquitous, because it is a-temporal, so I shall only refer the reader to that chapter. The third dimension is that of events and facts. There is a legal meaning for everything that happens, there is a legal

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91 This is slightly different to “ubi terra, ibi patria”.

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category, in which everything fits. This legal classification of the world might be latent. We do not always think of the things or the people surrounding us in legal terms. Nevertheless, they all exist in law and, when the right conditions are met, their legal classification is revealed. Finally, there is justification. It is not so much a matter of whether one can interpret the law or use reasons, which seem to be outwith it but the fact that, at the end of the day, one's action and its justification will be measured against the law and nothing else. In other words, the law does not deprive us of our free will altogether in the sense that we can freely either abide by or break the law. However, anything we do will always refer back to the law, it can never break away from it.

Let me now return to the clash of different legal orders. Jacques Derrida (1992) points out the paradox in the distinction between law-preserving and law-making violence. They inevitably collapse into each other, as the law-making violence stems from within a legal order (Buonamano, 1998). Negation of the law can only be meaningful with reference to a negated law. The contradiction is this (Derrida, 1992): founding violence can be criticised on the grounds of its illegality, of its savage lawlessness. On the other hand criticism becomes impossible exactly because of that lawlessness. For the criteria of rightness are cancelled.

Indeed, if one sees law-making and law-preserving violence in the light of their difference to the law, which they both presuppose either by founding it or by negating it, then the double bind, which Derrida reveals, does exist. However that can only be the case, when you only acknowledge one source of normativity, that is the state legal order. A parallel reading of Cover, Luhmann and Benjamin demonstrates law-founding conflict and instances of revolutionary violence do not occur against a background of anomie. It is the clash of substantively different nomoi. Reasons for approving or criticising are to be found in different arsenals of arguments, which have no way of communicating with each other. They each retain a claim to universality and that enhances their inflexibility. They reserve rightness for themselves and thus cannot perceive the possibility of an alternative. So, revolutions are not the manifestation of the clash between commitment to the law and defiance of the law. In total defiance there is law. Therefore, Derrida's "double bind" disappears. There is no contradiction, as there is no shared diction.
Recognising various sources of legal normativity has a number of implications. Firstly, one has to accept that normative pluralism can occur within normative systems other than state law too. Schematising the conflict of various legal orders of different dimensions and modes of validity as the clash of marginal, as it were, legal orders with state law, is to fall in the trap of the uniqueness of state law. The legal universe, which Cover describes, must be much more complex than that. Legal orders outwith state law are not structurally or conceptually different to the latter. They too are haunted by the same phantoms as state law, amongst which violence is the most dangerous one. All law is violent. Violence is not exclusive to state law. The difference is one of degree depending primarily on the level of institutionalisation and the real ability of summoning enough power to exercise physical violence as well. All legal orders respond violently to their denial, for they all have finite means of communication. Orders other than state law are not divine orders. Seen from the internal point of view, they too are self-preserving, self-centred mechanisms, which aspire to impose themselves authoritatively, as their claim to universality prescribes. This is the primary reason, for which I chose to use systems theory. Cover's thought is guided by his strong anti-state feelings. Therefore he commits two errors. Firstly, he shows too much faith in legal orders other than state law. There is no reason to believe that religious cults or communities are necessarily right or any less violent than state law, that they allow more freedom to their subjects or that the commitment of the participants is genuine and free. Secondly, there is a problem, which I pointed out when I gave the account of Cover's theses. Namely, he hints that he prefers some kind of law to complete lawlessness. The big question is whether complete lawlessness is possible in the first place and then there is always the problem of which law we should opt for! Because systems theory focuses on law as a functional societal subsystem, it is able to rid itself of the axiological approach to law. Therefore it does not consecrate state law nor does it celebrate the 'different' as manifested in the existence of 'peripheral' legal orders. It is able to merely acknowledge this plurality and also explain why there is a need for a law. In chapters seven and eight I shall expand more on these merits, as well as the shortcomings, of systems theory in the context of a theory of legal pluralism.

Secondly, the criteria have to be found for qualifying normative orders as law. It would be extremely dangerous to open the floodgates and hastily characterise all normative
phenomena as law. Again I intend to elaborate on this in the next chapter of this thesis, in which the discussion is about legal pluralism.

**ON FORCE AND VIOLENCE**

When discussing Cover and Benjamin I mentioned that neither of them would please the analytical sceptic, as they do not define the concept of violence with clarity and consistency. At times they both seem to be talking about physical violence and then they imply that violence is not necessarily accompanied by harm. One could object that my theses also suffer the same problem, as I speak of the violence in the law without explaining with certainty what I mean. In the following I want to defend Cover and Benjamin for using the term violence and also support their choice not to define it exhaustively. I shall argue that more important than ascribing a fixed meaning to violence is to question the ideological meaning ascribed to it by modern states and legal systems. In order for their violent nature to be disclosed their vocabulary must be deconstructed.

R.P. Wolff (1971) argues that the concept of violence is inherently confused and incoherent. Its definition, claims Wolff, depends upon the definition of the concept of legitimate political authority, which is also historically contingent and conceptually incoherent. Therefore it is meaningless to talk about violence. In addition one has to concede that using the concept of violence and that of non-violence is an ideological mechanism which confuses political discourse.

It can be said that my use of the concept of violence is as loose as Wolff's assertions require. I argue that trying to define violence in a strictly analytical way can be extremely misleading and confusing. I also try to show how the prevalent understanding of violence is based on the overemphasised role of authority. Therefore I prefer an intuitive understanding of violence. However, I shall also draw a connection between violence and justification. My claim is not that violence is non-justification and only that but that lack of justification or unjustifiability is always violence.

In order to justify my choice, let me probe one possible challenging approach to that common perception of violence.
Both in theory and in everyday language the concept of violence is referred to in contrast to the concept of force and the difference between them is located on the axiological level. Namely, it is commonly held that force and violence are morally distinguished, because, albeit they are both acts of use of physical power, the former is legitimate whereas the latter not. The issue is extremely interesting from various points of view: linguistic, philosophical, political, sociological. The implications of the answer to it are equally important. Let me then try to follow this distinction between force and violence, clarify the two terms and, effectively, defend my use of the term "violence" in relation to law. My approach to force and violence is primarily a moral philosophical one. I shall move to the realm of political theory only to explain the predominant use of the terms I am dealing with.

*Force is legitimate use of physical strength; Violence is illegitimate use of physical strength.*

It is clear that these two assertions consider the use of physical power as the common denominator of force and violence. So force is legitimate physical power and violence is illegitimate physical power. ‘Physical power’ is void of any moral content. It is solely a description of an act. The introduction of moral properties transforms physical power into a morally relevant category and subdivides it into force and violence. So far so good. There seems to be no problem accepting that force and violence refer to the same action and they become moral categories with the addition of the moral predicates of legitimacy and illegitimacy.

The predicate ‘legitimate’ can refer to two things. Firstly to the authority of the actor-addressor over the addressee. Secondly, to the moral justification of the act. As far as the former is concerned, Wolff points out that in the political theoretical sense it is authority that draws the line between force and violence. However, it does not seem to suffice from a moral-theoretical point of view. One can carry out forceful acts with no authority over the addressee whatever. For instance, one may (and perhaps ought to) slap someone in a hysterical fit across the face. The condition of the latter does not give any authority to the former; it merely justifies the choice of action. Therefore, it is in the realm of justification alone that we have to look for legitimation. Besides, on a second level authority is in need of justification as well. Especially if one advocates the merging of morality, politics and the
law, one must accept that that justification ought to be substantive. Furthermore, since the discussion is about an instance of practical reason, this justification must be permeated by moral, that is universalisable, arguments. I shall return to that issue, when I argue that it is authority that stands in the epicentre of the supposed difference between force and violence.

The assertion that the difference between force and violence can be drawn with reference to legitimacy as moral justification has several implications. Since what makes the difference between force and violence is reference to positive and negative degrees of morality, it necessarily means that force and violence must be incompatible; they cannot be simultaneously ascribed to the same phenomenon, for something cannot be both legitimate and illegitimate at the same time. One also has to accept that force and violence share an ontological basis and that their difference lies only on the axiological, the noumenal level. Let me now put these conclusions to a test.

In March 1999 NATO bombarded Serbia as a measure against suspected genocide committed by the latter against the Albanian minority in the Yugoslav region of Kosovo. The Treaty member states, which took part in the military action, put forth arguments of unquestionable moral character: the protection of a national minority, the prevention of crimes against humanity and so on. For the sake of the argument let us assume the validity and even rightness of these arguments. Let us also accept that air strikes were the appropriate measure to realise the moral goals and even that they are legally sound as well. According to the definitions of violence and force, which I have outlined so far, the NATO military action cannot be seen as anything else but force. It involved use of physical strength and it is legitimate. Therefore the term violence becomes automatically inappropriate. Nevertheless, it clearly is not so. It is not likely that anyone would hesitate calling bombardment a violent act. What compels one to think in such terms are the necessary phenomenological connotations of the idea of bombarding, the pictures of sheer terror and destruction. These connotations and associations refer to the pragmatic aspect of violence, not its moral merit or demerit. In everyday language something can be both legitimate and violent at the same time. Therefore the distinction between force and violence on axiological grounds is beginning to weaken already. That obviously calls for more development.
Saying that a forceful act can also be violent can mean two things. Firstly, it can suggest that the meaning of the term violence is exhausted in the act itself. In other words, no moral predicates are required before an act can be deemed as violent. The threshold of violence is only pragmatic and it is to be determined with pragmatic criteria. This cannot be true though. An act inevitably has a meaning beyond the phenomenon. Secondly, it can mean that the term violence has two concurrent modalities, a pragmatic and a moral one. In other words, what I called S in the previous paragraphs, that is the use of physical power, seems here to be a synonym of violence. So, if we substitute physical power with violence, it derives that: legitimate violence is force and illegitimate violence is violence. That can obviously not be, because violence would be rendered both the genus and the eidos. Unless violence has a different meaning in each case and we can therefore distinguish between the phrases 'violent act' and 'act of violence'. The former would refer to the pragmatic modality; a violent act is one that meets certain real criteria, that brings about a specific change in the world. An act of violence is one that is being ascribed the meaning of violence for reasons other than the ontology of the act. It is in that mode of the term violence that moral justification, the intentions of the addressee and the point of view of the observer become relevant. Those two modalities being autonomous and concurrent, one can argue that a violent act can be an act of violence and vice versa, but not necessarily.

However, the distinction between the two modalities of violence is, to say the least, not useful. Firstly, it relies far too much on arguments drawn from the ordinary use of language, which is not and cannot be accurate at all times and under all circumstances. Secondly, one has to note that distinguishing between two modalities of the concept of violence is not the same as distinguishing between two references of the same word. Violence as non-justification of action and violence as a certain kind of action are two predicates of the same occurrence in the world. Setting the criteria for that distinction is a rather futile venture, because one cannot help using contingent and indeterminate guidelines.

To be sure, adhering to the distinction between force as legitimate action and violence as illegitimate action is not completely unproblematic. One of the gravest shortcomings is what Wolff put forth. By attributing a moral content to force and violence, one automatically endorses the ideological fabrications of modern states. Political theory can show that the (mis)use of the terms force and violence is due to the significant transformation they have
undergone through the prevalent ideology of the state monopoly of legitimate exercise of power. The formula is quite simplistic and with its blatantly unfounded assumptions it conceals its fallacies:

the state is the only legitimate source of power;
force is by definition legitimate use of physical strength and violence by definition illegitimate

use of strength by the state is always legitimate

This ideological construction has been disguising the practices of states. Effectively the impression was created and embedded in political culture that the only standard, to which physical action can be morally measured up, is state sanctioning. States do violence only in cases of blatant abuse of power and violation of the rule of law. Extra-state or -legal activity though is by default violent, which is morally bad and politically subversive. It cannot be vindicated by moral justification.

