Law as a Linguistic Instrument Without Truth Content?

On the Epistemology of *Koskenniemi's* Understanding of Law

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Abstract

The most significant merit of *Martti Koskenniemi's* legal epistemology consists in decisively radicalising the "linguistic turn" in jurisprudence. This radicalisation involves the claim that law should be understood not just as a specific language, but as a language without truth content, regardless of whether this truth is assumed to have universal or even only contextual validity. The innovative potential of *Koskenniemi's* approach becomes even more evident if we consider it in the light of a short overview of the main strands of legal philosophy. However, the most far-going assertion of *Koskenniemi's* legal philosophy – namely that legal propositions do not

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contain any inherent truth content, nor do they refer to an external source of reliable validity – is also its most contestable postulation. Indeed, the most recent philosophy of language maintains that neither language in general, nor the language of the law in particular, can be regarded as devoid of truth content. As a consequence, the legal professional cannot just be allowed to use the law as an instrument at the service of his/her preferences, but should justify his/her position by resorting to the linguistic content in which law, without assuming a metaphysical or ontological substance, is fundamentally rooted.

I. Introduction

Martti Koskenniemi's large influence on theory and practice of contemporary law, in general, and of international law in particular, is mainly related to his many and brilliant analyses of the most contested issues of contemporary international law – in the most cases drawn from his direct experience as a legal adviser and as a member of international legal committees – as well as to his highly appraised contributions to the reconstructions of some of the milestones in the history of international law. Somehow outside the main interests of the legal academic community – therefore taken for granted and less discussed – is, instead, the epistemology that deeply informs his work. In fact, not only *Koskenniemi's* (international) law theory but also his interpretation of the case law, as well as his understanding of the legal adviser's role, depend on the epistemological assumptions that lie at the basis of his work. The preference for a certain epistemology – not just in *Koskenniemi's* work, but generally – paves the way for a specific conception of the law, for asserting the relation of the law to other social subsystems, and – last but not least – for outlining the (allegedly) unique identity of the legal professionals. As a result, concentrating on his epistemology should not be regarded as a pure academic amusement, with few consequences for a better comprehension of how law works as well as of the distinctive features of the legal profession, but rather – quite to the contrary – as an essential component of that exact comprehension.

In short, *Koskenniemi's* epistemological conception maintains that law should not be conceived as a formal expression of a kind of ontological and metaphysical "truth" to be found outside the linguistic form of the utterances that are defined as "law", but has to be analysed with special regard to

the structure of precisely those utterances.[1] Going into more detail, this general assumption can be divided into five distinct claims. The first is that the law can be best understood if we interpret it as a *specific language*; in this sense, the most brilliant legal theory is the theory that addresses the linguistic structure of the law. Second, the law does not refer to any *truth content* outside the legal discourse; therefore, no ontological basis and no normative claims outside the law guarantee for the validity of legal propositions. The third claim is that the law has *no inherent truth content* either, regardless of whether this is supposed to have a normative or a functional character. Fourth, although legal concepts are deeply related to social power, they do not limit themselves to mirroring the reality of social relations; as linguistic expressions, to the contrary, they are characterised by a dialectic relationship to the reality both in the sense that legal concepts are defined by interpretation and that their interpretation may be highly contested. The fifth claim – and, at the same time, the conclusion that can be drawn from the former assumptions – is that the normativity of the law can only be based on its *formalism*, without any reference whatsoever to truth content or to clear-cut references to the social context. On the basis of this general framework of interpretation, the first Section reconstructs *Koskenniemi's* epistemological theory as it is laid down, mainly, in his *From Apology to Utopia*, and secondarily in many other texts (II.).

Yet, the novelty of *Koskenniemi's* approach can only be understood if we consider it against the background of the main strands of legal philosophy (III.). The purpose of the short overview in the second Section is to show that legal philosophy, for the most part of its history, sought the basis for the validity of the law in something which was not law itself, although this "something" was of quite a different shape in the different philosophical traditions. Furthermore, even when legal theory began to locate the validity of the law within the legal discourse, the claim for self-reliance led eventually to self-contradictory results. In a last move, the awareness of the close relationship between law and language emerged in legal theory; yet, the potentially pathbreaking intuition was limited to nothing more than a clue, and no linguistic instruments were concretely applied to the analysis of the law.

Having set the scene, *Koskenniemi's* understanding of the law is then successively compared to the approaches outlined in the second Section (IV.).

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[1] *Koskenniemi* explicitly states that "*From Apology to Utopia* seeks … to go beyond metaphor. Instead of examining international law *like* a language it treats it *as* a language." (*M. Koskenniemi*, From Apology to Utopia: The Structure of International Legal Argument, 2005, at 568).

From this perspective, *Koskenniemi's* theory represents a great innovation for at least two reasons: first, law is analysed by using the conceptual tools provided by linguistics and philosophy of language; second, his interpretation of the law as self-reliant, non-normative language without truth content is unprecedented because of both its intellectual radicalness and philosophical ambition. Due to *Koskenniemi's* contribution, the "linguistic turn" – maybe the most significant novelty of 20th century philosophy – finally made its unrestrained entry into jurisprudence, now not just as a marginal element but as the core of the theory, developing thus its full potential of conceptual deconstruction.[2]

The practical consequence that *Koskenniemi* draws from his legal theory is that precisely because the legal language has no truth content in itself, it is up to the legal professional to give a sense to the law according to his/her priorities. In other words, exactly the lack of a truth content in the legal language enables the legal professional to use the law as an instrument at the service of his/her – lastly not rationally justifiable – preferences. Yet, *Koskenniemi's* claim is far from self-evident. Indeed – as I will show in the fourth Section – neither language in general, nor the language of the law – as a specific kind of linguistic interaction – are without truth content. A few examples will illustrate that the most important strands of contemporary philosophy of language deny any evidence supporting a turn to a radical neo-*Wittgensteinian* contextualism and scepticism (V.).

Nevertheless, *Koskenniemi's* drastic denial of any truth content of the law is the only assumption that can substantiate his decisionism in explaining the role of the legal adviser. Instead, if we admit that the language of the law has a truth content, the legal professionals will have to justify their position – and their use of the legal instruments – by resorting to that kind of content in which law is rooted. However, insofar as this content is not just mediated but thoroughly constructed by linguistic interaction, the rootedness of the law finds its explication – as it will be outlined in the last Section – without having recourse to any extra-linguistic metaphysical or ontological substance (VI.).

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[2] *E. Jouannet*, A Critical Introduction, in: M. Koskenniemi, The Politics of International Law, 2011, at 9.

II. On *Koskenniemi's* Epistemology and Its Consequences for the Understanding of the Law and the Self-Understanding of Lawyers

Koskenniemi's epistemology is, at first, a *legal epistemology*, addressing mainly the question whether legal propositions contain a provable and coherent reference to phenomena, facts or actions, and thus to a "true" knowledge of the world. Nevertheless, from his considerations on the epistemological quality of law a much broader assumption can be inferred concerning a general theory of knowledge – an assumption that actually denies both the possibility of true knowledge as well as the existence of a universal rationality.

The first relevant element of *Koskenniemi's* approach consists in his focusing on the epistemological dimension of law by concentrating on the analysis of its language. In other words, the attention is not drawn to whether legal propositions reflect phenomena, facts or preferences that are thought to be true, nor is it focussed on to which extent they can do that, but rather on the structure of legal propositions in their relationship to each other. Therefore, the focus here is on the language of law itself, and not on the external truth that the law is assumed to express. Starting from these premises, the results of *Koskenniemi's* inquiry are quite destructive for the epistemological content of the law. Indeed, his analysis unveils what he calls the "substantive indeterminacy" of law,[3] in particular of international law. This happens by leading the international law discourse back to couples of concepts, or to "binary oppositions",[4] which appear to be – at least at first glance – opposites, so that just one of them should be presumed to be correctly applied in a specific situation. Thus, given the opposite couple of legal concept A-B and given that they should be employed to the state of affairs X, if it can be justified to apply A, then the application of B to X should be regarded as false. Resorting to one of the examples proposed by *Koskenniemi*, the principles of self-determination and of *uti possidetis* build such a "binary opposition", in which the application of one principle should exclude the application of the other.[5] Yet, the reduction of the international law discourse to such a seemingly well-ordered linguistic structure turns out to be an illusion, according to *Koskenniemi's* interpretation, for two main reasons. First, the concepts forming "binary oppositions", although

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[3] *M. Koskenniemi*, The Politics of International Law (note 2), at 298.
[4] *M. Koskenniemi* (note 2), at 298.
[5] Quoted by *E. Jouannet*, A Critical Introduction, in: M. Koskenniemi (note 2), at 8.

assumed to rule out overlapping applications, are in fact, from the semantic perspective, no less mutually dependent on each other than mutually exclusive. Going back to the former example, as *Koskenniemi* claims, "self-government is only possible within a fixed territory; and the authority of existing power can only be justified by reference to some idea of self-government".[6]

The second reason for the indeterminacy of international law discourse does not refer to the meaning of its concepts in their relationship to each other but rather to their role, as concepts, in connection to the world outside. The explanation of this question requires some general considerations on the relationship between the law, in this case international law, and the field of human interaction, in this case the interactions in the international arena, for the regulation of which it is conceived. According to *Koskenniemi*, international law argumentations aim at the same time at two contrasting goals: "concreteness" and "normativity". By "concreteness" it is meant that the law has "to be verifiable, or justifiable, independently of what anyone might think that the law *should* be".[7] Thus, a proposition of the international law discourse is regarded as "concrete" if it does not just take into account but thoroughly reflects the real conditions of the actors' interactions within the international arena. On the other hand, "normativity" means that the law "is to be applicable even against a state (or other legal subject) which *opposed* its application to itself".[8] In other words, it belongs to the concept of law, and of international law as well, that it may – and in many cases should – oppose the preferences of the involved actors. The problem is that these two essential aims of international law – or, we could say, of law in general – namely concreteness and normativity, do not just oppose each other, which is quite self-evident, but also always imply each other. Indeed, every norm, rule or principle, as well as every argument of international law has to be "concrete" so as to be *effective*. However, if its "concreteness" turns out to be nothing more than the formal expression – and justification – of the real conditions of power, then the language of international law would lose that counter-factual dimension which is essential to the very concept of the law, becoming a mere *apology* of the existing state of social and political interactions and a defence of the injustice that may grow out of it. On the other hand, if the legal discourse only insists, in order to maintain its "normativity", on its opposition to reality, largely ignoring how it can have a relevant impact on it, it degenerates into what

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[6] Quoted by *E. Jouannet* (note 2), at 8.
[7] *M. Koskenniemi* (note 1), at 513.
[8] *M. Koskenniemi* (note 1), at 513.

