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## CRITICAL SUBSTANTIVE VALIDITY TESTING OF LEGAL NORMS. ON PRESENTATION OF STARTING POINTS AND METHOD TOOLS <sup>1</sup> (Part II)

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**Abstract.** The purpose of this article is presentation of starting points and method tools for critical substantive validity testing of legal norms. The research problem in question is partly in what way the substantive validity of legal norms are determined, assessed and tested, partly the possible connection between the substantive validity of a norm and its efficiency in application in the legal practices in concrete cases. This is dealt with by presentation of starting points and method tools for critical substantive validity testing of legal norms. They are the result of independent, explorative research on my part. They have a general design. They are intended for use by a legal scholar within legal science. This is one way of performing a critical-practical-legal philosophy within legal science and by a legal scholar. They create the preconditions for and open the door for future research and provide the basis for deepened discussions in legal science. This article is divided into two parts. The purpose of the first part of this article is presentation of legal starting points for critical substantive validity testing of legal norms. The first part is titled “Critical substantive validity testing of legal norms. On presentation of starting points and method tools (I)”. The purpose of the second part of this article is presentation of legal scientific starting points and method tools for critical substantive validity testing of legal norms. The second part is titled “Critical substantive validity testing of legal norms. On presentation of starting points and method tools (II)”.

**Key words:** legal criteria of validity, legal validity, formal validity, substantive validity, critical-practical-legal philosophy, legal starting points.

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## КРИТИЧЕСКАЯ ПРОВЕРКА СУЩНОСТНОЙ ДЕЙСТВИТЕЛЬНОСТИ ПРАВОВЫХ НОРМ. ПРЕДСТАВЛЕНИЕ ИСХОДНЫХ ПОЛОЖЕНИЙ И МЕТОДОВ <sup>1</sup> (Часть II)

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**Аннотация.** Целью данной статьи является представление исходных положений и методики для критической проверки сущностной действительности правовых норм. Исследовательская проблема, о которой идет речь, отчасти зависит от того, каким образом определяется, оценивается и проверяется сущностная действительность правовых норм, отчасти – от возможной связи между сущностной действительностью

нормы и эффективностью ее применения в конкретных случаях. Речь идет о представлении исходных положений и методики для критической проверки сущностной действительности правовых норм, которые являются результатом авторских независимых исследований. Они объединены общим предназначением: использование правоведами в рамках юриспруденции, что, в свою очередь, является одним из способов использования критико-практико-правовой философии в юриспруденции ученым-юристом. Указанные исходные положения и методика создают предпосылки и открывают двери для будущих исследований и служат основой для углубленных дискуссий. Эта статья разделена на две части. Целью первой части этой статьи является представление исходных правовых положений для критической проверки сущностной действительности правовых норм. Первая часть называется «Критическая проверка сущностной действительности правовых норм. Представление исходных положений и методов (I)». Цель второй части этой статьи – представить научно-правовые исходные положения и методику для критической проверки наличия сущностной действительности правовых норм. Вторая часть называется «Критическая проверка сущностной действительности правовых норм. Представление исходных положений и методов (II)».

**Ключевые слова:** правовые критерии действительности, правовая действительность нормы, формальная действительность, сущностная действительность, критико-практико-правовая философия, правовые исходные положения.

## 1. Introduction

### 1.1. Point of Departure

The purpose of this article is presentation of starting points and method tools for *critical substantive validity testing of legal norms* within a certain legal order with point of departure in my earlier research on legal validity and young persons at homes for care or residence (or institutions)<sup>2</sup>. This article is divided into two parts. The purpose of the first part is presentation of legal starting points for critical substantive validity testing of legal norms within a certain legal order. The purpose of the second part is presentation of legal scientific starting points and method tools for critical substantive validity testing of legal norms within a certain legal order. In the following, the second part of this article follows.

Point of departure is my elaboration of a legal analytical tool for critical substantive validity testing of legal norms within a certain legal order<sup>3</sup>. It provides a procedure for performance of an internal criticism of the law. The tool consists of five steps: 1) The choice of a legal norm 2) The analysis of the structure of the argument 3) The validity indicator 4) Linguistic rationality 5) The prospect of factual acceptance. It is intended for use (primarily) by a legal scholar in legal philosophy. The legal analytical tool won support in application on the example of homes for care or residence [2, p. 22, pp. 131-160, p. 162].