I mentioned earlier that legitimacy can be perceived as deriving from either authority or reasons. A consistent theory advocating the achievement of substantive justice through law (e.g. Ronald Dworkin’s theory) or one that seeks to prove that the law raises a potentially supported claim to rightness (e.g. discourse theory) cannot simply rely on the assumed justification of political authority. The law must justify each and every instance of its existence and action. Moral reasons are sine qua non prerequisites of a morally justifiable order. Since violence is defined with reference to justification instead of simply authority, then the state can, and indeed ought to, be asked to provide a sufficient moral justification for its practices. In what follows in this chapter and the rest of my thesis, I shall try to show exactly in what ways the state and the law do violence in the sense that they fail to justify interventionist action. It has to be noted that this failure is not historical and therefore contingent but conceptual. The inability to justify is immanent in the law and dictated by its own nature and form.
CONCLUSION

What a bold claim it is to say that the law is violent! In fact, not as bold as one would think.

The intuitive rejection of this statement as preposterous is, as I tried to explain in this chapter, due to the socially embedded political definition of violence as a counterpart of legitimacy in the sense of authority. If violence is by definition illegitimate, pointing out a violent side in the law is refuting the legal character of the law, which is a paradox and politically at least subversive. However if one discards the ideologically established perception of violence as illegitimacy, violence is being conceptually dissociated from the law and the road is cleared for drawing other connections between them.

The conceptual manipulation of violence is a prerequisite for the violence done by the law and it is violence itself, as it distorts the conditions of communication. That along with my analysis about the ways in which the law authoritatively interrupts communication in all four of its dimensions, and the systems-theoretical account of the law’s systemic closure, complement and qualify Cover’s and Benjamin’s theses. According to those, the law establishes its exclusivity by doing violence. All law safeguards its exclusivity by appropriating the normative vocabulary of other legal orders that base their operations on the same code (legal-illegal) but differ substantively on the level of programming. Thus their autonomy is violently denied.

So the vocabulary of my thesis has been expanded already. I started speaking of a plurality of legal meanings and of violence done not only to individuals but whole legal orders. I have hinted at the numerous problems connected to that thesis such as the possibility of co-existence of a central and other legal orders, and I have suspended the answers for the next chapter.
CHAPTER SEVEN

THE MORE THE MERRIER? THE ALTERNATIVE OF LEGAL PLURALISM

INTRODUCTION

All law that bases its operation on an undiscussed epistemology and a material intervention in the world by way of acting is haunted by a discursive inability due to which it cannot make sense of other concurrent normative orders. These are either explicitly rejected or their vocabulary is appropriated and distorted in a way that discourse is disabled to the extent that it becomes the manifestation of the violent maintenance of exclusivity. It is important to note that this violence is not exclusive to state law. All law bases its operations on the silencing of all other normativity.

In this chapter I seek a response to that inability of the law to communicate with other normative orders and register them. Legal pluralism is the most obvious place to look for such a solution. The legal pluralistic problematic departs from the premise that state law does not enjoy exclusivity. The novelty of legal pluralism lies in the fact that it searches for regulatory orders of a legal quality other than state law. Thus it potentially puts the law in a different perspective. In a context of dispersed institutionalised legalities central state law ceases to be a mechanism of integration and the focus is shifted towards ways of self-regulation, which are not necessarily holistic and do not raise a claim to moral rightness.

Firstly, I give an account of the most significant and influential theories of legal pluralism distinguishing them in two main strands: cognitivistic-positivistic theories, which apply
certain criteria in order to identify the legal, and studies, which depart from a critique of the law on grounds of its communicative inability and look for dispersed manifestations of legality not necessarily in institutional contexts. I then assess those versions of legal pluralism and try to draw and combine the most promising elements in order to suggest ways in which they can be proven useful.

THEORIES OF LEGAL PLURALISM

COGNITIVISM - POSITIVISM

Early theoretical endeavours in legal pluralism concentrated on the ability of the law to be responsive to the community by acknowledging its actual needs. In other words it was the study of the tension between formal law and the ways society was regulated in actuality. These endeavours range from sociological critiques of formal law to the legal anthropological study of the effects of colonisation and the imposition of the law of the colonising nations upon the colonised peoples. What all these versions of legal pluralism have in common is their cognitivistic - positivistic approach to law. They apply formal criteria in order to identify non-state legal orders and their relationship with state legal orders. A fundamental assumption underpins this positivism: since the identifiable legal orders have a different source of validity, since they are not placed on a continuum, they are marked by hermetic closure. Therefore, in cases in which they meet conflict is inevitable and it can only be settled in the field of power and politics. I shall expand on that methodology in my comprehensive critical assessment of theories of legal pluralism further on in this chapter. In this part I shall just give a brief account of some of these cognitivistic legal pluralistic theories.

In 1935 Georges Gurvitch demonstrated that judicial monism corresponded to a contingent political situation, namely the creation of big modern States between the 16th and 19th centuries (Carbonnier, 1983). Eugen Ehrlich (1936) was one of the first to contribute a great deal to the turn of the debate towards a sociological observation by perceiving the fact that in many cases the legislators were totally unaware of the social needs and the normative orders that various communities were developing and that very often there was a conflict between the latter and state-law. He argued that the major legal codifications outrageously
ignored the “living law”, which he claims is the concrete as opposed to the abstract expressed in legal texts (1936:501). He sought to demonstrate that every official legal ordering has to be based upon the actual social reality and that the law cannot remain isolated and alienated from the people. As romantic as that sounds, it was a very important first step, because it actually introduced a socially oriented legal pluralism distinguishing between the “law of the lawyers” and the self-regulating capacities of social formations. Thus it overcame the fixed instrumentalist notion of law, which portrayed it as a means in the hands of the power centres (Cotterrell, 1995). Ehrlich emphasised that purpose-oriented effectiveness and rational organisation of the law cannot no longer be incompatible. And the only way to do that would be to use living law as a source for state legislation. According to Ehrlich the state-law has mainly a dispute resolving function. What makes “living law” (lebendes Recht) unique is the fact that it prevents people from appealing to state-law, since it provides them with more flexible and uncontroversial ways of resolving disputes. Social relations emerge mainly within associations, which have their own regulatory functions (Ehrlich 1936:58, Cotterrell 1984:32). What binds the person to the association and in the second instance to society as a whole is the fear of exclusion, since this is usually the sanction for violating a norm of most of the social groups. So, what is important in Ehrlich’s analysis is that he precisely distinguishes that every social formation has self-regulating mechanisms, which are independent from the law of the state and that this “living law”, being much more direct, is subsequently more binding for the people. This explicitly questions the exclusivity of state-law and clearly broadens the horizons of legal pluralism. Ehrlich’s acute positivism raised many objections though. Gurvitch was among those, who accused him of broadening the concept of the legal too much and hence neglecting the “spiritual elements” in social relations (Cotterrell, 1984).

Carbonnier (1983) has a perception of legal pluralism similar to Ehrlich’s. He imagines it basically as a conflict between different normative orders of structurally complete social formations such as the State and the Church, or as a conflict between the “loi nouvelle”, the “droit actuel” and the “droit ancien”. This conflict is generated by the fact that juridical abrogation does not coincide necessarily with sociological abrogation, which leaves a void to be filled by the public conscience.
Anthropological studies of legal pluralism are in the same vein. John Griffiths defines legal pluralism as “that state of affairs, for any social field, in which behaviour pursuant to more than one legal orders occur” (1986:2). Although there is indeed a tendency to emphasise the continuity of the legal phenomenon\(^92\), more often than not there is talk of “central and peripheral” laws, indigenous and folk law and so on. Although there is no theory determining the criterial definition of the various legal orders, the point of departure of research is the assumption that there are such legal orders, institutionalised and closed, which clash with state law.

This inclination to look for cognitively identifiable laws is evident in von Benda-Beckmann’s comment on Engle-Merry’s impressively comprehensive article of legal pluralistic theories, on which I shall expand further on in this chapter, as it signifies a change of direction in the study if legal pluralism. The main argument is that although there are so many descriptive theories of legal plurality “little conceptual progress has been made” (von Benda-Beckmann, 1988:897); that “talking of intertwining, interaction or mutual constitution presupposes distinguishing what is being intertwined” (ibid:898). Von Benda-Becmann believes that there is an analytical question that has to be answered first, namely the essential qualities of the law have to be determined. Later, I shall argue strongly against this positivism on the ground of its rightness and desirability.

**POSITIVISM IS NOT VERY INSTRUCTIVE**

Those theories of legal pluralism, which I have called ‘cognitivist-positivistic’ seem to have a rather clear-cut and often naïve picture of the world. Law is what meets certain criteria such as the existence of a system of rules, institutionalisation, enforcement of these rules with sanctions and so on. By applying these formal criteria to prima facie regulatory orders, we can conclude whether they are legal or not. If yes, then state law has to recognise them as such, they have to be respected and not interfered with.

But who is to judge the legality of these orders? Whence are the criteria drawn? Let me look at two possible answers.

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\(^92\) See Allott and Woodman (eds.), 1985 about Galanter’s notion of concerning the decentered application of norms.
We draw the criteria from our experience of the law. We all live by and in the law, we can all tell the difference between the law and other normative orders. There are some features, which recur in various contexts. Therefore, they are designated as the conceptual core of the law and, every time their combination is traced, we can then safely claim that there is law.

A very grave fallacy is committed with this line of reasoning. It undermines the relativism, which legal pluralism seeks to establish in the first place. If there are self-regulated groups, which are colonised by the dominant legality, classifying their form of regulation in the terms of the dominant legality has an equally colonising effect. It is a form of epistemological heteronomy, which is bound to prove detrimental for the substantive autonomy of the group in question; it is an attempt to impose externally a meaning, which has been formed under different material and normative conditions. To allude to H.L.A. Hart once more, it is wrong to assume the content of the internal point of view of a different people based on the external observation of their practices. Thus we merely project our internal point of view to a different context and inevitably misinterpret the object of our study, we do it violence in a manner very similar to state law’s, as a final judgement is imposed in the absence of the interested party.

Law is what its subjects designate as law. This way of understanding the law and thus setting the agenda of legal pluralism is more consistent with its obvious relativistic basis. If the concepts of right and wrong cannot be transcendental and uniform, then there cannot be a central and authoritative way of deciding what the method of attributing content to these concepts. Both these ventures are located in the social and they depend upon the real conditions of existence of various communities and the representation of these conditions, that is the way they perceive of themselves and others.

This time the problem, which also marks the objective, criterial definition of the law, is substantive and therefore more serious. What happens when the peripheral orders, which have been granted or, more correctly, assume legal status seem wrong? Can they be put to a substantive test of rightness? At the end of the day, the discussion goes back to whether legal discourse is open to information outwith its pedigree and, if yes, to what extent, which is one of the threads running through this thesis. It is easier to understand the problem from
a point of view within a peripheral legal order. Then the question is reformulated from ‘can state law exercise control on other legal orders?’ to ‘do these legal orders allow any intervention in the first place?’ I shall come back to this fundamental question in the next part of this chapter and argue that it is where all versions of legal pluralism meet.