Koskenniemi calls a sheer *utopia*. Therefore, in order to be "concrete", the international law discourse always runs the risk of being apologetic – and, in order not to lose its "normativity", it is structurally in danger of becoming utopian.

As a result, the indeterminacy of law is characterised by a twofold contradiction: the first one depends on the mutual reference of (allegedly) opposite concepts; and the second one is due to the attitude of the international law discourse, which swings between apology and utopia. As regards the second contradiction, it could also be admitted that it is part of the most essential social function of the law, the norms of which *must be counter-factual* so as to bring about order in spontaneous and therefore rather disordered social interactions, and at the same time *cannot ignore the conditions of reality* so as to avoid ineffectiveness and, thus, uselessness. Yet, the way that contemplates the admission of the inescapability of tensions between legal discourse and reality is not the one chosen by *Koskenniemi*. Nor does he consider the missing "objectivism" of the international law discourse amendable through a reform of its epistemology and its better adaptation to the world outside. Indeed, according to *Koskenniemi's* epistemology, the legal discourse is evidently lacking proper truth content; yet, this deficit cannot be resolved by an improvement of the theoretical organon of the legal discourse simply because no universal rationality can be found in that world of social interaction either, to which the law should give rules. Not just the language of the law, thus, is devoid of truth content, but our knowledge in general – according to *Koskenniemi's* approach – does not lead to any proposition of universal validity.

The consequence of *Koskenniemi's* epistemological scepticism, which takes up the premises of postmodern philosophy,[9] is that the legal discourse can only be a question of "interpretation", for which we cannot claim any solid rational foundation that could make it acceptable for every reasonable human being.[10] The criticism of the universalistic claim of the legal discourse in general, and of the international law discourse in particular, does not lead however to sheer nihilism. Indeed, *Koskenniemi* does not reject the idea that some experiences may occur which are not characterised by mere contingency but, on the contrary, assume a kind of universal scope.[11] From the postmodern standpoint, however, this unassuming universality is not

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[9] For a critique of the impact of postmodern thinking on legal theory, in particular on comparative law, see *A. Peters/H. Schwenke*, Comparative Law beyond Post-Modernism, ICLQ 49 (2000), at 800.

[10] *M. Koskenniemi* (note1), at 478.

[11] *M. Koskenniemi*, International Law in Europe between Tradition and Renewal, EJIL 16 (2005), 113, at 119 et seq.

based on abstract ontological, moral or epistemological principles, but is derived from the continuity of the concrete experience of vulnerability among all individuals involved. According to *Koskenniemi*, artistic expression is probably the most suitable way to give voice to the universal scope of a humanity made of concrete human beings.[12] But legal discourse can also play a role in accomplishing this task. In fact, due to its *formalism*,[13] the law makes possible that, "engaging in legal discourse, persons recognise each other as carriers of rights and duties" which "belong to every member of the community *in that position*". Through the law – *Koskenniemi* adds – "what otherwise would be a mere private violation, a wrong done to *me*, a violation of *my interest*, is transformed ... into a violation against *everyone in my position*, a matter of concern for the political community itself".[14] The formalism to which *Koskenniemi* refers is of course something quite different from the formal rationalism of modern philosophy, as it has been developed in particular by *Kant*.[15] Rather, it is a "culture of formalism … that builds on formal arguments that are available to all under conditions of equality".[16] When they apply the "culture of formalism", the actors of international law, in particular lawyers [and] decision makers, "take a momentary distance from their preferences and … enter a terrain where these preferences should be justified, instead of taken for granted, by reference to standards that are independent from their particular positions or interests".[17] Among the consequences are "limits to the exercise of power" and the "message … that those who are in position of strength must be accountable and that those who are weak must be heard and protected".[18] The discourse based on legal formalism involves "professional men and women" who, by engaging "in an argument about what is lawful and what is not, … are engaged in a politics that imagines the possibility of a community overriding particular alliances and preferences and allowing a meaningful distinction between lawful constraint and the application of naked power."[19]

In line with Koskenniemi's interpretation, the law has no truth content because no universal rationality can be presumed. Nevertheless, we can as-

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[12] *M. Koskenniemi* (note 11), at 120.

[13] *M. Koskenniemi*, The Gentle Civilizer of Nation: The Rise and Fall of International Law 1870-1960, 2001, at 500 et seq.

[14] *M. Koskenniemi*, International Law and Hegemony: A Reconfiguration, Cambridge Review of International Affairs 17 (2004), 197, at 214.

[15] *M. Koskenniemi* (note 13), at 500.

[16] *M. Koskenniemi* (note 13), at 501.

[17] *M. Koskenniemi* (note 13). On *Koskenniemi's* understanding of "justification", see note 21.

[18] *M. Koskenniemi* (note 13), at 502.

[19] *M. Koskenniemi* (note 13), at 502.

sume a non-ontological, non-moral and non-epistemological universalism that originates from legal formalism. Against this background, *Koskenniemi* formulates his conclusive claim: the law, as a result of the fact that it does not refer any longer to a universal rationality, becomes a formal instrument that can be used for quite different purposes. The question on which goal should be pursued by resorting to the formal means of the law actually depends on the personal decision made by the legal professional.[20] Without universal rationality, no universal obligation to freedom, justice, democracy, or to any other value can be justified; only personal preferences can guide the legal professional to commit him-/herself to these goals.[21] *Koskenniemi's* epistemological relativism, however, does not end in political indifference or cynicism. Quite to the contrary, his inclinations are clear and the commitment of his whole life to support them is hardly questionable. Yet, his dedication to the defence of human rights does not rely on reasons of universal validity, but is presented as an unpretentious, though firm, personal and political decision. In fact, *Koskenniemi* points out that "political views can be held without having to believe in their objectivity and that they can be discussed without having to assume that in the end everybody should agree".[22] Even if we give up – following *Koskenniemi's* approach – the formulation of a universally valid "method", the "commitment to the whole, to peace and world order" remains.[23] But, insofar as this commitment is now understood as an individual decision and not as a rational principle presumed to be universally valid, law itself, which according to the traditional understanding was thought to be the formal and effective expression of a universal rationality and of a shared truth, cannot but re-modulate and actually reduce its ambitions. Far from being the synthesis of a uniform and compelling normativity, it is now rather a practical instrument for the solution of problems, or "a *practice* of attempting to reach the most acceptable solution in the particular circumstances of the case".[24]

Concluding, *Koskenniemi's* relativism in epistemological matters and decisionism in political questions leads to the result that the defence of human

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[20] "International law is what international lawyers make of it" (*M. Koskenniemi* [note 1], at 615).

[21] Indeed, *Koskenniemi* speaks explicitly of justifications that can be given through the interpretation of the law (see note 17). Yet, the only justification to which the legal professional can resort is based, according to his theory, on the pure formalism of the law. Always following his assumptions, however, the formalism of the law and therefore also the justifications, being devoid of criteria to determine the truth content, turn out to be a quite freely, if not downright arbitrarily, manageable instrument.

[22] *M. Koskenniemi* (note 13), at 536.

[23] *M. Koskenniemi* (note 13), at 556.

[24] *M. Koskenniemi* (note 13), at 544.

rights – or of any other value – is not a universal moral duty the accomplishment of which can be demanded from every human being, but it is a task that committed people undertake because of their specific sensibility – or *empathy* – towards the suffering of their fellow humans. As regards the profession of the lawyer, *Koskenniemi's* approach eventually leads to a pleading in favour of the role of legal advisers, who skilfully use the instruments put at their disposal by the formalism of the law in order to suggest solutions for the achievement of what they consider to be "a better society".[25]

III. Searching for the Foundation of Law Until the "Linguistic Turn" in Jurisprudence

If we want to properly understand the significance of the turn that *Koskenniemi* introduced in legal philosophy, we should set the scene. Concretely, this means that we have to look at his contribution from the perspective of what the dominant interpretations were before. *Koskenniemi's* innovation concentrates mainly on the assumptions, first, of an essential relationship between law and language; second, of the non-cognitive character of the law, which cannot aim, therefore, at reaching any kind of truth; third, of the constitutive self-reliance of the legal discourse; fourth, of the dependence of legal concepts' interpretation on social power; and, fifth, of the normativity of the law as a result of pure formalism, without any ambition to be the language and praxis that enshrine shared and rationally justifiable social values. As a consequence of the specific contents of *Koskenniemi's* epistemology, we are allowed to reconstruct the main tendencies in the history of legal philosophy – in a way that is surely far from exhaustive – along only four questions:[26] 1) how legal philosophers grounded the validity of the law by linking the legal discourse to an external source of truth, whereas this source is regarded as possessing normative content; 2) how a second strand tried to achieve the same goal of grounding the validity of the law by searching inside the legal discourse; 3) how a third strand began to locate the source of the validity of the law in social power, thus in an external

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[25] *M. Koskenniemi* (note 13), at 553.
[26] The questions correspond to the first four assumptions at the basis of *Koskenniemi's* epistemology and are thought to highlight the novelty of his approach, whereas for the fifth assumption – as the consequence of the originality of the former claims and as the quintessence of *Koskenniemi's* conception – no proper correspondence can be found in previous strands of legal philosophy.

foundation endowed with almost exclusively factual authority;[27] 4) how the awareness of the profound connection between law and language made its entry into legal philosophy. Lastly, the originality of *Koskenniemi's* interpretation of the law will be regarded as sufficiently substantiated if none of its main tenets was consistently anticipated by any significant legal philosopher or strand of legal philosophy before him.