The legal analytical tool is a conversion of Kaarlo Tuori's critical legal positivism and his conception of legal validity as presented in his main work *Critical Legal Positivism* (2002) into

practical use in legal philosophy based on a late modern legal science approach<sup>4</sup>. This includes deviations from and developments of his legal theoretical framework – which is based on a certain view of modern law as an historical type of law and its legal constructions – on my part. Some other sources were used as supplements to the main work, primarily Jürgen Habermas's writings on his method rational reconstruction and Henrik Zahle's writings on practical-legal philosophy [Cf. 2, p. 23, 25, p. 59 with reference to 6, pp. 1-68 and 11, p. 11, pp. 27-30].

### 1.2. Performance of Research Task

The legal analytical tool is based on certain starting points and method tools. The legal starting points are substantive validity as a relational concept, the two faces of the law, the theoretical structure of the law, the relations between the levels of the law, the structure of the legal actor and the validity criteria and their tasks. The legal scientific starting points are legal philosophy as a branch of legal science and a critical-practical-legal philosophical approach. Finally, the method tools are analysis of the structure of an argument, reconstruction and linguistic (sub)competence [2, p. 31, p. 57, p. 61].

The purpose of the second part of this article is presentation of legal scientific starting points and method tools for critical substantive validity testing of legal norms within a certain legal order. The legal scientific starting points and method tools have a general design. They are intended for use (primarily) by a legal scholar in legal philosophy

as a branch of legal science. The addressee is the legal scientific community. This is one way of performing a critical-practical-legal philosophy within legal science and by a legal scholar.

The performance of the research task involves an extraction, compilation and description of the components of my view of legal science and of the legal scientific method, as elaborated and presented in my earlier research, specifically the legal scientific starting points and the method tools of which the legal analytical tool is composed. The research problem in question is partly in what way the substantive validity of legal norms within a certain legal order are determined, assessed and tested, partly the possible connection between the substantive validity of a norm and its efficiency in application in the legal practices in concrete cases<sup>5</sup>.

The legal scientific starting points and method tools are presented in Sections 2-3. They are intended, designed and presented in the text as written instructions to the legal scholar in legal philosophy. The idea is that they can be used jointly or separately – not only by me – but also by other legal scholars within the scope of future research in legal science [See Section 4]. The legal scientific starting points and method tools are the result of independent, explorative research on my part. They are only drafts. No claims of completeness are made on my part.

### **1.3. Continued Outline**

Section 2 deals with presentation of legal scientific starting points for critical substantive validity testing of legal norms. Section 3 deals with presentation of method tools for critical substantive validity testing of legal norms. Section 4 deals with future research.

## **2. Legal Scientific Starting Points**

### **2.1. Legal Philosophy as a Branch of Legal Science**

The first legal scientific starting point for critical substantive validity testing of legal norms is *legal philosophy as a branch of legal science* [Cf. Sections 1.1-1.2. 2, pp. 57-58]. Point of departure is the task of legal philosophy.

According to Tuori, it is possible to make a division of normative legal science into various branches. Each branch has its specific tasks. Each

branch focuses on one of the levels of the law. The task at hand for legal philosophy is to bring to light the conceptual, normative and methodological elements of the deep structure of the law, to transform practical knowledge of the elements into a discursive form. The legal scholar then presents this knowledge at the surface level of the law. This is my task within the scope of this article. Consequently, it should be attributed to legal philosophy as a branch of legal science. The specific reasons for this order are the following [Cf. 2, p. 57. 10, pp. 283-284, 2, p. 58].

Critical substantive validity testing focuses on the normative element of the deep structure of the law. The aim is to transform the legal actor(s) practical knowledge of (mainly) fundamental legal principles in the deep structure into a discursive form. These principles constitute the ultimate yardsticks for assessment of the legal validity of legal norms. In this way, the research problem in this article, specifically in what way the substantive validity of legal norms within a certain legal order are determined, assessed and tested, is dealt with [Cf. Section 1.2. 10, p. 263, 2, p. 58].