Whichever method of defining the law one opts for, one thing is certain. According to a positivistic understanding of the law all legal systems are hermetically closed, they cannot make sense of any other normative order as such unless it is reduced to their own source of validity. Therefore, communication between legal orders is impossible unless these orders are merged into one. In other words, when such communication looks possible, it is disagreement about the law from within it rather than a conflict of different legal orders. They share their ultimate source of validity both in content, be that a practice, a Grundnorm or a sovereign. The reasons for which one order (usually the one sanctioned by the state) prevails over the others is not due to its normative superiority but is rather a matter of political power, it has to do with the actual and contingent ability to impose itself upon the rest.

The instructive role of that positivistic reading of the law and legal pluralism is exhausted in that conclusion. Unfortunately it does not and cannot go any further. Acknowledging the obvious fact that the state is not a necessary, conceptual prerequisite of the law does not even pose the question, let alone answer it, of the rightness of these legal orders. The fact that state law prevails violently with its communicative closure does not automatically vindicate the legal systems, which are excluded. If one thinks of these legal systems in terms of groups, as legal anthropology customarily does, the denial of their right to self-regulation does not necessarily mean that their law is legitimate or right. Peripheral law is equally exclusive and discursively closed. In fact, on numerous occasions it is more so than state law, precisely because it assumes a very high degree of legitimation. It too does violence by imposing constraints and thus manipulating discourse, if it allows discourse to happen at all. The fact that peripheral law is dominated against shows something about the external conditions of existence of law rather than its essence.
THE OTHER LEGAL PLURALISM

Engle-Merry (1988) diagnoses a transition in the way legal pluralism is perceived by theory. After discussing a very large number of legal pluralistic theories she formulates some suggestions, which should guide legal theory in the light of the recognition of the dispersal of the legal phenomenon:

- theory must move away from the ideology of legal centralism, that is the assumption that the only legitimate legal order is the one applied and enforced by the state;
- in order for that to be achieved, the law has to be understood in a historical rather than a conceptual manner:

“Defining the essence of law or custom is less valuable than situating these concepts in particular sets of relations between particular legal orders in particular historical contexts” (ibid.: 889)

- moreover, the law ought to cease being understood as merely a set of rules and start being perceived more spherically as a system of thought:

Law is not simply a set of rules exercising coercive power, but a system of thought by which certain forms of relations come to seem natural and taken for granted, modes of thought that are inscribed in institutions that exercise some coercion in support of their categories and theories of explanation (ibid.)

- legal pluralistic thinking in the above terms also facilitates the study of social ordering in non-dispute situations.
- finally, comprehending the interconnectedness of various legal orders offers a new way of thinking about social relations of domination.

In what follows I shall refer to three theorists, which have taken up the challenges set by Merry, albeit not explicitly, and have offered alternative theories, both descriptive and normative, of legal pluralism. Namely, I shall refer to Günther Teubner’s systems theoretical approach to pluralism from the point of view of structural coupling, Boaventura de Sousa De Sousa Santos’ account of intertwined legalities and Warwick Tie’s suggestion of a new epistemological model as a solution to the law’s inability to make sense of other normative orders.
Teubner (1992) subscribes to the programme of the new legal pluralism described by Merry and tries to qualify it from a systems-theoretical point of view. His point of departure is the closure of legal systems and their inability to make sense of other discourse in their terms. His aim is to propose a new way of theorising legal pluralism so that it becomes helpful in the project of making the law as responsive as possible to other regulatory discourses.

He asks the fundamental questions of what is to count as distinctively legal and how state and other law are to be interrelated. However, it is not cognitivistic criteria he looks for, as anthropological or early sociological legal pluralistic theories did. On a second level his aim is to clarify what makes communication between state and other law in the first place possible and secondly fruitful. Moreover, and as will become clear further on, his definition of the legal proprium has a different and distinct basis.

Teubner rejects theories that set normativity as the ultimate criterion for the recognition of a legal order (ibid.: 1449). Legal pluralism consists in normative expectations and excludes cognitive and behavioural ones. Teubner finds this solution inadequate firstly because it regresses into the debate concerning how legal and non-legal are to be distinguished and secondly because it does not grasp the processual and dynamic character of legal pluralism.

Similarly, functionalist theories, which promote social control as the ultimate criterion are not adequate either (ibid.: 1450). They are too inclusive and although they might be useful in pointing out functional equivalents of the law, they are not especially helpful in distinguishing between legal and non-legal norms.

Teubner proposes an understanding of legal pluralism in the vein of the linguistic turn:

Legal pluralism is then defined not as a set of conflicting social norms in a given social field but as a multiplicity of diverse communicative processes that observe social action under the binary code legal-illegal (ibid.: 1451).

This definition of law differs to ordinary cognitivism in the sense that it leaves it up to legal discourse itself to delineate its boundaries in relation to its environment.
Since the legal seals itself from its environment in such a way, communication between legal orders becomes rather improbable. This is what Teubner tries to make sense of. He is very sceptical about the use of terms such as “interdiscursivity”. He points out that communication between legal orders is inevitably distorted. He explains that in terms of what he calls “productive misreading”. When norms transcend the boundaries of a discourse and enter a new one, their meaning undergoes a critical shift. They either cease to be read in the light of the binary code “legal-illegal” and therefore lose their legality altogether, or they are adapted to the programme93 of the discourse, which they have become part of and change their meaning although they are still classified under the code “legal-illegal”. So, meaning cannot be imported or exported unaltered. For that reason Teubner prefers the term “mutual constitution” coined by Fitzpatrick (1984) to describe the way state and non-state legal orders make sense of each other. However he sets three necessary conditions:

First, against all recent assertions on blurring the ‘law/society’ distinction, the boundaries of meaning that separate closed discourses need to be recognized. Second, mutual constitution cannot be understood as a transfer of meaning from one field to the other but needs to be seen as an internal reconstruction process. Third, the internal constraints that render the mutual constitution highly selective must be taken seriously (ibid.: 1456)

If the binary code “legal/illegal” is promoted as the element, which crucially determines the legality of regulatory phenomena, legal pluralism should shift its emphasis from the study of social groups developing legal orders to self-regulating discourses. Legal pluralism is no longer about social norms but about the legalisation of other language games. In this process linkage institutions (ibid.:1457ff), such as bona fides, have changed character as well. Linkage institutions are those essentially contested concepts, the meaning of which varies depending on the context in which they are placed. In the new project of legal pluralism, linkage institutions bind the law with social processes. Through these concepts the law misreads processes and ascribes them a legal quality instead of incorporating the outcome of these processes in the form of social norms and therefore becomes more sensitive to its environment.

93 See chapter one for clarification of systems-theoretical terms.
When the law is structurally coupled with society informed by the problematic of legal pluralism, it becomes more responsive as it co-evolves with regulatory discourses dispersed in society. Understanding legal pluralism as the law's tacit knowledge of its social ecology (ibid.:1461) will relieve socio-legal theory as well as the project of normative emancipation from the constant anxious concern to import the knowledge of politics or that of social sciences so as to make it more responsive, both of which end up juridifying politics and science without guaranteeing the responsiveness of the law.

**ii. Boaventura de Sousa Santos and the need for new subjectivitities**

The fundamental question de Sousa Santos (1995) seeks to answer with reference to legal pluralism is how the apparently mutually excluding pillars of regulation and emancipation can be made compatible. Legal pluralism is for him the new reality in which we are developing new ways of understanding the world and therefore new ways of regulating our lives. However, this regulation is not static, it cannot and indeed does not claim finality. It is an ongoing process of rediscovering and regulating the world.

He distinguishes between three phases in the debate about legal pluralism. 1) The colonial period, 2) the post-colonial period in capitalist modern societies and 3) the post-modern legal plurality, which includes transnational, suprastate orders. He claims that what makes the third period exceptionally post-modern is the fact that what is crucial is no longer a search for a definition of law but the identification of the three distinct levels of analysis which correspond to the three time-spaces of the legal phenomenon, the local the national and the transnational (1995:117).

The third stage is marked or is preceded by an epistemological transition, a new form of knowledge and understanding of the world. Instead of modern knowledge, which is an aggregate of unquestionable truth claims, which regulate our world with a claim to absolute rightness and certainty, he suggests that it is a different kind of knowledge we should be pursuing. Namely, what he terms a “prudent knowledge for a decent life”. This emergent epistemological paradigm wedds science and society. Unlike modern knowledge, which claims exclusivity, post-modern knowledge is knowledge of the self and the community. It does not offer tools of explaining the world, and to which the world has to fit; it is an ongoing process of understanding and revising our explanatory tools.
In the discussion about the ways to identify the various normative orders de Sousa Santos begins with the remark that it is not enough to acknowledge the plurality of them but it is necessary to also ground it theoretically (1995:403). He then tries to do so by isolating social configurations, i.e. six-dimensional and thus complex structures, and by observing which kind of law they are regulated by, which kind of power relations one can trace in them and which epistemological form permeates them. At the same time he examines which institutions guarantee the regularisation of patterns of social relations, the social agencies, and the developmental dynamics, which basically are the factors that perpetuate their existence and can be both aims or means of reproduction. The six structural places are the householdplace, the workplace, the marketplace, the communityplace, the citizenplace and the worldplace. He argues that these structural places always remain stable and hence reliable as social “topoi” and observational standpoints. Additionally he estimates that what makes them unique places is the fact that they are both social and geographical constellations and that their specific spatiality makes locational and temporal reference always possible. What each of these structures represents is more or less revealed by their own name. Nevertheless some points of the typology and the argument seem prima facie rather vague. What appears to be the cohesive element of each of these structural places is the specific form of social relations that are being developed within them. These social relations constitute a web around a basic element, which penetrates them and determines their development and appearance. This element, as de Sousa Santos conceives it, varies from one structural place to the other and is associated with the functions of each of the latter. Thus, for instance, the communityplace is “clustered around the production and reproduction of physical and symbolic territories and communal identities” whereas the workplace is

the set of social relations clustered around the production of economic exchange values and of labour processes, relations of production stricto sensu (...) and relations in production (...).

The workplace, concept that sounds rather broad and somewhat obscure, is defined as

the sum total of the internal pertinent effects of the social relations through which a global division of labour is produced and reproduced (1995:421).
Let me explain Santos’ scheme further: The worldplace is a universal umbrella for all the other structural places. Comprising both social and political spheres (namely nation-states), the worldplace provides the necessary universal framework and the organising pattern for their development and reproduction.

<table>
<thead>
<tr>
<th>Structural Places</th>
<th>Law</th>
<th>Power</th>
<th>Epistemology</th>
</tr>
</thead>
<tbody>
<tr>
<td>Householdplace</td>
<td>Domestic law</td>
<td>Patriarchy</td>
<td>Familial culture</td>
</tr>
<tr>
<td>Workplace</td>
<td>Production law</td>
<td>Exploitation, capitalist nature</td>
<td>Productivism, technologism</td>
</tr>
<tr>
<td>Marketplace</td>
<td>Exchange law</td>
<td>Fetishism of commodities</td>
<td>Consumerism, mass culture</td>
</tr>
<tr>
<td>Communityplace</td>
<td>Community law</td>
<td>Unequal differentiation</td>
<td>Community culture</td>
</tr>
<tr>
<td>Citizenplace</td>
<td>Territorial law</td>
<td>Domination</td>
<td>Civic culture</td>
</tr>
<tr>
<td>Worldplace</td>
<td>Systemic law</td>
<td>Unequal exchange</td>
<td>Science, global culture</td>
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It is also useful to see how de Sousa Santos conceives of the law in the first place. He identifies three distinctive features, three structural components of the legal phenomenon, which characterise every normative order and not just state law. These three characteristics are rhetoric, violence and bureaucracy (1995). Rhetoric, as the art of persuasion by argumentation, is both a communication form and decision-making strategy. So are violence and bureaucracy, the former of which implies and involves the use or threat of physical force, while the latter refers to the regularisation of procedures. These three structural components have no stable form but function in mutual articulations within each normative order and the way in which they are being combined determines the final form of the legal order and its functional pattern. It must be noted that de Sousa Santos does not use these three features as criteria in order to identify diverse normative orders. Rather, he detects the latter in diverse social fields and then tries to apply rhetoric, violence and bureaucracy upon diverse legal forms and simply comment on the form of interpenetration of the three structural components.