1. The Ontological Foundation of Validity and Normativity of the Law

The theories that postulate that the law has to find the foundation of its validity outside itself generally situate this foundation in the ontological element that also constitutes the normative basis for social order. In other words, the fundament of a just and "well-ordered" society also provides the guarantee for the validity and normativity of the law. Depending on which ontological element is meant to be the fundament of a just order, and therefore, on which *paradigm of social order*[28] is respectively put at the centre of the theory on the validity of the law, we can distinguish three different approaches.

a) Following the most ancient understanding of social order in the Western tradition – an understanding that we can describe as *holistic particularism* – a just and stable order is only possible within limited and quite homogeneous communities. According to this premise, the validity of the law is based on the same ontological foundation of social homogeneity that also assures, in general, social order. However, we can identify in the history of political thought distinct variants of holistic particularism, each of them characterised by the centrality of one distinct and specific ontological element. The earliest of these variants was developed by *Plato*, the first Western thinker who emancipated the law from myth and tried to ground it on a rational basis. In *Plato's* perspective, law is not just what the public power – the state or the polis – has decided. Rather, the law should be able "to dis-

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[27] Within this strand, even when law is considered an instrument to foster social change towards the empowerment of the powerless, its normative dimension is exclusively depending on the fact that the norms mirror no less real – though more just – social relations. See Section III. 3.

[28] On the "paradigms of order" see *A. von Bogdandy/S. Dellavalle*, Universalism Renewed. Habermas' Theory of International Order in Light of Competing Paradigms, in: GLJ 10 (2009), 5 et seq.; *S. Dellavalle*, Dalla comunità particolare all'ordine universale. Vol. I: I paradigmi storici, 2011.

cover what is",[29] that means the essence of the political community which is not primarily strength towards external enemies, but "friendship and peace" within the polis.[30] In order to accomplish these two main goals of political life, the polis should be established on the principle of "justice", which anyway has quite a different meaning in *Plato's* philosophy than in our contemporary interpretation. Indeed, according to *Plato*, justice has nothing to do with the distribution of resources, but is the condition in which everyone implements the activity for which he has the most relevant natural predisposition.[31] Thus, a society is "just" if it is conceived of as an organic body in which every part or member can do his own work, and is "unjust" if the division of labour is not sufficiently realised and there is a somehow inefficient overlapping of activities as well as a general tendency to interfere with occupations and decisions outside the sphere of one's own competencies. As a result, the law is the system of norms that makes justice – i.e., the organic division of labour – possible, and injustice – i.e., actions in field of competencies different from the ones we have by nature – impossible.

Let us leave aside the question as to why this understanding of "justice" is not only unusual but completely unacceptable for us, and let us concentrate on how the idea of the ontological basis for the external validity of the law was developed after *Plato*. Indeed, *Plato's* idea of social homogeneity proved to be far too demanding already during his lifetime. In a period in which the cohesion of the Greek polis was fading away, the individuals could not see the self-identification with the aims of their *politeia* as the one and only purpose of their life any longer. The social cohesion – and with this also the law that had to express it – needed to rest on a new fundament, and the author who gave to this question a groundbreaking answer that deeply influenced political thought for almost two thousand years was *Aristotle*. In fact, he not only proposed a new definition of "justice" according to which it is essentially related – in a way that is much nearer to our sensibility – to the principles that guide the distribution of resources and advantages on the basis of reasonable and justifiable criteria.[32] In addition, he also located the highest goal of practical life not in the service for the political community, as *Plato* did, but in what he called the "theoretical" or "contemplative" life.[33] Nevertheless, he maintained – like *Plato* – the necessity of an organic and holistic understanding of the *politeia*. Yet, why should the

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[29] *Plato*, Minos, in: Plato, The Works, 1860, Vol. IV, 313 b et seq.
[30] *Plato*, Laws, 2006, 626 b et seq.
[31] *Plato*, The Republic, 1901, Book IV, 433 b.
[32] *Aristotle*, Nichomachean Ethics, 1890, Book V, Chap. 5, 1134 a.
[33] *Aristotle* (note 32), Book X, Chap. 7, 1177 a.

members of the political community owe solidarity to each other if their most essential aim consists in living a life characterised by the individual searching for theoretical truth and by its contemplation? On which fundament can the loyalty to the social group be based? *Aristotle's* answer is astonishingly plain and intuitively convincing at the same time: because all members of the political community belong to an enlarged family, so that they have to support the community as every good family member is expected to do as regards his/her relatives.[34] As a result, the law itself cannot but be the expression of this family-based community, finding its validity in its principles.

The familistic justification for social order and for the validity of the law was a huge success in political thought. However, in the Modern Ages it degenerated progressively into a mere validation of the absolutistic monarchic power.[35] Therefore, as the crowned heads began to tremble in Europe and America, and were substituted by republics by the two great revolutions of the late 18th century, the supporters of the particularistic-holistic interpretation of society were once again in search of a new foundation of social order and of the validity of the law. This was found in the idea of the *nation*, understood not primarily as the community of citizens, but rather – as it came up as the consequence of the reshaping of the concept of nation in the countries on the Eastern side of the Rhine – as the quasi-natural *Gemeinschaft* of the members of the *Volk*, namely of those who in German are called the *Volksgenossen*. The conception developed by the political romanticism[36] and the German Historical School, according to which law not only reflects the identity of the "national" community but has to be thoroughly devoted to foster it,[37] has deeply inspired the legal thinking far beyond the German linguistic area in which it was elaborated. Its influence up to the present is mirrored by the scepticism with which some traditions of constitutional adjudication meet supranational legal and political integration, and by the arguments that are brought into the debate to support the overcautious attitude.[38]

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[34] *Aristotle*, Politics, 1967, Book I, Chap. 2, 1252 b.

[35] We can see the beginning of this process in the work of *Jean Bodin*; see *J. Bodin*, Six livres de la république, Imprimerie de Jean de Tournes, 1579, (1st ed. 1576). The defence of the absolutistic monarchic power then becomes the central issue in *J. Filmer*, Patriarcha, Or the Natural Power of Kings, 1680.

[36] *A. Müller*, Die Elemente der Staatskunst, 1922, (1st ed. 1809), I, IV, at 76 et seq.

[37] See Section III. 4.

[38] See, in particular the sentences of the German Federal Court (*Bundesverfassungsgericht*) with regard to the Maastricht Treaty (BVerfGE 89, 155) and to the Lisbon Treaty (BVerfG, 2 BvE 2/08, 30.6.2009), as well as the declaration of the Spanish Constitutional

b) The first paradigmatic revolution in the theories of order brought the transition from the idea that order is only possible *within* the particular and homogeneous communities and not *between* them, to the conviction that order is, in principle, extendable to the whole humanity. Yet, order, although understood with a cosmopolitan range, was conceived as no less organic and holistic than in the older paradigm: indeed, the community remains also in this paradigm not only genetically but also ontologically and axiologically superior to the individuals as its members; simply, the community here is broadened so as to include the whole of humankind. The new paradigm – which we can call *holistic universalism* – was introduced by the Stoic philosophers.[39] It was however with its further development by the Christian political theology – both on the Catholic and on the Protestant, in particular the Calvinist, side – that the holistic-universalistic conception of order became influential on legal thinking, addressing also the question of where the fundament of the validity of the law had to be located. The Christian theology of the Middle Ages situated the last source of the validity of the law in God's revelation: It was in the universal scope of the Christian revelation that the universalism of the Christian idea of order was grounded, and it was in the command of God that the mundane authority was lastly justified. According to this principle, *Thomas Aquinas* derived explicitly the positive law (*lex humana* or *lex positiva*) from God's law (*lex divina*), though passing through the mediation of natural law (*lex naturalis*) and *jus gentium* as well as of the doctrine of the Church.[40] This conception was then taken up by the School of Salamanca in the early Modern Ages and transformed, in particular by *Francisco Suarez*, into a highly differentiated and innovative systematics of public law that, in its multilevel setting, anticipates some contemporary approaches.[41]

From the perspective of the Calvinist theology, on the contrary, the way of the direct derivation of the validity of the law from God's will had been shut down since the possibility of grasping the divine truth by means of reason had been made impossible – according to the Protestant doctrine – due to human original sin. Therefore, the legal philosophers influenced by Protestantism had to seek elsewhere the source of the reasons why and under which conditions the law should be regarded as valid. They found it by going back to the old Stoic concept of οικέιωσις, namely to the idea that all

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Court (*Tribunal Constitucional*) concerning the Constitutional Treaty (Tribunal Constitucional, Declaracion de 13.12.2004, <http://www.boe.es>).