The legal actor's (or actors') reconstructed practical knowledge of fundamental legal principles in the deep structure of the law is presented by the legal scholar at the surface level of the law in a written text. The knowledge produced is used for assessment of the fulfilment of the second task of the validity criteria. This pertains to the fundamental legal principles in the deep structure of the law and their accounting for establishment of legal normativity. In this way, the research problem in this article, specifically the possible connection between the substantive validity of a legal norm and its efficiency in application in the legal practices in concrete cases, is dealt with [Cf. 10, p. 280.2, p. 58].

### **2.2. A Critical-Practical-Legal Philosophical Approach**

The second legal scientific starting point for critical substantive validity testing of legal norms is *legal philosophy as a branch of legal science* [Cf. Sections 1.1-1.2. 2, pp. 58-59]. Point of departure is the two faces of the law.

Critical substantive validity testing presupposes a study of the interaction between a

certain legal order and the legal practices in *sensu medio* and the legal practices in *sensu stricto*, respectively. The focal point is on the legal practices' mediation of the relation of justification between the levels of the law. This is, in turn, done by their connected legal actor(s), i.e., politicians, lawyers and experts. Critical substantive validity testing presupposes interaction between theory and practice. This is apparent in this article in the following way [Cf. 9, p. 346.2, p. 58].

The legal science approach can be described as *critical-practical-legal philosophical*. This approach means partly that legal philosophy is used on practical material, partly that the results are used as the basis for a professional critical reflection. This results in a standpoint on the prospect of factual acceptance of the legal norm, which is the object of validity testing. The legal science task consists of the unification of practice and critical-legal philosophy [Cf. 10, p. 253, pp. 320-322, Cf. 11, p. 11, pp. 27-30. 2, pp. 58-59].

The *practical approach* involves the following. The research topic and complex of problems are searched for in the legal practices in *sensu medio* and/or the legal practices in *sensu stricto*. The fragmented legal order and the law-creating activities of the legal scholar are viewed as individual as well as social practices. The legal norm within a certain legal order, which becomes the object of validity testing, regulates an interpersonal course (or courses) of action between members of society [2, p. 59].

The focal point is on *the ought* in human relationships in various situations (in life). These have, in turn, become the object of legal regulation within a certain legal order. The law-creating activities of the legal actor(s) connected to the legal practices in *sensu medio* and the legal practices in *sensu stricto*, respectively, are performed in a certain legal context. The circumstances in the concrete case may necessitate the performance of empirical studies by the legal scholar for gathering of material [Cf. 8, pp. 297-298, 3, pp. 250-255, pp. 419-542, 2, p. 28, pp. 131-160. 2, p. 59].

The *critical-legal philosophical approach* involves the following. The fragmented levels of the law are viewed from within legal science, in my capacity as a legal scholar. Critical substantive validity testing focuses on reconstruction of the legal actor(s)'s practical knowledge of the

normative element of the deep structure of the law. The focal point is on the prevailing relation of justification and the relation of criticism between the levels of the law. The knowledge produced in reconstruction is used for (possible) presentation of an internal criticism of the law [2, p. 59].

### 3. Method Tools

#### 3.1. Analysis of the Structure of an Argument

The first method tool for critical substantive validity testing of legal norms is *analysis of the structure of an argument* [Cf. Sections 1.1-1.2. 2, pp. 66-74]. Point of departure is the surface level of the law.

The object of validity testing is a legal norm within a certain legal order. The norm regulates an interpersonal course (or courses) of action between members of society. The basis for validity testing is found in linguistic acts, which have been presented at the surface level of the law. These acts are the written utterances of the legal actor in relation to the norm in question [2, p. 67].

Utterances presented, through language, regarding justification of courses of action, are *normative arguments*. They are, as such, supposed to substantiate the moral and/or ethical acceptability of the object; in this case a legal norm at the surface level of the law. The word *argument* is in this article used for a series of clauses in a *text*. Some of these clauses, which are called *premises*, are said to be reasons or grounds for another clause, which is called a *conclusion* [Cf. 10, p. 247, 7, p. 15, p. 98. 4, p. 289, 2, p. 67].

The linguistic acts of the legal practices appearing at the surface level of the law are in this article viewed as different arenas of *legal argumentation* (to a greater or lesser extent)<sup>6</sup>.