The synthesis of the above forms de Sousa Santos’ picture of legal pluralism. He imagines it as a cluster of interpenetrating legalities, which regulate all instances of our whole lives and correspond to our knowledge of the world. As this knowledge changes, so do the forms of
regulation we experience. He uses three telling metaphors to describe the new epistemological and legal paradigm. The *frontier* means we never belong fully to one or the other side. We do and do not have the internal point of view at the same time, to borrow a Hartian image. Living on the frontier enables us to perceive the centre as oppression rather than emancipatory regulation. Achieving a *baroque* subjectivity means that order is always suspended. The baroque is always suspicious of totalities, it is extreme and does not subscribe to rational calculations. Finally, the *South* must recover its voice. We must rediscover the *colonised different* only not in an imperialistic manner, which purports to be scientifically universalistic. It must be re-given its voice and its language and the North must be prepared to listen to it carefully.

#### iii. Pluralism as an epistemological necessity

Warwick Tie’s research programme is similar to de Sousa Santos’. His defence of legal pluralism in his recent *Legal Pluralism* (1999) is motivated by an epistemological concern. He puts under scrutiny various strands of critical legal theory, which he terms legal pluralist in his broad view of what pluralism involves. He identifies three categories: post-realist (including Marxism and feminism) (ibid.:93ff), post-modern (ibid.:113ff), and post-pragmatist (ibid.:138ff). Post-realist envisions various legal orders as co-existing against the background of a stable and accessible reality; in this a ‘right answer’ exists and its discovery is feasible. This, emphasises Tie, is what stops post-realist legal pluralism from getting off the ground and fully voicing an emancipatory demand. It leaves the realm of metaphysics undismissed and therefore undermines the project of making liberty and regulation compatible. The post-modern critique of the law focuses on the claim of state law to ethical exclusivity and authority. It argues that injustice will be perpetuated for as long as the masculinist, capitalist, colonialist “unconscious” of the law remains latent. However, post-modernism is, according to Tie, too indeterminate and ephemeral, which can render it as oppressive as over-regulation. Additionally it is too voluntaristic, for it leaves it up to the subjects to determine the ‘law of the law’ depending on what they deem as singularly most important to them. Finally post-pragmatism is the most promising in its emancipatory message but relies too much on an intersubjective discovery of the truth.

The epistemological paradigm that informs Tie’s version of legal pluralism is “naturalised evolutionary epistemology” (hereafter NEE) (ibid.:introduced at 34, analysed at 169ff). NEE
is based on a combination of ontological realism and epistemological post-realism, which, according to Tie, gives a new perspective to the study of the legal phenomenon. The central tenet is that there is a reality that exists beyond our perception but, as our epistemic tools are limited, we do not have full access to that reality. This epistemic deficiency is compensated by the invention of "proxies", that is abstract representations of the unknown. Objectivity is only an ideal to which cognitive activity aspires but can never be reached. Since the proxies vary in content, enquiry and discourse are always inconclusive. Reasoning is risk and this makes formalist logic impossible. In terms of law’s response to this, the effort to overcome the inconclusiveness of reasoning creates the pathology - expressed in the exclusionary nature of legal statism -of the suppression of attempts at interpretation, which originate in what is culturally diverse.

The other central idea that underpins NEE is that social evolution is due to the systems’ adaptation to changes in their socio-biological environment. The law, as itself a part “of the reality, which it administers” (ibid.:93ff), is located within socio-cultural diversity. The legal phenomenon is dispersed in such diversity; yet, as all systems it exerts some control over its adaptation mechanisms. A differentiation between types of law is made based on three concepts introduced by NEE; namely, superfoliation, a decision-theoretic conception of rationality, and the representation of laws as epistemic institutions. Superfoliation is

the non-linear (undetermined) manner in which systems increase their adaptability to environmental diversity” (ibid.: 174)

and is geared by the need to maintain environmental stability. Accordingly, rationality is defined as the ability of an institution “to diversify its range of adaptive processes” (ibid.:190). Epistemic institutions are

“social entities, such as science and law, that yield normative claims about what ought to occur” (ibid.: 189).

However and contrary to the positivist perception of the law, the latter cannot produce fundamental or procedural norms but can only try and reflexively make sense of how changes occur.
A new conception of law emerges from the epistemology of NEE. The law cannot provide the “right answer”. It can only aspire to regulate patterns of consensus and dissent. It must strike a balance between closure and critique, regulatory refinement and ascent in the terms of NEE (ibid.:178ff). A certain degree of consensus is needed in the sense that the various cultural groups must recognise each other’s Otherness and form a mutual understanding of their identities. But this consensus and closure cannot go as far as to impede non-rational creativity, which is according to NEE a pivotal adaptive mechanism. All this can be accommodated within a single institution as long as its aim is not to give conclusive and authoritative solutions to disputes.

IS EMANCIPATORY LEGAL PLURALISM POSSIBLE?

By reconstructing these theories of legal pluralism and assessing them critically I hope to arrive at a conclusion about whether anything can be gained from the concept of legal pluralism. Let me pre-emptively announce that I shall argue that, in the forms it has taken so far, legal pluralism does not promote significantly the project of emancipation. Theory has oscillated between inflexible and therefore conservative positivism and indefinite and inconclusive, therefore utopian, radical pluralism. Despite the instructive and guiding role of utopia though, actual emancipation as self-regulation must be pursued, at least at a first stage, in a more realistic and feasible way.

LEGAL PLURALISM CANNOT STOP SHORT OF UTOPIA

De Sousa Santos and Tie try to reach justificatory bedrock, so to speak, and drive the justification of the plurality of legal orders, which exist in the margins of state law but in the heart of society, to a stage of irreducibility. They recognise the need for communication between these dispersed laws not as domination but in a mutually constitutive way. De Sousa Santos does so with his reference to subjectivities corresponding to forms of post-modern knowledge, which allow for the possibility of change and do not identify regulation and justice with constancy and universalisation. For the same reason Tie resorts to naturalised evolutionary epistemology, which seeks to explain the legal in terms of our adaptation to our knowledge of a pre-existing reality.
Tie is right in suggesting that the inability of the law to make sense of other culturally embedded normative orders stems mainly from its eagerness to provide conclusive answers, which cannot accommodate all possible perspectives and also, crucially, drastically limit possibilities of change in the future. Therefore, there is indeed a need for regulation of conflict on the grounds of mutual recognition. Formulaic solutions to disputes cannot but generate disputes anew because they do not eliminate the reasons for dissent.

However there are two points that I find rather dubious is Tie's argument. Firstly, I doubt that an alternative epistemology can remedy the inflexibility and totalitarian tendencies of the law. As I tried to prove in the first part of this thesis, the trouble is not only substantive in the sense that it is not only the epistemology of modernity, which insist on making sense of things only in terms of universalisable patterns, repetition, and causal connection. There is a meta-theoretical problem as well. The very fact that the law bases its normativity on a fixed epistemological paradigm already compromises the discourse by limiting its informational input and by tacitly steering its end result. A different epistemology would perhaps solve the substantive shortcomings but on a meta-theoretical level, it would make no difference at all which epistemology the law would prefer to support its normativity. What is important is that once that paradigm is deployed, it would not be problematised in the course of institutionalised legal discourse irrespective of its content.

This brings us to my second point of disagreement with Tie, namely his suggestion that epistemological and subsequently normative adaptability can be achieved institutionally. Institutionalisation of dispute-resolution automatically imposes restrictions on the discourse informing its decision making function. A background of relevance is formed, which circumscribes both the discovery of the truth and the justification of the final decision. It is hard to imagine how an institution of a legal -albeit not formalistic- character would decide between competing normative claims without degenerating into exactly what legal pluralism so anxiously urges it not to be: a mechanism for the authoritative resolution of conflicts. On the other hand, the alternative of extending the status of legal institutions to orders other than state law would lead to the same results. A conflict of legal orders would merely replicate the undecideability at a different level. To conclude this point: one of the primary problems which a theory of legal pluralism ought to face is that of institutionalisation and whether the recognition of the different is possible within the confines of institutional
closure, in the sense that institutionalisation depends on universalisation and thus on silencing of the particular. And a theory of legal pluralism must address that problem in order to establish itself as a theory of legal as opposed to value plurality.

Moreover it has to be noted that the epistemological grounding of Tie’s account of legal pluralism is not unproblematic. The combination of ontological realism and epistemological post-realism, which NEE claims to have achieved, seems rather too fast a solution to the fundamental problems of ontology. If there is a reality beyond our perception, how are we ever to discover it? Even the possibility of verification of this fundamental assumption is already undermined by the acknowledgement of the inadequacy of our cognitive abilities. For exactly the same reasons the presupposition of a material reality is not of great use either. The need for a stable basis for ethics would not be satisfied, as it would be modified along with our perception of this material reality. Therefore, if the discourse determines its object entirely, what is the meaning of assuming the existence of that object?

There is another pressing question calling for an answer, which concerns both Santos’ and Tie’s approached to legal pluralism. Why are these theories of legal and not just value pluralism? The way positivistic legal pluralism does not offer anything novel in comparison to classical legal positivism, this kind of legal pluralism is not distinctly different to theories advocating the substantive openness of the law to moral or political discourse, such as discourse theory or Dworkin’s theory of integrity in legal reasoning. It has to be proven that talk of legal plurality is not mere rhetoric.

If what I have argued in this thesis is correct, then such a legal pluralism as the one Santos and Tie put forward is not possible. Because the law is not discursive enough to accommodate a plurality of informational input or allow discourse to develop freely Legal pluralism can only mean abolition of the law altogether, at least the way we have known it so far. Legal pluralism cannot stop short of the utopia of non-law.

My overall argument in this work has been that the law is a totalitarian, so to speak, system of thought to the extent that it does not and cannot communicate fully with individuals and, more importantly, with any other discourse and normative order. I have claimed that the law is all about decisions that exclude, about action in the form of sanctions, the justification of
which is uncertain and always suspended, postponed. I also showed that judicial fact-finding is always an act of interpretation guided by the preconceptions of historical truth and a coherent narrative. Finally I showed that the law selects a certain understanding of time, which is always excluded from discourse and how it colonises discourse by merging its time with the time of discourse and that of the participants. This discursive closure of the law is not due only to its monopolisation by the state. The law is organised around the violence that is communicative isolation. It is the latter that makes the law possible and facilitates its perpetuation. One needs to go no further than an empirical observation to certify that even non-state law is violent in the same way.

In other words, the law’s violent communicative isolation does not stem from its grounding on Kantian universalisation and the modern scientific paradigm. The law’s violence is not just a by-product of the Renaissance. It is inherent in the concept of law to the extent that the latter is about conclusive decisions and taking corresponding action. The law is not merely a discourse concerning the right or wrong course of action under certain circumstances. Primarily it is action itself. To put it schematically, the law does not just give reasons for action thus reducing complexity by selecting one amongst innumerable contingent decisions; it violently eliminates all the alternatives by implementing its decisions.