[39] *J. von Arnim*, Stoicorum veterum fragmenta, Vol. I and III, 1903-1905.
[40] *T. Aquinas*, Summa theologica [1265-1273], 1980, Part II, Section I, Question 91 et seq.
[41] *F. Suarez*, De legibus, ac Deo legislatore [1612], in: F. Suarez, Selections from three Works, 1944, at 1 et seq.

human beings are bound to each other by a natural tendency to "sociability". In particular, the alleged social "essence" of humans was regarded as the basis for the universal norms of international law.[42] Interestingly, the foundation of international law on the assumption of the existence of a universal community of humans sharing fundamental interests and values has remained important up to the present day, specifically within the so-called "theory of the constitutionalization of international law".[43]

c) The second paradigmatic revolution in the theories of order overturned the former hierarchy between community and individuals: if within the former paradigms the whole of the community was thought to be in any sense superior to the sum of its members, now the centre of social order is put in the rights, interests and rational capacity of the individuals, whereby authority – and public law as well – is only justified if it aims at the protection of individual rights and interests. The revolution from holism to *individualism* was initiated by *Thomas Hobbes* and then carried forward by the major exponents of modern contractualism, explicitly *Locke*, *Rousseau* and, in particular, *Kant*. Common to all these authors is the idea that public law is insofar legitimate – and thus valid – as it derives its content from those rights of the individuals the safeguard of which is at the origin of the fictional contract that grounds social and political life. Starting from this shared premise, however, the positions of the contractualist philosophers separated from each other significantly, depending on which rights were regarded as the most fundamental and, thus, on how far-reaching the alienation of rights by the individuals was in conjunction with the establishment of the *societas civilis*. Concretely, according to *Hobbes*, law is valid if it fulfils the task of protecting the life of the citizens – or, rather, of the subjects – since the protection of life is the most essential aim for the realisation of which the *societas civilis* has been constituted and the right to life is the only one which is not transferred to the "Leviathan" through the *pactum unionis*.[44] To the contrary, *Locke* believed that law should protect in particular

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[42] *A. Gentili*, De jure belli libri tres [1612], 1933; *H. Grotius*, De Jure Belli ac Pacis [1646], 1995, "Prolegomena", No. 6.

[43] See *A. Verdross*, Die Verfassung der Völkerrechtsgemeinschaft, 1926; *C. Tomuschat*, International Law: Ensuring the Survival of Mankind on the Eve of a New Century, Collected Courses of The Hague Academy of International Law 281 (1999); *A. L. Paulus*, Die internationale Gemeinschaft im Völkerrecht. Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung, 2001; *M. Payandeh*, Internationales Gemeinschaftsrecht, Springer, Heidelberg 2010; *T. Kleinlein*, Konstitutionalisierung im Völkerrecht, 2012. On the constitutional dimensions of international law, see *J. Klabbers/A. Peters/G. Ulfstein*, The Constitutionalization of International Law, 2011.

[44] *T. Hobbes*, De Cive [1642], 1651; *T. Hobbes*, Leviathan, or the Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil, 1651.

the spontaneous interactions – specifically, the economic transactions – of the members of the newly established Commonwealth,[45] and *Rousseau* assigned to it the mission of expressing the *volonté générale* of the community forged together by the "social contract".[46] *Kant*, lastly, committed to the law the achievement of *autonomy* at the political level, enabling therefore the citizens to translate the highest principle of moral life into the social dimension.[47] Despite the differences, in contract theory law never finds its justification and validation in its specific form and language, which is instead considered with a certain degree of indifference, but always in an external ontology of the individual, expressed by those rights that are respectively regarded by every single author as essential and inalienable for the ontological constitution of the subject.

2. Law as Self-Reliant System

If most legal theorists explicitly refer the validity of the law to an ontological basis outside the legal system, a second, more recent strand has tried to pursue a different, if not opposite, strategy. According to these authors, the validity of the law has to be sought, internally, in the logical structure, i.e. in the specific rationality, of the legal system itself. Also within this strand we should differentiate between two variants, quite distant from each other as regards the respective epistemological premises: legal positivism (a), and systems theory (b).

a) In his "pure theory of law", *Hans Kelsen* firmly rejects the idea that the law should resort, so as to found its validity, to any social realities or ethical as well as moral principles.[48] In his understanding, the legal system – which is regarded as strictly self-referential – is made up of hypothetical propositions, the validity of which is guaranteed only by the fact that their production follows the rules established by a higher norm.[49] Therefore, in

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[45] *J. Locke*, Two Treatises of Government [1690], 1698.

[46] *J.-J. Rousseau*, Du contract social, ou principes du droit politique [1762], 1966.

[47] *I. Kant*, Grundlegung zur Metaphysik der Sitten [1785], in: I. Kant, Werkausgabe, ed. by W. Weischedel, 1977, Vol. VII, at 65; *I. Kant*, Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis [1793], in: I. Kant, Werkausgabe, Vol. XI, at 150; *I. Kant*, Zum ewigen Frieden. Ein philosophischer Entwurf [1795], in: I. Kant, Werkausgabe, Vol. XI, at 204; *I. Kant*, Der Streit der Fakultäten [1798], in: I. Kant, Werkausgabe, Vol. XI, at. 364; *I. Kant*, Die Metaphysik der Sitten [1797], in: I. Kant, Werkausgabe, Vol. VIII, § 46, at 432.

[48] *H. Kelsen*, Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik, 1934, at 21.

[49] *H. Kelsen* (note 48), at 22.

the formal pyramid of legal positivism the validity of any proposition is founded on the validity of a norm located at a hierarchically higher level. Yet, the logic of such a conception leads inescapably to a regression *ad infinitum*, so that *Kelsen* – in order to avoid this conceptual shortcoming that would undermine his whole construction – creates a borderline concept of legal theory, the *Grundnorm* (fundamental norm).[50] When we reach the top of the positivistic legal system's pyramid – i.e., the constitution within the national legal system and, at an even higher, global level, the essential norms of international law – we find, according to *Kelsen*, sets of positive norms on which all other norms are grounded. Nonetheless, these positive norms, so as to be valid, must also be based on another, even more essential norm. In order to interrupt the regression *ad infinitum*, *Kelsen* describes this most fundamental of all norms as non-positive, namely as a pre-positive principle which is the source of any validity of the law. The *Grundnorm* may actually assume any content: the only quality that is essential to the pre-positive principle of the whole legal system is its effectiveness.[51]

Kelsen's failure to justify convincingly the self-reference of the legal system as a system of self-reliant propositions – which he shares with legal positivism in general –[52] is lastly due to his understanding of the legal lan-

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[50] *H. Kelsen*, General Theory of Law and State, 1949, (1st ed. 1945), at 115 et seq.

[51] *H. Kelsen* (note 50), at 120.

[52] *H. L. A. Hart* tried to avoid *Kelsen's* somehow obscure, explicitly pre-positive and implicitly effectiveness-based concept of the "Grundnorm" by introducing the notion of the "rule of recognition" (*H. L. A. Hart*, The Concept of Law, 1994, at 100 et seq.). Yet, it is *Hart* himself who eventually admits that the "rule of recognition" is lastly not a proper rule of the legal system since "in the day-to-day life of a legal system its rule of recognition is very seldom expressly formulated as a rule" (*H. L. A. Hart* [note 52], at 101). Thus, if the "rule of recognition" is not a proper rule of the legal system, it must be – analogously to *Kelsen's* "Grundnorm" – a pre-positive and in the most cases implicit assumption which provides "both private persons and officials … with authoritative criteria for identifying primary rules of obligation" (*H. L. A. Hart* [note 52], at 100). Furthermore, the "rule of recognition" is not specifically connected with reflexive processes of rule acceptance and democratic legitimacy. Indeed, *Hart* contends that "the existence of a legal system is a social phenomenon which always presents two aspects," on the one hand "the attitudes and behaviour involved in the voluntary acceptance of rules," on the other "the simpler attitudes and behaviour involved in mere obedience or acquiescence" (*H. L. A. Hart* [note 52], at 201). Nor is the "rule of recognition" necessarily tied to moral criteria. In fact, according to *Hart* "a concept of law which allows the invalidity of law to be distinguished from its immorality, enables us to see the complexity and variety of these separate issues; whereas a narrow concept of law which denies legal validity to iniquitous rules may blind us to them" (*H. L. A. Hart* [note 52], at 211). Concluding, although *Hart's* "rule of recognition" comes out as more nuanced and less dogmatic than *Kelsen's* "Grundnorm", the factual validity of a norm and, in general, its effectiveness seem to be, also in *Hart's* understanding, the ultimate – if not the only – criterion for the identification of what law is. And, given that the validity of the law rests therefore, also in *Hart's*

guage not as a system of propositions the meaning of which is depending on its use by the epistemic community, but as a strictly organised set of judgements, the validity and truth content of which is from the outset given by their position within the hierarchical scale.[53] From this point of view, even interpretation is a monological technique, consisting in applying the law to the individual case, and not a discursive procedure which has to justify itself before the community of those who are involved in the legal interaction and thus contribute – implicitly or explicitly – to the definition of its terms.[54] Yet, if legal propositions do not find their significance within the discursive context of the legal community, the system of the law developed by legal positivists – although analysed as a linguistic structure – remains bound to a traditional and non-dialogical, somehow backward idea of "meaning", still far away from what has been described as the "linguistic turn".[55]

b) According to *Niklas Luhmann's* theory of systems, law is an independent social subsystem the function of which consists in stabilising the normative expectations deriving from other social subsystems.[56] The interpretation of society based on systems theory asserts that every social subsystem produces expectations as a consequence of the achievement of its functions. In order to prevent the disruptive effects that could arise from the pretensions formulated by social actors, their expectations are expressed in the form of norms, and the claims appealing to these norms are dealt with through formal procedures following the principles laid down by law. Given these premises, the assertion of the self-subsistence of the legal subsystem is nevertheless problematic. Systems theory claims, in fact, that the legal subsystem – like any other social subsystem – only operationalises communication that unfolds according to its specific internal binary code[57] which is based, for this particular subsystem, on the contraposition between lawful and unlawful.[58] This assumption may simply mean what is self-evident in a context of social differentiation, namely that inputs from outside can be operationalised within a system only if they are translated into its own language. Systems theory however – at least according to *Luhmann's* interpre-

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interpretation, lastly on extra-legal circumstances, the claim to self-reliance of the legal system is by no means more stringent here than in *Kelsen's* "reine Rechtslehre".