The legislator makes a substantive validity claim in the norm in question. At the surface level, the discursively formulated answer to the validity claim from the legal actor (including the legislator) appears. This, in turn, occurs through presentation of *argument(s) for justification*, meaning argument(s) for or against the correctness of the suggested course of action<sup>7</sup>.

An argument for justification states or presupposes that the course of action should be

in a certain way. The legal actor in the legal practices conducts *normative legal argumentation* in relation to the legal norm, meaning argumentation for a normative standpoint. The legal actor's argumentation is performed in various actor-specific text (or texts). The *actor-specific text* is an argumentative text, meaning that the text deals with the legal norm and the actor's motivation for his or her standpoint in relation to the suggested course of action in the norm [Cf. 7, p. 100, p. 153. 2, p. 68].

The actor-specific texts produced by the legal practices in *sensu medio* and/or in *sensu stricto* are designated and viewed in this article as sources of legal information. A *source of legal information* pertains to a source of information regarding the sub-surface levels of the law. Such a source is produced in the legal practices in *sensu medio* and/or the legal practices in *sensu stricto* and by their legal actor(s), i.e., politicians, lawyers or experts [2, p. 69].

The legislator's substantive validity claim in a legal norm is tested through argument(s) and counter-argument(s) for justification, which the actor (including the legislator) has presented in actor-specific texts at the surface level of the law within a certain legal order. An individual argument for justification is, in this article, viewed as the legal actor's answer to the legislator's substantive validity claim in the norm. The argument is supposed to substantiate the moral and/or ethical acceptability of the legal norm in question [2, p. 69].

The analysis of the structure of an argument begins with the wording of the argument in the actor-specific text at the surface level of the law. It continues through the actor's supposition about the normative element of the legal culture. The analysis ends in the legal actor's fundamental supposition about the normative element of the deep structure of the law. This procedure for analysis of the structure of an argument can most closely be likened to a "regressive analysis" [2, p. 69].

Critical substantive validity testing focuses partly on the assessment of the substantive validity of a legal norm, partly on the way in which the fundamental legal principles in the deep structure of the law account for establishment of legal normativity. Validity testing presupposes knowledge production of the normative element of the sub-surface levels of the law. This, in turn, occurs through *knowledge transformation* [2, p. 70].

The legal scholar's task consists of transforming the legal actor's practical knowledge of (primarily) general legal principles in the legal culture and fundamental legal principles in the deep structure of the law into a discursive form. Knowledge transformation is performed through reconstruction of the actor's supposition and fundamental supposition about the correct course of action, which have resulted in the wording of the argument for justification in the actor-specific text at the surface level of the law [2, p. 71].

The analysis of the structure of an argument provides insight into the relation of justification between the levels of the law. A supposition and a fundamental supposition about the correct course of action, respectively, show the actor's practical knowledge of the sub-surface levels of the law. The fundamental supposition about the correct course of action *also* shows the legal actor's practical knowledge of the general normative deep structure of society. The reconstructed practical knowledge of the normative element of the sub-surface levels of the law lays the foundation for critical substantive validity testing of a legal norm. In this way, the law is tested on its own terms [See Section 3.2. 2, p. 74].

### 3.2. Reconstruction

The second method tool for critical substantive validity testing of legal norms is *reconstruction* [Cf. Sections 1.1-1.2, 2, pp. 75-79]. Point of departure is the need for knowledge transformation by the legal scholar.

In this article, *reconstruction* pertains to a systematic procedure for transforming the legal actor's practical knowledge of the sub-surface levels of the law into a discursive form. The purpose is to reconstruct the actor's supposition and fundamental supposition about the correct course of action, which gives an insight into the legal practices' mediation of, inter alia, the relation of justification between the levels of the law. The legal actor's supposition and fundamental supposition gives an insight into, inter alia, the normative element of the sub-surface levels of the law within a certain legal order [2, p. 75].

The specific purpose is to reconstruct the practical reasoning of the actor as regards the correct course of action through the legal order. Point of departure is the build of an argument. It

is a *human product*. An argument is (vertically) built up of *explicit*, *implicit* and *fundamental implicit components*. The legal actor has produced the argument in the actor-specific text using his or her practical knowledge of the sub-surface levels of the law. The practical reasoning of the actor results in the wording of the argument in the actor-specific text at the surface level of the law [Cf. 5, pp. 25-26. 2, p. 73, p. 75].