Since the law is so communicatively segregated, legal pluralism, the admission of a plurality of sources of legality can only mean one of the following:

→ legal pluralism is critically undermined by the existence of an ultimate law of laws.

It is the same problem, which does not allow positivistic legal pluralism to get off the ground. The central argument concerning the plurality of legal orders is undermined by the promotion of one of these orders as the last instance of judgement. Tie makes this concession by admitting the inevitability of maintaining a “central” law. I believe that such a concession can only be detrimental to the project of legal pluralism, for such a central institution will inevitably develop to colonise other legal orders. Unless, of course, it is not of a legal quality, if it is not institutionalised, urgent, non-discursive. This point brings us to the second alternative reading of legal pluralism.
If the law can indeed exist only by silencing other normative orders, then a theory of legal pluralism must go as far as denying the existence of law altogether, if it wants to adhere to its agenda of emancipation. In this light legal pluralism becomes the theory of dispersed normativities, which adapt to each other and thus set the conditions of their compatibility without the mediation of an institution, to which will be left the ultimate choice between these orders.

Pluralism does not only mean the proliferation of informational input. Such an understanding of it confines it in the dimension of space thus disabling the possibility of change in time or at least making it extremely unlikely. To put it more schematically, it is not enough to allow participation in the decision-making procedure of all the interested communities. One has to make sure that this discourse will not end in a binding and coercively enforced decision, which will either redirect the discourse or disallow it altogether in the future. The emergence of other communities must be taken into consideration and the appearance of more information or interpretative approaches enabled. If theories of pluralism only referred to space, they would not go much further than perceptions of the law as a system of formal logic, which does not allow in the decision-making discourse any information that cannot be translated into its language or classified into its categories. Pluralism must be the suspension of the decision, the postponement of the moment of finality. As soon as it is submitted to the constraints of institutionalisation, it is tempered and becomes a compromise. To refer to Ronald Dworkin once again, one cannot have pluralism and a right answer at the same time. There can be an answer, even a satisfying one, but it can never be the right answer, as judgement concerning its rightness is always to come.

Legal decisions, as I have been arguing in this thesis, are necessarily actions, which violently interrupt discourse or reset its conditions. Emancipatory utopian pluralism is exactly the denial of the very need for such a decision. Law as decision and action, as a final judgement on any level (judgement on action or judgement between other evaluative judgements), any type of law in any form and degree of institutionalisation, is violently totalitarian and
therefore incompatible with pluralism. Pluralism is a process whereas law is a decision-making, action-taking mechanism, which can only create by destroying.

So law is unable to accommodate a plurality of informational offers and leave room for a multitude of eventualities. Therefore pluralism can only be a constant process in the realm of the political. This is where Santos’ and Tie’s theories of legal pluralism become useful. By emphasising the need for (or indeed the reality of) the epistemological shift from modern inelastic knowledge as regulation to post-modern knowledge as a process which accommodates and is comfortable with aporia as lack of poroi, of cognitive resources, theory will also begin to feel more comfortable with the notion of normativity as a guarantee of procedure rather than the arrival to transcendental moral truth. But this cannot happen in and through the law. The space for unimpeded communication and conflict can only be politics.

This is not to say that politics is not marked by constraints, which undermine discourse. One can think of various such impediments such as ideology, material inequalities and so forth. However, these constraints are not inherent in politics. Therefore there are ways of overcoming them with the use of reason and the balancing of the material conditions and terms of discourse. In the law this is not possible, as some of the constraints it imposes on discourse, such as the spectre of the decision, which haunts legal discourse and dictates the incomplete justification of action in the form of sanctions.

This is why what I called the other legal pluralism or at least Santos’ and Tie’s versions of it are utopian. They can only lead to the abolition of law. Their aspiration is to include as much as possible under the canopy of law. But too much law can only be no law at all in the sense that if there is not a central law, to carry on using legal pluralism’s favourite geographical analogy, to deliver an ultimate judgement, one of the essential features of the law is missing. On the other hand, when that feature is in place, emancipatory plurality becomes impossible.

Despite those shortcomings, Santos’ and Tie’s accounts of legal pluralism are inspired to the extent that they are reconstructing a continuum of intertwined legalities and replace the regulatory inflexible certainty of modern law with a form of regulation, which is responsive
to knowledge and the materiality of our existence. The focal point is shifted from the recognition of legal systems reducible to certain criteria to the relations developing between dispersed legalities, discourses of a legal quality and the way they can be fruitfully combined. Also of great value is that both Santos’ and Ties’ legal pluralisms focus on the close affinity between normativity and epistemology. Finally, despite the fact that their utopian nature makes them less attractive, as it is by and large practicality that is more appealing especially when it comes to law, it is precisely the fact that they are geared towards the inachievable that lends them the character of guiding paradigms. In the following section I shall try to make use of these values and see whether they can be combined with a more realistic legal pluralism.

UTOPIAS ARE GREAT BUT LET’S GET REAL

So far I have been following the intuition that legal pluralism might be able to provide a solution to the problems arising from the discursive deficit of the law and the subsequent violent silencing of concurrent institutionalised normative orders. I have argued that the positivistic versions of legal pluralism from the sociological critique of the inflexibility of state law and its low degree of responsiveness to social needs to the anthropological study of the laws of colonised peoples have been rather disappointing. They are inflexible themselves and do not offer any ways of substantively testing non-state legal orders. More importantly though, they commit the epistemological fallacy of criterially defining law and thus substituting the autonomy of the participants of ‘peripheral’ legal orders. On the other hand, utopian legal pluralism does exactly the opposite. It disperses legality so much that it either becomes meaningless or it has again to be submitted to the destructive regulation of an ultimate law. So, utopian legal pluralism suffers from all the problems but also shares all the virtues of utopia.

I haven’t yet critically discussed the alternative positivism offered by Teubner. In his systems theoretical terms, the law can become more responsive when it is structurally coupled with society. This will be achieved when a central law communicates with other discourses with the constructive use of contested concepts.

The value of Teubner’s legal pluralism lies primarily in two points. Firstly, he puts the law in a different perspective by focusing on its functional character and its specific aims and
abilities. Thus legal pluralism, and indeed all legal theory is relieved from the impression that the law incorporates or mirrors the whole normative universe of a community or even that it can embody the moral experience of the whole of humanity. The significance of the law and our expectations of it will then be reduced and, subsequently, we shall not be relying on it to regulate every single instance of our being-in-common and that the discourses, in which our lives are organised, can regulate themselves and that our input can make a difference there, as it will be taken seriously into account.

The shift of focus from moral eigenvalue of the law to its function underpins the second point of significance in Teubner’s legal pluralism. Since function is promoted as the decisive criterion and the search for diffused legalities is guided by the binary code of legal/illegal, i.e. allowed/forbidden, it is other social discourses and the way state law can make sense of them that become the centre of attention. The vocabulary of positivism changes radically; regulatory discourse replaces law as institution, social processes replace legal orders. Thus legal pluralism does not need to look for legalities underpinned by a shared identity or morality any longer. It can make the law substantively and constructively responsive to social needs by dealing with its practical character.

Moreover, the fact that the discussion is about discourse rather than groups or laws establishes a strong connection between Teubner’s legal pluralism and my critique of the law on grounds of its low degree of discursiveness. By acknowledging a multitude of self-regulating discourses, it becomes clear that there is no reason why we should assume or try to prove that the law is more inclusive, responsive, flexible or that it embodies and materialises the principles of justice better than other discourses dispersed in society. Central law can serve as a meeting point of these discourses by setting a regulatory framework. To that extent Teubner’s is a positivistic legal pluralism. He looks for a legal system, which will provide certainty on a meta-level, that is on the level of the communication of discourses, inasmuch as and in the way that this is possible without any risk of mutual colonisation. But this kind of positivism does not concentrate on the law’s normative pedigree and its exclusivity in interpretation and regulation. Rather it is interested in the law’s relationship with its systemic environment and how informational input coming from the latter is processed. Therefore it is by definition concerned both with the law’s regulatory ability but also with its degree of responsiveness.
However, this turn to law as practice and function does not render utopian legal pluralism irrelevant or redundant. On the contrary, the significance of utopia for the planning of an emancipatory legal pluralistic project cannot be overemphasised. Utopian legal pluralism provides us with the indispensable critical basis, which makes the inadequacy of state-bound law visible and the need for the expansion of the concept of legality pressing. It draws attention to the fact that the law cannot be all-inclusive, as it is oblivious to concurrent, albeit not necessarily competing, normative orders. The two accounts of, what I called utopian, legal pluralism, which I outlined, are of particular significance in that they criticise the very strong connection between normativity and epistemology, which is also part of my argument in this thesis. Thus they redirect the discussion from the question of whether just interpretation is feasible in and through the law to the prerequisites of that interpretation and the image of the world that the law is modelled to and therefore reflects and, at the same time, perpetuates, by protecting it normatively. The question of justice becomes one concerning our whole way of life, how we perceive and place ourselves in our surroundings.

Perhaps combining the virtues and discarding the shortcomings of utopia and a new kind of ecological positivism seems like the comfortable middle way. It is indeed the middle way, because I try to combine the safety of closure with the flexibility of openness, which guarantees increased responsiveness and bears promises that substantive rightness is not given up altogether as an impossibility. Nonetheless, it is not comfortable because there is a seemingly irresolvable tension between these two aspirations. The concepts of openness and closure are incompatible. Every time the discourse ends there is violence and every time it opens up to receive more informational input it will remain inconclusive, if it doesn’t remain open forever. However, on a practical, empirical level, a satisfying compromise can be struck. One that will not make the law right, it will not guarantee substantive correctness of its methodology or its outcomes but it will at least bring it a little closer to that correctness.

What I shall put forward in the next chapter and, for which I have been paving the way for in this thesis, is the need for a law open to political-moral critique from the point of view of legal pluralism. I make a suggestion for a new legal theory, one that will take into consideration some crucial facts about the law. Firstly, it must reconcile with the fact that the law is, perhaps primarily, a functional system with specific aims. Secondly, its ability to
divert from these aims is rather limited because of the very high degree of institutionalisation, which safeguards the predictability and certainty promised by the law. So, instead of trying to establish that through the law we can arrive at unquestionable decisions that deliver pure justice and that, if they thought about it hard enough, everybody would be happy even with decisions that are against their immediate interests. Under these conditions a new legal theory will be able to take advantage of its position on the frontier (to allude to Santos) between institutionalised law and self-regulating social discourses and become the medium of communication between those two realms.