[53] While *Kelsen's* failure to justify convincingly the assumed self-reliance of the legal system is largely shared by *Hart* (see note 52), the same similarity cannot be detected as regards their conceptions of the language of the law. On *Hart's* innovative interpretation of the connection between law and language, see Section III.4.

[54] *H. Kelsen* (note 48), at 90 et seq.

[55] See Section IV.

[56] *N. Luhmann*, Das Recht der Gesellschaft, 1993, at 131.

[57] *N. Luhmann* Die Gesellschaft der Gesellschaft, 1997.

[58] *N. Luhmann* (note 56), at 60 et seq.

tation – maintains more than just this, asserting that no extra-systemic actor can become part of the infra-systemic interaction if he does not give up his extra-systemic dimension, as well as that no external content can penetrate into the causal chain of the infra-systemic operations. Indeed, every subsystem not only has its own rationality but is also self-referential, i.e., its operational chain is impermeable to the environment.[59] Communications coming from outside are interpreted exclusively as "irritations" affecting the usual functioning of infra-systemic operations.[60] In fact, no extra- or supra-systemic reason – i.e., a rationality rooted in the "lifeworld" –[61] is thinkable in systems theory's conception of self-contained social subsystems.

In line with the epistemological premises of systems theory, law is also understood as a self-referential subsystem characterised by a self-sufficient rationality: the law would therefore be based exclusively on itself. Two problems arise, however: the first concerning the relation between law's rationality and language; the second regarding the assumed self-referentiality of systemic rationality. First, the rationality of the law – and thus also its validity – is, from the perspective of systems theory, not a linguistic rationality, based on argumentation and dialogic communication, but a functional one, only aiming to improve the efficiency of social performances. Second, even if we accept a concept of rationality just limited to functionality, it is at least questionable whether subsystems in general, and the legal subsystem in particular, can really be regarded as self-reliant. Indeed, the idea of an exclusively self-reliant rationality of the legal subsystem meets its limits when the epistemological question is raised as to whether the membrane between system and environment can actually be seen as impenetrable and, as a consequence, whether the adaptations of the system's operations to the environment can adequately be explained merely by resorting to the concept of "irritation." An alternative description of the relations between system and environment would consist in presupposing the intervention of external actors as well as the raising of non-system-immanent claims within the communication process of the legal subsystem. From this perspective, provided that the external actors' action and the non-system-immanent claims are translated into the language of the legal subsystem, it would be possible to explain how the system-immanent rationality can benefit from direct input from the lifeworld. Furthermore, it would not be necessary to assume – as in *Luhmann's* systems theory – an epistemologically and sociologically problematic double-blind coupling between different non-communicating

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[59] *N. Luhmann* (note 57), at 65, 95 et seq.
[60] *N. Luhmann* ((note 57), at 118.
[61] *J. Habermas*, Theorie des kommunikativen Handelns, 1981.

systems.[62] The advantages of the approach that presupposes interaction with external actors as well as the existence of an extra- and supra-systemic rationality becomes evident when it comes to the analysis of extra- or supra-systemic phenomena like human rights protection and justice. The difficulties that systems theory meets in explaining these issues by maintaining the principle of systemic self-referentiality[63] may offer sufficient evidence that the legal subsystem, even if relying on the conceptual organon of systems theory, can hardly be seen as self-sufficient: in order to understand some aspects of its functions the resort to forms of extra-legal rationality seems to be inevitable. As a result, the deficit of the attempt by systems theory to validate the law by itself is twofold: on the one hand, the assertion that "law is what law deems to be law"[64] refers to a functional and not – as it could be assumed at first glance – to a linguistic dimension; on the other, even from the functional point of view self-referentiality is not guaranteed.

3. Law and Social Power

The emphasis on the connections between legal concepts and social power is not a new topic in political and legal thought. Indeed, it can be traced back to at least as far as the Sophists, as testified in *Plato's Republic*, in which *Thrasymachus* is reported to explicitly state that "justice … is the interest of the stronger".[65] However, *Plato* let *Socrates* successfully reject *Thrasymachus'* argument – and in fact, since then, the idea of the reliance of law's interpretation on social power, although re-emerging again and again, was rather doomed to marginality in face of the prevailing conception of the law as a system of norms containing normative truths and shared values. The interpretation of the law as essentially power-related reappeared – at that time with a significantly higher impact – in the middle of the 19th century. In the *Manifesto of the Communist Party* of 1848 *Karl Marx* and *Friedrich Engels* asserted unequivocally that the "jurisprudence [of the ruling

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[62] *N. Luhmann* (note 57), at 100.
[63] See, e.g. *A. Fischer-Lescano*, Globalverfassung. Die Geltungsbegründung der Menschenrechte, 2005; *A. Fischer-Lescano*, Globalverfassung: Verfassung der Weltgesellschaft, Archiv für Rechts- und Sozialphilosophie 88 (2002), 349; *M. Neves*, Die symbolische Kraft der Menschenrechte, Archiv für Rechts- und Sozialphilosophie 91 (2005), 159; *G. Teubner*, Selbstsubversive Gerechtigkeit. Kontingenz- oder Transzendenzformel des Rechts?, Zeitschrift für Rechtssoziologie 29 (2008), 9; *G. Teubner*, Die anonyme Matrix, in: W.Brugger/U. Neumann/S. Kirste (eds.), Rechtsphilosophie im 21. Jahrhundert, 2008, at 440.
[64] *N. Luhmann* (note 56), at 143 et seq. (engl.: Law as a Social System, 2004, 157).
[65] *Plato* (note 31), Book I, 338 c.

class, or of the bourgeoisie] is but the will of [this] class made into a law for all, a will whose essential character and direction are determined by the economical conditions of existence of [this] class".[66] As a consequence, no legal system can justifiably claim to be *just per se*; to the contrary, it will be just – or unjust – depending on the role played at that specific historical moment by the social class, the interests of which it represents. The validity of the law, thus, is not determined by its inherent quality or by its argumentative justification, but by its position within a teleological understanding of history.

The *Marxist* idea of the dependence of the legal system on the priorities of the ruling class was highly influential among many progressive social movements and leftist thinkers, far beyond the circle of those who believed in a largely deterministic teleology of social emancipation. Yet, whereas the most radical *Marxist* approach reduced the law to a mere instrument of the ruling class, thus actually unworthy to be taken seriously, a couple of decades later and in a completely different intellectual and political environment a further theoretical conception emerged as a form of *internal* criticism of the legal system carried out by legal scholars. It was, in fact, the American legal realism that developed a theoretical framework that rejected the claim to self-reliance both of the legal system and of jurisprudence and emphasised the connections of the law with moral and political assumptions as well as with the social reality as a whole, yet not as the result of external observation or of a general *Weltanschauung*, but on the basis of the internal analysis of legal categories.[67]

The scholarly accent on the social contextuality of law came to merge with the progressive impulse to unveil it as a (possible) instrument of the consolidation of injustice within the movement of the Critical Legal Studies (CLS), to which the intellectual personality of *Martti Koskenniemi* is linked in many respects. Although it is almost impossible to lead the manifold CLS movement back to a unitary position, its most essential tenets can be identified, nevertheless, by referring to the work of *Roberto Unger*, unquestionably one of the most theoretically ambitious exponents of the movement. In his book dedicated to *The Critical Legal Studies Movement*, *Unger* starts by criticising the most dominant approaches in legal theory. The first is "formalism" which is defined as "a commitment to, and therefore also a belief in the possibility of, a method of legal justification that contrasts with open-ended disputes about the basic terms of social life, disputes that people call

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[66] *K. Marx/F. Engels*, Manifest der Kommunistischen Partei [1848], 1969, at 42.
[67] *G. Frankenberg*, Partisanen der Rechtskritik: Critical Legal Studies etc., in: S. Buckel/R. Christensen/A. Fischer-Lescano (eds.), Neue Theorien des Rechts, 2006, at 97 et seq.

ideological, philosophical, or visionary".[68] In other words, law is affected by "formalism" if it is understood as a system of norms detached from the society and claiming, thus, to be self-referent. The second highly influential, but nevertheless false approach is "objectivism", which is described as "the belief that the authoritative legal materials – the system of statutes, cases, and accepted legal ideas – embody and sustain a defensible scheme of human association".[69] In the "objectivistic" conception of law the problem is therefore almost the opposite to the former mistaken vision, the deficit consisting here in depriving the norms of any autonomy and considering them as the sheer embodiment of a state of things which is assumed to be morally or functionally correct. To the contrary, according to *Unger*, law has to assume the role of supporting social change. This role has been already taken on by the law in the past, in particular during the transition from the Middle Ages to the Modern Ages.[70] In the course of this epochal passage, the law gave up its former function as "a defense of the underlying order of social division and hierarchy",[71] assuming the task of describing "the basic possible dealings among people, as property owners and as citizens, without regard to the place individuals occupy within existing society".[72] Thus, if the role of the law in the Modern Ages has consisted in developing the "system of rights", in the transition from modernity to postmodernity also the challenge for the legal system has changed. In our time, its most essential mission – backed by what *Unger* calls a "deviationist" or "expanded doctrine" –[73] should be to identify the lines of rupture in society and to support emancipation[74] as well as bottom-up forms of participatory or "empowered" democracy.[75]

Hence, the philosophy of the CLS movement, as it has been formulated by one of its most prominent scholars, can be tentatively summarised as follows. First, the legal system cannot be regarded as a self-sufficient set of norms with no connections to moral assumptions and social conditions. Secondly, law which does not fall short of its potentialities cannot be interpreted as a system of norms simply mirroring the existent conditions of social power either. Thirdly, the relationship between law and society has a dialectic character, in the sense that the interpreters of the law and, in gen-

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[68] *R. Mangabeira Unger*, The Critical Legal Studies Movement, 1983, at 1.
[69] *R. Mangabeira Unger* (note 68), at 2.
[70] *R. Mangabeira Unger*, Law in Modern Society, 1976.
[71] *R. Mangabeira Unger* (note 68), at 24.
[72] *R. Mangabeira Unger* (note 68), at 24.
[73] *R. Mangabeira Unger* (note 68), at 15 et seq.
[74] *R. Mangabeira Unger*, What Should Legal Analysis Become?, 1996.
[75] *R. Mangabeira Unger* (note 68), at 31 et seq.

eral, the legal professionals have to be made aware, on the one hand, of the social rootedness of norms; on that basis, they have to identify, on the other hand, the progressive tendencies in society, using then the instruments put at disposal by the law to support and implement those tendencies. Fourthly, and as a consequence of the former points, the source of the validity of the law is located in social reality, yet in a highly selective way; indeed, the validity of the law is dependent on its capacity – or, to put it more correctly, on the capacity of its interpreters – to identify social trends that may promote the empowerment of citizens and foster them.