**CONCLUSION**

In this chapter I hope to have shown the great differences between the various versions of legal pluralism and also under what conditions legal pluralism can be instrumental in a project of achieving a, seemingly paradoxical, emancipatory kind of regulation. I came to the conclusion that a more discursive law open to input from other normative orders can be achieved by developing a kind of law, which will provide the framework of co-existence of concurrent legalities. Thus, social discourses will be able to regulate themselves and also communicate to a certain extent. Of course, the problems stemming from institutionalisation will not be eliminated entirely. But this is part of my argument as well: that the law not only is not the realisation of justice but it is also an obstacle of justice. However, it is a necessary evil, it simply cannot be done away with.
THREE THESES ON LEGAL DISCOURSE AND LAW AND
TWO TENTATIVE THESES ON LEGAL THEORY

THESIS #1

Alexy's *Sonderfallthese* (1989a) comprises three fundamental theses: Legal discourse is practical discourse; it raises a claim to rightness; it is intertwined with general practical discourse and it is a special case of the latter due to the 'real constraints' imposed by the institutional context, in which legal discourse takes place. The first four chapters of this thesis were critical of these claims. I argued that legal discourse cannot be free, uncoerced and unfettered, because there are 'real constraints' immanent in the law and bound to its material, empirical nature. In particular I argued that these constraints are related to two features of the law: its adherence to an epistemological paradigm, which cannot be problematised, as that would substantively undermine the law's normativity; the urgent need of the law to take positive action in order for it to be effective and safeguard its systemic integrity. Therefore, general practical discourse cannot be accommodated in a legal context. Legal discourse is self-contained and necessarily directed towards its goals, which are to a large extent (pre)determined by its empirical orientation. To that extent it is not a special case of general practical discourse; it is a separate kind of discourse altogether. Alexy (1999) distinguishes between general practical and moral discourse the way Habermas (1995b) defines the latter (see chapter one). Alexy argues that general practical discourse comprises moral, ethical and pragmatic arguments and to that extent it is realisable and adaptable to particular situations. But this understandable tempering of the concept of general practical discourse does not prove the connection between that and legal discourse.
General practical discourse must be open and free and these conditions are impossible to achieve within the law.

Habermas does not accept the close affinity of legal with general practical discourse raised by the *Sonderfallthese* either. In fact, he goes as far as to dissociate general practical from legal discourse rather radically:

> Once the judge is allowed to move in the unrestrained space of reasons that such a 'general practical discourse' offers, a 'red line' that marks the division of powers between courts and legislation becomes blurred. In view of the application of a particular statute, the legal discourse of the judge should be confined to the set of reasons that legislators either in fact put forward or at least could have mobilised for the parliamentary justification of that norm. The judge, and the judiciary in general, would otherwise gain or appropriate a problematic independence from those bodies and procedures that provide the only guarantee for democratic legitimacy (1999:445)

And earlier he was arguing that:

> Although the special case thesis, in one version or another, is plausible from a heuristic standpoint it suggests that law is subordinate to morality. This subordination is misleading because it is still burdened by natural law connotations. (1996:233)

To be sure, Habermas has not become a militant positivist. He is -justifiably- eager to protect the legal process and the distribution of justice from uncontrolled judicial discretion and creativity. For Habermas it is at the stage of legislation that justice is played out. But if that is the case it still has to be shown how laws can be discursively tested and revised, when disagreements occur at the stage of adjudication. Günther’s notion of appropriateness (1993a), which is based on the limitation of the principle of universalisation by the parameter of 'unchanging circumstances', provides a possible solution. But that solution is already a compromise. Admitting that the law is a discourse of application rather than justification is tantamount to conceding that the law is communicatively and operationally closed and that, at best, it can provide tentative and inconclusive solutions.

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94 See chapter two for an account of Günther’s theory of application discourses.
So according to that scheme of things legal discourse kicks off fully aware of its institutional constraints and thus dissociated from general practical discourse. The decisive testing of laws takes place in politics and is therefore to a certain extent pre-legal. But by deferring the question of rightness, Habermas ends up showing even more confidence in the judiciary instead of forcefully expressing his scepticism. Expecting the judges to reconstruct the reasons that the legislator “could have mobilised for the parliamentary justification” of a norm already entrusts them with an essentially political and extremely substantive task. Moreover even if that is correct, it is not the whole truth about legal discourse. Legal discourse extends over areas, which perhaps seem to be value-neutral in the sense that they do not involve interpretation of rules but which are in reality substantively laden. Fact-finding provides an excellent example. In evaluating evidence, one does not necessarily deal with the rules. Nonetheless, as I showed in chapter four, this empirical information is always substantively sifted through the law’s latent epistemological presuppositions. These substantive problems cannot be remedied by participatory politics. They only occur at the stage of adjudication and, although they also determine to some degree the future content of rules, they are strongly bound to the particular case. Therefore, suspending the moral evaluation of such judgements amounts to silencing them and thus doing violence to discourse and the participants in it.

To the extent that it looks for the morality of the law and the ways it can be maintained, the Sonderfallthese is more consistent, careful and faithful to discourse theory than the (later) Habermasian approach to law. Unlike the latter the Sonderfallthese does not mask the problem of justification as a problem of legitimation. Thus critique can be directed against the inability of legal institutional contexts to accommodate general practical discourse.

*Thesis #1 on legal discourse:* Far from being a special case of it, legal discourse is radically separated from general practical discourse.

**THESES #2 AND #3**

In chapter six I examined what consequences the law’s low degree of discursiveness has on a macro-level. I argued with Cover and Benjamin and also used Luhmann’s systems-theoretical concept of the systemic closure of the system of law to lend coherence to these very diverse accounts of the law’s violence. My conclusion was that the law cannot make
sense of any other normative system and that it exclusively regulates social relations. This is not merely a strategic, political choice. The totalitarian claim to exclusivity and universality is due to inherent features of the very concept of law. Therefore it is true of all legal systems and not just those backed by and, in turn, backing a state. Institutionalised regulatory orders establish and perpetuate themselves by offering guarantees of certainty, which they attempt to keep by taking action and intervening in the world so that they adjust it to the criteria they set. Thus they also maintain their systemic integrity and safeguard it against all regulatory attempts from outwith it.

There are two conclusions to be drawn. Firstly, the uniqueness of central law is an ideological construction organically related to the monopolisation of violence as well as the explanation of the world by the state. Although this ideology has prevailed as a way of mapping the normative world and, on a second level, shapes reality, other normative orders do not cease to exist, whether they be recognised as such or not. To the extent that these normative orders are institutionalised and they are systems of action as well as providing reasons for action, they are essentially similar to what we are accustomed to recognise as official law.

Secondly, to the extent that these concurrent legal orders are institutionalised and they operate by basing action on an undisussed understanding of the world, they too do violence by way of silencing other regulatory alternatives.

*Thesis #2:* State law is not the only source of legality.

*Thesis #3:* All law is marked by a low degree of discursiveness.

**A TENTATIVE THESIS ON A DISCOURSE THEORY OF LAW**

In chapter five I dealt with a possible counterargument from discourse theory. The preconditions of ideal discourse are clearly impossible to achieve, if not imagine in the first place. All the discourses we experience are real discourses subjected to temporal, social, spatial and so forth constraints. My response to that objection was to reverse it and turn it against discourse theory: since all discourses are incomplete compared to ideal discourses, why is there any reason to believe that the law is a unique exception? I argued that, on the contrary, for all the reasons and in all the ways I have elaborated in this thesis the law
subjects discourse concerning the right (as opposed to merely the legal) to constraints that do not exist in other contexts. Therefore, instead of investing a lot in the law by assuming that through it justice can be delivered, it would be much more fruitful to look at how justice can be found in other contexts and can be the outcome of discourses outwith the law.

In fact, discourse theorists have been flirting with the idea that discourse might not always lead to one right and unquestionable answer. Alexy himself concedes that the establishing and abiding by the rules of discourse does not always necessarily guarantee the rightness or uniqueness of the solution:

...discourse theory does not offer determinate decisions. This certainly holds true for actual discourses and to a certain extent probably for ideal ones too.

However the fact that discourse theory does not lead to just one solution in every case does not entail that it fails to establish a solution in any case. (1992b:245)

Habermas too has suggested that discourse theory does not necessarily lead to one right answer thus tempering the claim that truth and justice are only discursively redeemable. He has incidentally argued that that discourse ethics have a role complementary and elucidating of the moral point of view. However, this concession still does not address the main problem or amend the fundamental premise. Instead of questioning whether justice is achievable or cognisable in the first place, discourse theorists are often forced to smuggle a pre-discursive normative criterion in the rules of discourse in order to rescue the Kantian normative nature of discourse theory:

...The question therefore arises whether there are at least some outcomes which are discursively necessarily and others which are discursively impossible (Alexy, ibid.)

And he goes on to deem some human rights "discursively necessary" for the maintenance of argumentative freedom, equality and impartiality. Pavlakos (1999) argues in the same vein that the rules of discourse are based on normative presuppositions and a certain conception of the person.
So, it is clear that the proceduralism of discourse theory is from the outset substantively charged to the extent that it is overshadowed by the conception of *justice as an end*. Procedure then loses its autonomy and, although it can in be tested on grounds of rightness or fairness in its own right, it is also tested according to its outcome. At the end of the day, the crucial question remains whether justice has or has not been 'done' or 'delivered'. But what if this is not the case? What if justice cannot be objectified in that manner and the magical and intangible moment upon which is seems to be depending never actually comes?

In this thesis I have been hinting that justice is not an achievable goal, it can only be an ideal that motivates and gears decision-making processes. Justice is a *telos*, an end in the sense of aim but it meets no *telos* in the sense of finish, it is never concluded. And that is the case not only in abstract but also in particular cases as well. One can perhaps be more or less certain that a specific decision might be correct given the known facts and norms but that decision can never be said to be correct with certainty. This inconclusiveness is not due to the knowledge of what would without doubt be just but to the *suspicion* that things might not be as they appear to be, that the decision concerning the rightness or wrongness of an act and the action grounded on that decision might have consequences other than the ones expected, that circumstances might change radically thus radically altering the situation. That is not a mere intuition. The falsifiability of normative decisions is established knowledge emanating from our experience of the contingency of human life. Every time we make a decision on any practical matter, whether that be as simple as whether we ought to make a purchase or very important as whether we should punish someone, we always make an implicit parallel decision to live with the suspicion that we might have made a mistake. Naturally, this uncertainty should not disable action altogether. But at the same time we have to take into account the possibility that we might be wrong. This possibility will not be denied, only if the decision-making process remains open to new input and stimuli. Moreover, action must constantly be revisable. That there always comes a time to act does not mean that one must religiously adhere to that action and its consequences.

The law is based on a premise directly opposite to those: in order to know that justice has not been done one must have an idea of justice as a standard against which action can be

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95 See Habermas 1983; 1986. See also Kern 1986.
measured. According to this logic, the admission to an inability to be just can only be explained as an admission to insufficient knowledge of all the features of the case or of the relevant norms. Nonetheless, these features and norms do exist and it is just a matter of discovering them. In other words, the law can only exist and be operational and effective only if the prospect and the possibility of an end is established. And that end, that state of excellence it calls justice. This end justifies the imposition of sanctions; it provides the law with a temporal dimension; it determines the truth of evidence; it dictates decisions between concurrent and competing legalities. It is also incapable of keeping the discourse open at all times and as a whole. Firstly, the law owes its operative autonomy to action. It is by acting, either in the form of sanctions or other interventions in the world, that it perpetuates its validity and normative character. Furthermore, the law disables and steers discourse by adhering to an epistemology, which cannot be problematised in the course of legal discourse. These two points are interconnected. In the first chapter I said that all law is in a way natural law, albeit not in the following sense. I believe this has become clear now. Action is based on epistemology. In turn, epistemology is confirmed, established, and enhanced with action. The law thus forms a circular system, which underpins and substantively forms justification but which is not visible and can therefore never be put to the test.

Fuller (1971) departs from the same premises but arrives at diametrically opposite conclusions. He distinguishes between two kinds of moralities, that of duty and that of aspiration. The morality of aspiration is based on the Platonic notion of the knowledge of the state of excellence toward which we strive. On the other hand the morality of duty sets a minimum requirement. It is based on the rules of conduct without which social co-existence would be rendered impossible (ibid.:13-14). Then Fuller goes on to relate those separate kinds of moralities to areas of human endeavour and argues that the morality of duty is connected with the law whereas the morality of aspiration finds its expression in aesthetics (ibid.:15). According to Fuller the difference between the morality of duty and that of aspiration is also revealed in the fact that under the former it is understandable that penalties should take precedence over rewards. We do not praise a man, or confer honours to him, because he has conformed to the minimum conditions of social living. Instead we leave him unmolested and concentrate our attention on the man who has failed in that conformity (ibid:30)
He then defines the inner morality of the law as the morality of duty expressed in his eight requirements of the rule of law.

Bankowski\textsuperscript{96} agrees with Fuller that the law is indeed related to the morality of duty (p.71). But he also argues that there is not all there is to it. Following a law is also aspirational and that should not be overlooked.

We have to look at the rule of duty within the context of the practice of aspiration of which it is a part. Though we have duties for which one might say that legalism is appropriate, this does not mean that they are written in stone. For aspiration will sometimes mean that the \textit{sine qua non} of duty might have to be changed. At other times, duties that seem set in stone can be seen as an imprecise way of helping us to get to the aspiration which will also change those duties.\textsuperscript{(ibid.:72)}

For Bankowski duty is the morality of \textit{legalism}, that is the understanding of law as a rigid system of rules, as opposed to \textit{legality}, which refers to creative rule-following. Bankowski successfully relates duty and aspiration to legalism and legality and records the tension between them but also how they mutually complement each other. To the extent that this refers to how one ought to understand and obey the rules, it is indeed a powerful thesis. But it certainly does not describe how the law actually thinks and works. According to what I have argued in this thesis, \textit{all institutional law is legalistic}. Institutionalised duty suffocates aspiration and the law inevitably regresses into a destructive monologue.

As a \textit{system} of interdependent rules the law tacitly sets standards of excellence that we ought to meet. It necessarily embodies an impression of perfection. It is that notion that lends it coherence and guarantees its character as a system. A look at the prerequisites of the rule of law reveals how the law incorporates rigidly aspirational elements thus also showing discrepancy between Fuller’s understanding of the moralities of duty and aspiration and the perception of the law. When the state of perfection is not known, one must be prepared to constantly revise the rules and reconsider what has been deemed wrong. But what else does ‘constancy through time’ (Fuller, ibid.:79ff) mean but that the law thinks it has achieved a

\textsuperscript{96} In his forthcoming \textit{Living Lawfully: Love in law and law in love}. The page numbers I use refer to a late version of the manuscript.
state of excellence? Moreover, it is only against a background of perfection that the failure to honour a duty can be punished in the final and irreversible way of the law. Punishment is action and, to the extent that the law raises a claim to rightness, it must be justified action. Therefore, the law already sets a standard of excellence to itself. As I showed in chapter two, the discourse concerning the rightness of sanctions can never meet its end. However, the law assumes such an end is possible as is also revealed by the prerequisite of non-retroactivity (Fuller, ibid.:51ff)\(^97\)

Thus and contrary to the rhetoric of law and the rationalisations of a great part of the theory, in law, even more so than in any other instance of practical reasoning, just decisions can never be reached, the Dworkinian 'right answer' (1986) cannot be arrived at. What is attainable is an answer that is not wrong to the extent that the supporting epistemology does not critically bias the outcome of the discourse. Institutionalised legal discourse, that is discourse in which one of the parties is the law, cannot break the confines set by the epistemological presuppositions and the character of the law as action. In fact, the law as institution loosens the bonds of discourse with justice by taking positive action. What is more important for the law is the maintenance of its systemic integrity and the translation of that integrity into social regulation.

Nonetheless, Fuller's thesis can be qualified with a different understanding of aspiration. In order for the law to be guided by aspiration it is not necessary that the latter be mapped. On the contrary it must remain a suspicion, a mere feeling that a further stage can be achieved, that excellence is always in the future, it is à venir, to refer to Derrida again. And it is precisely such an understanding of moral excellence that makes Bankowski reserve a constructive role for aspiration as a prerequisite of the state of legality.

Far from being incompatible with it, discourse theory can provide an ideal environment for such a notion of justice. The idea that justice has a truth value in the sense that it is inextricably linked to the development and quality of discourse can be the basis of a moral theory that does not view justice as a an end but the idea of justice as a motivating aspiration. Therefore discourse theory must temper its Kantian origin or reinterpret it so as

\(^{97}\) See chapter three for an account of the inherent contradiction between universalisation and non-
to re-evaluate the moral point of view and redefine procedure as the forum where justice is played out entirely. In that scheme of things the law will acquire a new role too. I explain how in the next section.\textsuperscript{98}

A TENTATIVE THESIS ON LEGAL THEORY

In chapter seven I looked at legal pluralism. The legal pluralistic problematic brings to the surface and emphasises the existence of concurrent normative orders of a legal character. Some strands of legal pluralism also take a normative slant and seek a solution to this inability of state law to communicate with or even make sense of other normative orders.

I was attracted to legal pluralism for two main reasons. A lot of legal pluralistic thought, such as Santos’ and Tie’s, which I considered in the previous chapter, departs from the realisation that the law bases its operations on an epistemological paradigm, which is also the crux of my argument concerning the law’s discursive deficit. Secondly, legal pluralism seems to be wedding the prima facie incompatible concepts of legality and flexibility, regulation and emancipation. Theories of legal pluralism range from a rigid positivism to inconclusive postmodernism. The assessment of the most important legal pluralistic strands showed that cognitivism-positivism is not useful in that it does not offer any way of criticising the law as such. It is also self-undermining to the extent that it proposes that the legal character of other normative orders be judged against a fixed set of criteria. That already compromises the relativism of legal pluralism and, more substantively and importantly, it undermines the project of emancipation, as it imposes conceptual and practical constraints to forms of regulation outwith the state. On the other hand, postmodernism commits a fallacy at the opposite end. It is too inconclusive and as such, while perhaps satisfying the need for flexibility, it leaves the practical need for some sort of complexity-reducing regulation completely unaddressed. This makes it utopian. And although utopia’s aspirational value must not be underestimated, it must also be acknowledged that it cannot provide any concrete and viable solutions.

\textsuperscript{98} Miller (1992) takes a step toward that direction by attempting to clarify what constitutes a rational dissent and how co-ordination can be achieved in cases of social conflict with the mediation of discursive rules.
I have left the discussion of legal pluralism unfinished. My tentative conclusion was that the version of legal pluralism that satisfied the need to combine emancipation and regulation was Günther Teubner's. I argued that its values lie mainly in the fact that it departs from the realisation that some kind of institutionalised law is inevitable if not necessary and in that it shifts the focus from groups and the subjective ways, in which they might define their co-existence as law, to discourses and the way they regulate themselves. That radical change of the agenda bears great and numerous promises: It promotes a functional instead of a heavily axiological understanding of the law and thus puts the latter into perspective. Furthermore, by focusing on discourses instead of groups, their identities or legal systems and so forth, it sets the conditions for a law, which will not obstruct diversity, free discourse and development.

Günther Teubner's legal pluralism is part of his broader project of reflexive law. That comes as a response to a primarily sociological problem. The law's inability to make sense of other discourses thus manipulating and upsetting their operations and subsequently doing injustice to them is translated in legal-sociological terms as the juridification (Verrechtlichung) of social spheres, which has long been identified as a problem of welfare interventionism. My interest does not lie in those sociological problems. Rather I am interested in combining the concept of self-reflexion with the conclusions of legal pluralism. So let me first explain the former.

Teubner's reflexive law is a qualification of the historical and, to a certain extent, normative account of the ways, in which the law has developed culminating in the stage of 'responsive law' offered by Nonet and Selznick (1978). They depart from the tension between integrity and openness (1978:76) of the legal and indeed any institution. According to their analysis, the inversely proportional relation between regulation and flexibility has been dealt, or is being dealt, with in three main ways in the course of development of the law. At the stage of repressive law, the law collapses into politics. There is no guarantee of predictability and it usually coincides with systems of authoritarian and elitist domination. Those conditions of

99 The same problem has been discussed numerous times and described in many a term such as the 'colonisation of the lifeworld' (Habermas, 1983), in an American context there was talk of 'legal explosion' and 'flood of norms' (Barton, 1975). Teubner (1987) gives an excellent comprehensive account of the juridification debate. In the same volume there are very interesting discussions of the manifestations of the problem in various social domains.
arbitrariness changed at the stage of autonomous law, the main benchmarks of which are the fetishisation of rules and procedure and its separation from politics. Autonomous law is a system of strict positivism and systemic closure. Responsive law ends the separation of law and society. Responsive law is both a historical development as well as a normative suggestion on behalf of Nonet and Selznick. Its aim is primarily functional without losing sight of the substantive issues at play in various problem-solving problems. The law assumes a much more active and positive role in dealing with things.\textsuperscript{100}

Teubner combines Nonet and Selznick’s developmental model with the early neo-evolutionary critical legal sociology of Jürgen Habermas and Niklas Luhmann’s neo-functionalism. He comes to the conclusion that the ‘sovereignty of purpose’, which Nonet and Selznick advocated as a solution to legal over-regulation does not address the ‘rationality crisis’ advanced by Habermas. This crisis is inevitably produced by state interventionism, as discourses as diverse as economics, politics and the law are unable to synchronise and converge on both a cognitive and normative level. Furthermore, Nonet and Selznick’s responsive law fails to tackle a problem revealed by Luhmann’s functional account of society; namely, instead of liberating social discourses, a substantively purposive law will interrupt the process of societal differentiation, as the complexities of subsystems cannot be merged and still maintain their systemic integrity.

According to Teubner, what Nonet and Selznick’s, Habermas’ and Luhmann’s accounts of the regulatory crisis have in common is that they all involve an element of reflexivity. His reconstruction of the possibility of substantive legal rationality in modernity came to these conclusions:

1. Reflexion within social subsystems is possible only insofar as processes of democratization create discursive structures within these subsystems. 2. The primary function of the democratization of subsystems lies neither in increasing individual participation nor in neutralizing power structures but in the internal

\textsuperscript{100} The same objection can be raised against Pashukanis’ claim (1978:79ff) concerning the difference between legal and therefore essentially bourgeois and repressive rules and technical rules that are neutral. Institutionalised systems of rules are necessarily ‘legalised’, that is they are axiologically fraught and they isolate themselves from their environment. Schlesinger’s (1945) critique of Pashukanis is along these lines. (See also O’Hagan 1984:90-93). Although Pashukanis rightly argues that all law is bourgeois, he goes on to exclude some sorts of regulation from the category of law, because they do not seem to be depending on the existence of a bourgeois state. Revealing the repressive character of all institutionalised rules relieves Pashukanis’ analysis from that self-undermining connection with capitalism.
It is *reflexive law* that meets these preconditions. Instead of attempting to regulate substantively, thus making the internal rationalities of subsystems clash, the law ought to confine itself to setting the regulatory framework for the free development of other subsystems. In his own words:

> Reflexive law, in other words, will neither authoritatively determine the social functions of other subsystems nor regulate their input and output performances, but will foster mechanisms that systematically *further the development of reflexion structures within other social subsystems* (ibid.:275)

Legal pluralism as the connection of the law with social discourses through structural coupling with the use of linkage institutions satisfies precisely that need for a framework, which will facilitate rather than manipulate self-regulation. As I said in the chapter about legal pluralism, the focus is shifted from the positivistic search for an element lending coherence to a *prima facie* legal order, to the mode of self-regulation of various discourses.