4. Law and Language

The awareness that law is not only an expression of an ontological truth or of formal and abstract principles of rationality, but is also deeply rooted in language emerged for the first time as a product of the German Historical School. It was *Friedrich Carl von Savigny*, in fact, who contended that "where we find the first evidences of history, there the … law has already its specific character, which is typical for a certain nation (*Volk*)".[76] As a result, we can always observe an "organic connection of the law with the essence and the character of the nation".[77] In other words, the law should be regarded as one of the most relevant manifestations of the "spirit of the people" (*Volksgeist*), i.e., of the "national character" of a cultural and also – at least in the wishes of the romantic nationalists – political community. Furthermore, since language is the most essential feature of the culture of the *Volk*, it is the national language indeed that serves as the substrate on which the correlation is built between legal rules and the life of the national community. Therefore, the law can only be the law of a *specific* nation – and thus a *living* law, not simply a sclerotic system of abstract norms – because it is permeated by the language of the *Volk*. *Savigny* summarises his thought as follows: "The law is formed in the language; it takes a scientific shape and, as it lived before within the consciousness of the whole nation, it passes now to the consciousness of the lawyers."[78] Hence, if it is true that *Savigny* drew attention to the linguistic essence of the law for the first time, this happened in his interpretation only in the sense that the linguistic form al-

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[76] *F. C. von Savigny*, Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft, 1814, at 8; also available in: J. Stern (ed.), Thibaut und Savigny: Zum 100jährigen Gedächtnis des Kampfes um ein einheitliches bürgerliches Recht für Deutschland, 1914, 69 et seq.

[77] *F. C. von Savigny* (note 76), at 11.

[78] *F. C. von Savigny* (note 76), at 12.

lows the law to correlate with its social fundament which is understood, here, as the culture of the nation. As a result, the analysis of the language of the law does not lead in *Savigny's* work to any specifically linguistic method, but is finally reduced to the outlining of the historical and cultural constants of the national legal systems.

If for the Historical School, therefore, language was just the conveyer that connects the law to its true essence, namely to the *Volksgeist*, in a further step meaning and validity of legal propositions were not to be sought *beneath* the linguistic surface, but *in the language itself*. It was *H. L. A. Hart* who introduced this significant development by "provocatively extend[ing] Wittgenstein's later thought to law".[79] The reference here is to *Wittgenstein's Philosophical Investigations*, in which he developed the revolutionary idea that the meaning of language depends exclusively on the use that we make of it.[80] Thus, the question is how "Hart's conception of jurisprudence is representative of Wittgenstein's conception of philosophy".[81] In fact, if we look at the methodology applied in *Hart's* analysis, we can discover that he does not search for the *essence* of the law, or for its *true definition*, but simply *describes* the structure of the language of the law. In other words, he presents what the language of the law consists of – more concretely, private and public primary rules, secondary rules, as well as rules of adjudication and of change.[82] In this sense, he acts methodologically precisely in the same way as *Wittgenstein* does with reference to more general philosophical questions concerning the meaning of language. While *Wittgenstein* traces back the significance of propositions to the "ordinary" language and to its concrete use, *Hart* finds no deeper content of the law than the linguistic features of its actual unfolding. Summing up, "ordinary language is binding for philosopher and jurist alike, not because an everyday or common sense perspective is in itself normative but because ordinary language is their own, the only one in which they 'write' (think, feel, mean, hope, want, etc.)".[83]

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[79] *A. Lefebvre*, Law and the Ordinary: Hart, Wittgenstein, Jurisprudence, in: "Telos", 154 (Spring 2011), 99 et seq., at 101.

[80] *L. Wittgenstein*, Philosophische Untersuchungen [1953], in: L. Wittgenstein, Werkausgabe, 1984, I, at 225 et seq.

[81] *A. Lefebvre* (note 79), at 100.

[82] *H. L. A. Hart* (note 52), at 3.

[83] *A. Lefebvre* (note 79), at 113.

IV. *Koskenniemi's* Radicalisation of the Linguistic Turn in Legal Philosophy

After outlining the main contents of *Koskenniemi's* epistemology in the first Section (II.), and summarising the most significant strands of legal philosophy with reference to those contents in the second (III.), it is now possible to evaluate how innovative *Koskenniemi's* approach is by placing the single elements of his conception against the background from which he sets himself apart. Significantly, only the tenets of the first strand are completely rejected by *Koskenniemi*, whereas he shares the fundamental assumptions that characterise the other approaches. Yet, he radicalises them in a way that eventually leads to conceptual results which were either only sketched in the former conceptions, or go explicitly beyond their horizon.

1) All strands of legal philosophy presented in the former Section assert the truth content of the law as the source of its validity, although in quite a different way. The first of them sought it outside the legal system, more precisely in the ontological foundation of social order. Depending on the different paradigms of order, the foundation of social order was located in the "just" *politeia* or in the enlarged family, in the nation or in the *communitas christiana*, in the whole of humankind or in the individuals. Some of the solutions may belong definitively to the past. So, for instance, the reference to the "just" *politeia*, to the enlarged family, or to a universal *communitas christiana*. Yet, *Koskenniemi* also rejects those proposals which are still influential. For the international lawyer committed to the worldwide guarantee of peace and fundamental human rights, the nation is inevitably too narrow a horizon. Furthermore, he criticises explicitly the theory of the constitutionalisation of international law,[84] therefore implicitly denying also the ontological assumption on which it is based, i.e., the existence of a global human community with shared values and interests.[85] Finally, he reduces *Kant's* global constitutionalism – and the universalistic individualism in

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[84] *M. Koskenniemi*, International Legislation Today: Limits and Possibilities, Wisconsin International Law Journal 23 (2005), 61 et seq.

[85] *C. Wilfred Jenks*, The Common Law of Mankind, 1958; *H. Mosler*, The International Society as a Legal Community, 1980; *B. Simma*, From Bilateralism to Community Interest in International Law, Collected Courses of The Hague Academy of International Law 250 (1994), at 217 et seq.; *R. St. John Macdonald*, The International Community as a Legal Community, in: R. St. John Macdonald/D. M. Johnston (eds.), Towards World Constitutionalism. Issues in the Legal Ordering of the World Community, 2005, at 853 et seq. See also note 43.

which it is rooted – from a deontological argument aiming to justify an obligation, to a "mindset" devoid of cognitive ambitions.[86]

2) *Koskenniemi* shares with the authors of the second strand the conviction that the legal system should be regarded as self-reliant. But, unlike most legal positivists and systems theorists, he takes the claim seriously. In fact, we have seen in the former Section that some of the most prominent exponents of both approaches – specifically, *Kelsen* and *Hart* for legal positivism, and *Luhmann* and *Teubner* for systems theory – eventually locate the ultimate source of the validity of the law outside the legal system, either in the effectiveness of the *Grundnorm* and in the realistic content of the "rule of recognition", or in the functional rationality of the social system, respectively. Instead, *Koskenniemi* rejects these solutions in the same way as he declines any other recourse to external and objective sources of the validity of the law. Furthermore, the legal system described by legal positivists and system theorists is assumed to be internally coherent insofar as it is regarded as rooted in a consistent idea of rationality. On the contrary, one of the most essential tenets of *Koskenniemi's* epistemology consists precisely in the assertion that the linguistic analysis of the legal discourse demonstrates its lack of internal consistency.

3) *Koskenniemi* also agrees on the close relation between law and social power. Yet, in contrast to many authors who stressed this correlation before him, he rules out that the normative quality of the law could be improved by simply resorting to social change. The point, here, is that *Koskenniemi* does not maintain that social relations can entail the source of law's validity. In this sense, social power is no less inadequate than any other external foundation of the law. We would misunderstand the specific quality of legal formalism if we believe that a law has to be rejected as unjust because of an *intrinsic* connection with a social state of affairs that defies the most essential criteria of justice. And we would be no less wrong – still according to *Koskenniemi* – if we assume that a legal system would become just only by changing its social basis, i.e., by enforcing the criteria of justice and, concretely, by empowering those who have to obey the rules. Indeed, in *Koskenniemi's* view law has no *immanent* relation to the conditions of social power: It is not inherently just (or unjust) because its social basis is deemed to be just (or unjust). To the contrary, law should be regarded as a formal instrument, the quality of which, in terms of justice, depends exclusively on the decisions of the legal professional who makes use of it.

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[86] *M. Koskenniemi*, Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization, Theoretical Inquiries in Law 8 (2007), 9 et seq.

4) The authors who laid emphasis on the linguistic dimension of law were motivated by the endeavour to find a more suitable basis for law's validity in face of the rising crisis of universalistic rationality. Since a reliable and convincing foundation for the assertion of a universally acceptable truth content of the law was assumed to be missing, the anchoring of the law in the language of a national community or in the "ordinary language" could guarantee, at least, for a *contextual* validity (and even truth content). *Koskenniemi* takes up the idea of law as a language – and the still ground-breaking character of his attempt becomes even more evident if we consider the on-going efforts to revitalise natural law theories through neo-metaphysical interpretations.[87] However, *Koskenniemi's* conception of law as a language does not aim at searching for a post-metaphysical and post-ontological fundament for the truth claim of the law. Rather, he detaches the language of the law also from the shared agreements on meaning of a limited community. In doing so, he starts with *Wittgenstein*, but goes a long way beyond him. In particular, *Koskenniemi* incorporates a poststructuralist element into the *Wittgensteinian* architecture: resorting to *Derrida's* "deconstruction"[88], he uses "the language against itself",[89] showing that the language of the law develops self-contradictory meanings.

V. Arguments for a Post-Metaphysical Understanding of the Truth Content of Language

By "linguistic turn" we understand the pathbreaking metamorphose in 20th century Western philosophy that deeply changed the understanding not just of language and of its relation to the world of phenomena and actions, but also of truth itself.[90] According to the traditional view, the "true" meaning of a word or of a proposition depends on their correct reference to objects or connections between objects in the "real", i.e. non-linguistic, world. By following the "linguistic turn", instead, the meaning of the language is sought in the language itself, in its use and in the praxis of action implied by it. Therefore, "truth" – insofar as it is admitted to exist – is not something located in the connection between linguistic propositions and the world,

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[87] See *J. Finnis*, Natural Law and Natural Rights, 1980; *J. Finnis* (ed.), Natural Law, 1991.
[88] *C. Norris*, Deconstruction, 1982.
[89] *N. Onuf*, World of Our Making, 1989, at 11.
[90] *R. Rorty* (ed.), The Linguistic Turn, 1967.

but it is rather embedded in the pragmatics of communication.[91] By analysing the legal discourse through the characteristics of its language and by assessing its validity by means of resorting to the methods of linguistics and philosophy of language, *Koskenniemi* reasserts and reinforces the "linguistic turn" in his discipline. Yet, *Koskenniemi* does not just turn attention to the linguistic dimension of law. He goes a step further by claiming that the language of the law has no truth content. This assertion may be interpreted in two different ways: As a general assumption that language actually works without any reference to a truth content of propositions (1), or as a claim that, even if language in general *has* a truth content, it is the *language of the law*, specifically, which has none (2). Let us consider the two possible and divergent implications of *Koskenniemi's* epistemology separately.

1) If we look back at the history of epistemology, we can only acknowledge that the historically predominant attitude was the assumption that utterances have a meaning essentially because they refer to an external – i.e. non-linguistic – object and that this relationship between the elements of language and the non-linguistic world accounts for the truth content of the language. Some distinctions from a strict "objectivistic" theory of language had been already made in more or less distant times – such as the "nominalistic" interpretation of universal or abstract concepts introduced in the late Middle Ages,[92] or the differentiation between "sense" and "meaning" elaborated in the late 19th century.[93] But it was *Ludwig Wittgenstein* who claimed for the first time that we can understand each other through our linguistic communication by just relying on linguistic habits and without resorting to any assumption of a more-than-contextual truth content of our utterances.[94] This is precisely the epistemology and philosophy of language that *Koskenniemi* puts at the basis of his works on international law. By even going a step further, he radicalises *Wittgenstein's* approach by denying any

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[91] This assumption does not mean that the object "outside" – at least in the most strands of contemporary philosophy of language – would completely disappear. The "truth" about this object, however, is now assumed to be reconstructed as an internal process of language and communication. In other words, from a dualism between subject and object we have switched now to a pluralism of subjects communicating with each other (intersubjectivity) in reference to an object outside. Only some radical interpretations pretend to refrain from any reference to the object outside as an element of truth content.

[92] *W. of Ockham*, Opera philosophica et theologica, ed. by Gedeon Gál et al, The Franciscan Institute 1967-1988. On nominalism, see *G. Rodriguez-Pereyra*, Nominalism in Metaphysics, in: The Stanford Encyclopedia of Philosophy (Fall 2011 Edition), E. N. Zalta (ed.), <http://plato.stanford.edu>.

[93] *G. Frege*, Über Sinn und Bedeutung, Zeitung für Philosophie und philosophische Kritik 100 (1892), at 25.

[94] See *L. Wittgenstein* (note 80).

attribution of a consolidated meaning to propositions, even if this meaning is characterised by a limited and solely contextual scope. However, *Wittgenstein's* sceptical contextualism has not found many supporters in the later developments of the philosophy of language, leaving its radicalisation by *Koskenniemi* all the more to rest on a rather unstable epistemological ground. This does not come as a surprise, due to the quasi-nihilist effects that *Wittgenstein's* approach might have had on the theory of knowledge, which could have been even more disruptive for other branches of human thought than for legal philosophy. Thus, a large part of the efforts made by philosophers of language in the last decades was dedicated to the reconstruction of a non-sceptical truth theory. Without going too much into details, let us single out two of these post-*Wittgensteinian* approaches, simply to indicate that the epistemological way undertaken by *Koskenniemi* is not without alternatives.

a) A first answer to a possible sceptical drift in the theory of knowledge as a result of the *Wittgensteinian* "turn" can be described as a renewal of the tradition of the empiricist philosophy of language and is prominently expressed in the works of *Donald Davidson*. The loss of reference to the concrete object within the post-ontological and post-mentalistic understanding of language is countered by *Davidson* through the return to a kind of "objectivism" that bears the distinctive traits of a pre-intersubjective, if not even of a pre-subjective epistemology. So as to reach his goal, he pursues a twofold strategy. First, he distances himself from *Descartes'* subjectivism by asserting that doubt itself is an idea of the truth which is based on a *natural* knowledge of the reality and of its objects.[95] By this reference to the possibility of a pre-reflexive knowledge of reality *Davidson* takes a position that, due to the alleged spontaneous and natural osmosis – which he calls "holism" – between our cognizance and the world outside, recalls quite clearly essential elements of the pre-Cartesian epistemology. Coherently, *Davidson* goes so far as to say that, precisely as a result of this alleged quasi-natural osmosis, empiric knowledge would not need any epistemological justification.[96]

Yet, *Davidson* recognises – rather from a methodological than from an ontological or hermeneutic standpoint – that the process of cognizance does not happen solipsistically, but is socially mediated through the communication between the speaker and the interpret.[97] Here he develops his second strategy for the consolidation of an epistemological return to objectivism by

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[95] *D. Davidson*, Problems of Rationality, 2004, at 3 et seq., 15 et seq.
[96] *D. Davidson*, Subjective, Intersubjective, Objective, 2001, at 39 et seq.
[97] *D. Davidson* (note 95), at 18.

working out a theory of communication that can be considered insofar "pre-intersubjective" as communication is assumed to function even without a normatively significant mutual recognition,[98] or an interpretation of society as a communicative community. From the perspective of *Davidson's* theory, the interaction of speaker and interpret does not aim at the exchange of arguments, or at the implementation of the normative foundations of social life. Rather, it concentrates – in a kind of triangle modus – on the comparison of the reactions to the stimuli that the external object can produce on both participants in the interaction. Linguistic communication results in mutual understanding if the linguistic reaction to the stimuli happens in a way that can be clearly interpreted by the counterpart.[99] The comparability – and, therefore, also the interpretability – of the individual reactions are ensured by the fact that all participants in the linguistic interaction are innately embedded in a "common language".[100]

b) *Davidson*, thus, rescues the truth content of language and avoids the risk of a sceptical drift, which is implied in the contextual linguistics developed by *Wittgenstein*, by once again shifting attention onto the external object. The result is attained, however, at the high cost of rejecting the normatively unreduced, properly intersubjective dimension of language as exchange of arguments. In the latest philosophy of language we can find, yet, another strand in which the truth content is maintained, but within an unequivocally intersubjective setting. This is the way chosen by *Robert Brandom* in his language theory, the goal of which consists in making "explicit" the "implicit" rules of an inferential semantics, characterised by the exchange of reasons and arguments through the linguistic communication.[101] In fact, only an idea of communication as an exchange of arguments takes full account of the novelty introduced by the "linguistic turn". However, if the first hurdle, the Scylla consisting in the danger of wiping out the social dimension of communication by concentrating only on the external object, has been successfully passed by conceiving a truly intersubjective communication theory, a second threat is yet to be mastered, namely the Charybdis of scepticism or the rejection of what has been defined as the "truth's universal claim".[102] Without this further step, we would fall back into that kind of *Wittgensteinian* epistemological scepticism the deficits of which have been targeted by contemporary language theory. *Brandom* meets this sec-

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[98] On mutual recognition as the condition for a full-fledged intersubjectivity, see *A. Honneth*, Kampf um Anerkennung, 1992.

[99] *D. Davidson* (note 96), at 107 et seq.

[100] *D. Davidson* (note 96), at 120 et seq.

[101] *R. Brandom*, Making It Explicit, 1998, (1st ed. 1994), at 132 et seq., 618 et seq.