Although promising, Teubner’s reflexive law and the respective understanding of legal pluralism are not unproblematic. He points out a potential shortcoming himself, namely the undermining character of the implicit cognitive presuppositions underpinning reflexive structures, which mediate between the legal system’s orientation towards the social system as a whole (*function*) and towards other social subsystems (*performance*). A legal system, which will purport to make sense of the epistemology of other subsystems to the full will already have regressed to the substantive formal rationality, which led to juridification in the first place. Therefore, Teubner tells us that:

> Perhaps an additional role of reflexive processes in the legal system is to define legal self-constraint in the context of *building models of social reality* (1983:280)

One thing I hope to have proven in this thesis is that as long as there is a central, institutional legal order, the conditions of discourse will always be undermined, partly because the cognitive basis of normative regulation, precisely as Teubner implies in the last passage, remains beyond discourse. To the extent that regulation is aimed at certainty, predictability and homogeneity, it must operate by way of destruction. Linkage institutions
provide a very good example of the inability of an institutionalised system of regulation to transcend its underpinning epistemology. The interpretation of *bona fides* does not only presuppose the abstract concept of *fides*; it is based on an implicit knowledge of what it means to be able to show faith, that is of the physical, psychological and emotional preconditions of faith. In turn, this is based on a presupposed perception of the person as well as on the possible ways of communication between persons. Structural coupling does not suffice to overcome the fact that the outcome of legal discourse is always tainted by those epistemological taboos. In the shadow of a central law of laws, which remains beyond discourse, justice will always be compromised. And, as I showed in the first part of this thesis, epistemological rigidity is not the only factor limiting the law’s ability to make sense of other normative orders. Teubner’s solution to that problem would be to remove reflexion by one more degree. However, the hindrances imposed by institutionalisation can be done away with only under conditions of non-institutionalisation. Therefore increasingly distanced structural coupling will, at a final stage mean, that law has disappeared from the picture altogether, which leaves us with a social integration problem anew.

Reflexive legal pluralism is also problematic when seen in the light of the question of justice. Very often in the discussion concerning the regulatory crisis, the question of justice is put aside, it is suspended and effectiveness becomes the centre of attention. For instance Nonet and Selznick are confident that:

> purposive law encourages a fuller realisation that individual justice, in the long run and not only in the case at hand, depends on supportive institutional conditions (1978:106).

Thus justice seems to collapse into equality in the form of fair distribution of opportunities or goods by a central agency.

Elsewhere Nonet and Selznick argue that:

> If there is a paradigmatic function of responsive law, it is regulation and not adjudication (ibid.:108).
So, responsive law seems to be disregarding altogether the degree of inconclusiveness inherent in regulation stemming from the epistemological rigidity of homogeneous regulation.

With the problem of justice remaining unaddressed it is clear that the 'sovereignty of purpose' (Nonet and Selznick, 1978) and the normative autonomy of discourses can very easily slip into becoming the sovereignty of market forces of uncontrolled political power. The solution that both Nonet and Selznick and Teubner suggest is the democratisation of the discourses as a control mechanism of the outcome. But how is this democratisation to occur? If it too is based on legalism, if it is legally constituted democracy, then not only will the problem not have been solved but it will become even more serious, for the conditions of suppression of discourse will have been dispersed in specialised contexts, thus suffocating social being-in-common. Furthermore, if democratisation is to happen at the decision-making end, in order for it to be substantive and complete, it must be accompanied by the radical emancipation of discourse. That can only be achieved by broadening participation both in terms of numbers of participants and of issues that can be problematised in the course of the discourse. If the justice of the outcome of discourse is to be guaranteed by ensuring the justice of the procedure, then the conditions of procedure have to be radicalised to the extent that they will approximate the conditions of ideal discourse.

The radical emancipation of discourse and the harmonious combination of purpose and justice through procedure also require a background of equally radical pragmatic changes. For instance, it cannot take place in conditions of global market capitalism. It also presupposes a certain kind of law. If there is to be an ultimate law of laws, that is if there has to be a final level of judgement between conflicting or merely concurrent regulations, that must be found in discursive politics rather than in an institutionalised legal order. Thus a vicious circle begins anew with the institutionalisation of normative political discourse and the subsequent collapse of the conditions of free discourse.

In chapter seven I criticised Santos' and Tie’s legal versions of pluralism as too utopian. However, it seems that when Teubner’s alternative is stretched to its limits, it is equally utopian, as it cannot reconcile the concepts of legality and total emancipation without doing away with one of them. Indeed, this tension has not been resolved by any legal-sociological
or philosophical account. The constant conflict between facticity and validity, to return to Habermasian terminology, the incompatibility of institutional rigidity with the fluidity of justice and the demand for normative emancipation seem to be contradictions plaguing legal discourse.

However, legal pluralistic thought in combination with the notion of self-reflexion can pay off on a different level. I shall not propose a grand theory of law, justice and society. However, I shall make some comments concerning the substantive part that critical pluralistic legal theory can play if law is to become an agent of emancipation in context.

Legal discourse, as Alexy himself points out, is not exhausted within the limits of the legal institution. Practical questions of right or wrong, either legal or moral, do not have to be institutionalised. Those non-institutionalised instances of legal discourse are necessarily pluralistic. They are contained in and to a large extent constitute the person. At the same time they are necessarily social, they take place in various fora, which have infinite ways of constantly redefining themselves and what lends them coherence. Moreover, these instances of legal discourse are not subjected to the constraints of institutionalised legal discourse. They are genuine cases of unfettered practical reasoning, for they do not have to lead to action and the framework, in which they are placed, does not set limits to what can be imported in the discourse or what can be problematised. So, they are instances of legal discourse to the extent that they are informed by the law but their dimensions are not colonised by it. Epistemology and all other presuppositions underlying discourse can always be put to the test and be re-evaluated. Note that I am not talking about separate legal orders any longer. These dispersed legal discourses still refer to norms and institutions of the central law.

Legal theory\textsuperscript{101} occupies a special place amongst these non-institutionalised instances of discourse about the law. On the one hand it is not institutionalised: no limits are imposed on the input or the outcome of discourse, as there are no presuppositions that cannot be questioned. On the other hand, it is institutionalised, and in fact very heavily so, in a

\textsuperscript{101}Note that by ‘legal theory’ I do not refer only to Jurisprudence proper. I include the whole of the law as a discipline, because I believe that it is the use of theory that distinguishes the law as an academic discipline from the law as a craft.
different way: as a part of academic institutions, it acquires a different function, it must adapt its operations to fit the system of the academia. On that level, legal theory must be productive in a concrete way, which is nowadays modelled after the ways of the market, and its outcome must fit in a coherent whole with the rest of academic knowledge. Thus its substantive association with the law becomes secondary but at the same time it is significantly affected. Because legal theory is trapped between the institutionalised demand for effectiveness and productivity, which is enhanced by the unfortunate close affinity of academic production with the state, on the one hand and the freedom and independence inherent in its content, legal theory is very often not able to transcend the actual law and be critical. It has assumed the role of the apologist of the legal system instead of looking for ways, in which the law can be driven beyond its institutional confines. The demand of the academic system for effectiveness has made the discipline of law a theory of management of mainstream politics thus developing the incidental, business-oriented function of the law to the detriment of the character of legal theory as practical reasoning and second level discourse about instances of practical reasoning.

Nonetheless, this is not an irreversible reality. Without great difficulty or revolutionary changes the placement of legal theory in the borderline between non-institutionalised legal discourses and official state law can cease to be an uncomfortable position imposing a binary choice and it can become the privileged position of enjoying the best of both worlds. In other words, legal theory can become the intermediary between justice as constant process on one hand and institutionalised legality on the other and importing feedback from the former to the latter. Critical thought has been focusing primarily on the politicisation of theory and its release from institutional constraints. What this approach misses is that, when placed in an institutionalised context, theory can never be fully political in the sense that it cannot rid of its inherent and superficial affinities with the state and the law. With a process of self-reflexion this organic connection can be acknowledged and thus redeemed. Critical legal theory does not stand in total opposition to the law; it sits comfortably in this advantageous position of communicating both with the political and with state law.

This is where the relevance of legal pluralistic thought surfaces forcefully. Critical legal theory must begin to be more attentive to the ways social discourses regulate themselves, to examine all the instances of emergence of the legal phenomenon. In other words, since it is
proven that the law cannot be pluralistic and at the same time realistic, it is theory that must become pluralistic. It is important that this shift of focus does not take place in the manner of positivism or legal anthropology by applying pre-given criteria to prima facie regulatory orders. In order for legal theory to be able to mediate between the law and society, research must focus on the phenomenon of regulation instead of looking for supposed sources of legality thus begging the question. The study of the legal must be directed towards the discovery of alternative perceptions of the world and justice as well as different practices of solving practical problems by accommodating competing interests as well as meeting the prerequisites of substantive justice.

The intervention of legal theory will not make the institutions of official law any more discursive. The latter will still be unable to make sense of other normative universes and it will still do violence to them by silencing them. However, if legal theory assumes this intermediate role facilitated by its binary essence, it will be able to keep the law informed, either by way of direct input in the form of norms and information of legislative bodies. Free and democratic enactment of laws will indeed guarantee a minimum of justice. Constant critique and communication of the law with self-regulating social discourses with the mediation of legal theory will at least guarantee that the law does not stagnate and that it does not regress into an openly and consciously conservative system of oppressive regulation. This critique can only happen, and indeed is only possible, under a conception of justice as an aspiration, which is not based on the knowledge of the state of perfection but on the suspicion that there is always a further stage of improvement.
CONCLUSION

In this thesis I chose to argue against a holistic theory, that purports to explain everything in its terms. I was therefore forced to touch on many areas and develop many marginal arguments in support of my main theses. However, I believe I remained faithful to the aims I set myself at the beginning and did not overexpand or offer too much information, which would effectively undermine the critical force of my arguments.

I hope to have achieved at least three things. Firstly, I offered an original critique of discourse theory of law. Critique of the Sonderfallthese usually focuses on the problem of interpretation of legal rules and whether moral arguments can be accommodated in the language of legal rules. I directed my critique toward a different aspect of the Sonderfallthese and argued that general practical discourse cannot be accommodated in the law, not because of the linguistic or interpretative constraints but because of the real obstacles imposed by institutionalised law. By doing so I also brought to the surface the material aspect of the law, which is very often overlooked by theory. I showed that this material aspect is not merely incidental. The law is an essentially material order to the extent that it is action that lends it its autonomy and social relevance and also perpetuates it as a system. And this action is inevitably based on a specific epistemology. Finally, I showed that state law does not enjoy exclusivity in the regulation of social co-existence. But because it raises such a claim and it is marked by a low degree of discursiveness, it cannot make sense of other concurrent legal orders. I also made a new case for legal pluralism. I argued that it is valuable to the extent that it emphasises the existence of dispersed legalities but I also qualified it by arguing that acknowledging other legal orders does not tell us anything about their rightness and it certainly does not remedy the inability of state law, or indeed any law, to make sense of them. Then I imported these conclusions as well as two undiscussed assumptions in my tentative theses on legal theory. I argued that the problematic of legal pluralism and a discourse moral theory in the light of a conception of justice as a motivating ideal can be combined by legal theory, which enjoys an advantageous position in the limbo between institutionalised law and politics, in order to make the law more attentive to alternative forms of self regulation.
When introducing this thesis I said it comes as a response to my aporia concerning the ability of the law to be a forum of general discourse concerning justice and whether it can be just and conclusive at the same time. To some extent my questions have been answered, although new ones have arisen in their place. It is a legal theoretical thesis. Therefore it shares the épokhè of the law and legal theory. It does not arrive at an end; it is itself part of an ongoing discourse, both substantive and meta-theoretical, which is the outcome and at the same time it is always in expectation of a result to come.
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