[102] *J. Habermas*, Wahrheit und Rechtfertigung, 2004, at 153.

ond challenge by construing an epistemological continuum between "facts", "concepts" and "true claims".[103] Since "concepts" are articulated in an inferential modus – that means, are not regarded as mere representation of objects, but always in the context of propositions based on arguments –, they build the theoretical bridge that brings "facts" and "true claims" together. Indeed, both "facts" referring to external objects, as well as "true claims" concerning these same objects, are structured as "concepts" and therefore inferentially. As a result, an ontological overlapping is assumed to exist between the "facts" of the world and our assertions expressing truth claims as regards the same objects of the world: "facts are just true claims", is *Brandom's* lapidary statement.[104] The outcome of this overlaying of "facts" and "true claims" consists, first, in a theory of knowledge that avoids scepticism by including into the discourse references to concrete objects, although always conceived of in an inferential way, and secondly in a kind of neo-idealistic understanding of communication,[105] clearly influenced by *Brandom's* innovative revival of *Hegel's* epistemology.[106]

2) However, even if we have to admit that the idea that communication is only contextual, lacking any convincing resort to what can be called an "objective reality", is rather marginal in today's theory and philosophy of language, we could also assume that *Koskenniemi's* criticism does not target the truth content of language in general, but just the truth content of the *legal* language. In other words, the question that we can pose is: should we assume that, if not language in general, at least the language of the law is actually devoid of truth claims? Once again, yet, the position does not seem to be supported, in its radical assumption, by contemporary philosophy of language. Let us briefly see which solution is given to answer this question by the previously considered approaches: the neo-objectivistic, on the one hand, and the inferential on the other. In both cases, yet, we have to broaden the question by switching the focus from the truth claims of the legal language, in particular, to the wider field of the truth claims of languages that imply the use of practical reason. In other words, to find an answer to the question, we have to change, in the taxonomy of the use of practical reason, from the species of legal language to the more general genus of the language addressing issues with regard to the use of practical reason.

a) *Davidson* extends his neo-objectivistic understanding of truth in language also to propositions addressing moral or ethical questions. From his

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[103] *R. Brandom* (note 101), at 622.
[104] *R. Brandom* (note 101), at 622.
[105] *J. Habermas* (note 102), at 138 et seq.
[106] See *Brandom's Hegel* interpretations available at: <http://www.pitt.edu>.

perspective, ethical values are insofar "objective" as they are regarded as *given* in a quasi-natural way within the social group of reference of the speaker.[107] In this sense, the social substrate of ethical convictions plays, with regard to the ethical discourse, the same role taken by the "objective" external world within the theoretical discourse. By presuming that ethical values have a quasi-natural basis in social convictions, however, we deny the possibility that values have universal validity – since social convictions may vary from time to time and from place to place –, as well as from the chance of determining a criterion for validity which could stand as a fundament for the scrutiny of currently predominant values.

b) Although remarkably different in its epistemological premises, *Brandom's* inferential semantics also leads, when applied to questions concerning the use of practical reason, to conclusions which are quite similar to those drawn by *Davidson* from his objectivistic theory of language. In particular, *Brandom* widens the ontological overlapping between "facts", "concepts" and "true claims" also to the "norms", going thus beyond theoretical reason and reaching the field of practical reason as well.[108] From his point of view, moral and ethical norms share the same status as descriptive propositions with truth claim: all of them – "norms" as well as "truth claims" – make the rules "explicit" which have their objective fundament in the "facts" of the world.[109]

We can thus conclude that both *Davidson's* neo-objectivistic and *Brandom's* inferential philosophy of language regard rules derived from the use of practical reason – and therefore, we may add, also *legal* rules – as something *given*, an "object" or "fact" of the world that communication, if it is to achieve its goal, cannot but accept. This way, however, communication turns out to lack the *constructive* dimension that characterises the use of practical reason. Actually, by proposing arguments for mutual consideration, moral and ethical discourses do not just take reality into account but also build a dimension that can, in a counter-factual move, transcend actuality and pave the way for the realm of the "yet to come".

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[107] *D. Davidson* (note 95), at 39 et seq.

[108] For the application of *Brandom's* philosophy of language to the theory of legal argumentation, see *M. Klatt*, Making the Law Explicit. The Normativity of Legal Argumentation, 2008.

[109] *R. Brandom* (note 101), at 624.

VI. Some Considerations on the Intersubjective Truth Content of the Law and the Need for Justification in the Legal Profession

In contrast to *Koskenniemi's* epistemology, it seems – on the basis of the analysis carried out in the former section – that the most significant strands of contemporary philosophy of language do not share *Wittgenstein's* scepticism with regard to the truth content either of the theoretical or of the practical dimension of linguistic communication, implicitly rejecting, *a fortiori*, also any further radicalisation of it. Both the neo-objectivistic theory and its inferential counterpart reassert, on the one hand, the possibility of a true knowledge, and expand the truth claim to propositions addressing issues of practical reason on the other. Yet, the affirmation of the truth claim of moral, ethical and legal propositions is eventually grounded on the reduction of the truth content of practical reason to the mere reproduction of existing rules. Still, this is precisely what *Koskenniemi* tries to avoid with his legal philosophy: from his standpoint, the legal professional has to construe, or even *create*, his or her interpretation of the existing rules so as to use them for the sake of the forsaken. If the truth content should only consist in the safeguard of the *status quo*, then we would probably do much better indeed – with *Koskenniemi* – by simply ignoring it, insisting on the intuitive cognition that practical reason *does* also comprehend something different from the existing state of affairs.

But is it really correct that practical reason can just have truth content as reaffirmation of existing rules? Or is it possible to find another definition of truth which is applicable also to propositions addressing questions of practical reason but without reducing them to the given situation? Can, in other words, rules "of our making" have a truth content?[110] I actually claim that it *is* possible. It depends on how truth is understood. We can draw some suggestions on this issue from the *communicative paradigm of order*, as it has been developed by *Karl-Otto Apel*[111] and *Jürgen Habermas*.[112] According to this approach, linguistic communication, so as to work, has to be regarded as always having a truth content. In other words, if we should assume that the utterances of our counterpart in the linguistic interaction are devoid of any content that we can interpret as "true" – i.e. as having a meaning that

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[110] On the "constructivist" understanding of rules, see *N. Onuf* (note 89), at 33 et seq.
[111] *K.-O. Apel*, Transformation der Philosophie, 1973.
[112] *J. Habermas* (note 61)); *J. Habermas*, Moralbewußtsein und kommunikatives Handeln, 1983; *J. Habermas*, Vorstudien und Ergänzungen zur Theorie des kommunikativen Handelns, 1984.

we can share – we would not engage in any serious interaction with this actor, with the consequence that the interaction would promptly conclude without results and the communication, as an exchange of meaningful utterances, would actually not take place at all. Concretely, in order to guarantee that communication works, the participants in the linguistic interaction must mutually presuppose that: a) from an *objective* perspective, the assertions are *true* (in the sense that the propositions refer to real situations or facts); b) from a *subjective* perspective, the speakers act *truthfully* (in the sense that they are committed to fair-minded purposes and are sincerely persuaded that their assertions meet the conditions for truth); c) from an *intersubjective* perspective, the speakers interact according to the principles of *rightness* (in the sense that they accept that their assertions have to meet the criteria for a general and mutual acknowledgement by all participants in the communication).[113] From this standpoint, communication preserves (refer to a) the reference to the external object, which, however, does not constitute – like in the objectivistic theory of language – the only criterion for truth, nor it is conceived in idealistic terms like in *Brandom's* semantics. Moreover, c) guarantees the inferential character of a communication made of exchange of arguments. Lastly, b) and c) stand for the inherent normativity of the interaction. On the whole, communication understood in this form maintains the claim for a universal validity, but without any resort to ontological or metaphysical presumptions.

If applied to the legal discourse, the communicative paradigm leads to consequences which are quite different from *Koskenniemi's* view. On the one hand, the legal instruments as the objective sources of what we can call the "legal truth" – the external object which the presupposition a) of a successful communication refers to – seem to bear more importance and to be less available for individual strategies, or even manipulation. Secondly, the legal discourse is bound to an inherent normativity. In other words, law can display its social function and the legal discourse can unfold successfully only if law is seen as something different and more than just strategic thinking and acting. Thirdly, legal "truth" is always connected to the discourse within the epistemic community, which includes not only the legal professionals but the entire society. In a similar way to *Koskenniemi's* legal theory, from a communicative perspective the lawyer has the task to interpret the law, but, in order to realise its full normativity, he/she has to take into account the discourse within the epistemic community and has to justify

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[113] *J. Habermas* Vorstudien (note 112), at 598; *J. Habermas*, Nachmetaphysisches Denken, 1988, at 73, 105 and 123; *J. Habermas*, Wahrheit (note 102), at 110.

his/her interpretation in front of it.[114] Therefore, the critical interpretation of the existing law is not just possible but downright necessary; yet, it should be seen as the result not only of the commitment of the individual lawyer but of a broader social discourse that the lawyer has the task to translate into the language of his/her discipline.

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[114] In his "Epilogue" to the second edition of From Apology to Utopia *Koskenniemi* replies to the idea of an intersubjective fundament of the legal discourse by simply confirming his scepticism about the possibility of establishing a connection between shared meanings and the language of the law and by reaffirming the creative activity of the legal professionals: "Hermeneutics is right in that intersubjectivity is important. But it is wrong to reduce the professional context to one that 'operates on the basis of common understandings and shared beliefs' (*I. Johnstone*, Treaty Interpretation: The Authority of Interpretive Communities, Mich. J. Int'l L. 12 [1991], 449). In fact we know virtually nothing of 'understandings' or 'beliefs': the insides of social agents remain irreducibly opaque. The interpretative techniques lawyers use to proceed from a text or a behaviour to its 'meaning' create (and do not 'reflect') those meanings." (*M. Koskenniemi* [note 1], at 597). However, he does not address directly the arguments of the counterpart.