An individual argument is an element at the surface level of the law within a certain legal order. The (vertical) structure of an argument follows the (vertical) levels of the law. The explicit components of the argument, its wording, have their structural counterparts at the surface level of the law. The implicit components of the argument have their structural counterparts in the legal culture. The fundamental implicit components of the argument have their structural counterparts in the deep structure of the law [2, pp. 73-74].

Reconstruction of the legal actor's supposition and fundamental supposition about the correct course of action is performed in the following way. An analysis is carried out regarding how an individual argument for justification, as a carrier of a supposition and fundamental supposition about the correct course of action, has been generated by the actor from the start. An individual argument has its structural counterparts in the subject- and knowledge structure of the legal actor [2, pp. 75-76].

An individual argument has its structural counterpart in the subject structure of the legal actor. The wording of the argument in the actor-specific text has its structural counterpart in the actor in his or her original guise, i.e., as a politician, a lawyer or an expert. The implicit components of the argument have their structural counterparts in the legal actor as a representative of a certain legal community. The fundamental implicit components of the argument have their structural counterparts in the actor as a legal subject in society [2, pp. 75-76].

An individual argument also has its structural counterpart in the knowledge structure of the legal actor. The wording of the argument in the actor-specific text has its structural counterpart in the actual use of language of the actor in the concrete case. It shows the legal actor's discursive knowledge of the surface level of the law. The implicit components of the argument have their

structural counterparts in the actor's supposition about the correct course of action. It shows the legal actor's practical knowledge of the legal culture. The fundamental implicit components of the argument have their structural counterparts in the legal actor's fundamental supposition about the correct course of action. It shows the actor's practical knowledge of the deep structure of the law [2, pp. 75-76].

The legal scholar transforms the legal actor's practical knowledge of the sub-surface levels of the law by using *questions and answers* to the individual argument for justification. He or she reconstructs the actor's supposition and fundamental supposition by asking (pre-) formulated questions by the legal scholar to the individual argument in a certain order. He or she thereafter answers these questions independently [Cf. 6, p. 19. 2, p. 76].

The legal scholar's analysis of the structure of an argument begins with its wording in the actor-specific text presented at the surface level of the law. It continues through the legal actor's supposition about the normative element of the legal culture. The analysis ends in the actor's fundamental supposition about the normative element of the deep structure of the law. The *exact same questions* must be posed in the *exact same order* to each argument for justification, which constitutes the basis for validity testing of the legal norm. The answers depend on the conditions in the concrete case [Cf. 2, pp. 138-146, pp. 149-155. 2, p. 77].

The analysis of an argument for justification and its build produces *hypotheses*, which are fallible, i.e., verifiable or falsifiable. The legal scholar *compares* the actor's fundamental supposition *with* the wording of the legal norm. Hypothesis testing consists of seeing if the fundamental supposition *responds* to the wording of the norm or not. If there is an (albeit) fictitious discussion going on between the legislator and the legal actor regarding the suggested course of action in the legal norm, then the legal scholar's hypothesis ought (at least) to make a claim of verifiability in relation to another [2, pp. 77-78].

In critical substantive validity testing, the legal scholar is a *participant* in the research process. He or she participates from within legal science. Focus is on a legal norm within a certain legal order. The legal scholar participates through

reconstruction of the legal actor's supposition and fundamental supposition about the correct course of action through the legal order. He or she participates in the discussion of the norm at the surface level of the law partly through a substantive validity assessment, partly through an assessment of the prospect of factual acceptance of the legal norm [Cf. 10, p. 285. 2, pp. 78-79].

The legal scholar's reconstruction of the actor's supposition and fundamental supposition entails participation in reproduction and modification of the legal order in question. In reconstruction, he or she participates in a one-way communication with the legal actor through the written language in an actor-specific text. The legal scholar participates in all the actor guises, i. e., as a lawyer, as a representative of a certain legal community and as a legal subject [Cf. 10, p. 285, p. 291. 2, p. 79].

### 3.3. Linguistic (Sub)competence

The third method tool for critical substantive validity testing of legal norms is *linguistic (sub)competence* [Cf. Sections 1.1-1.2, 2, pp. 79-85]. Point of departure is an individual argument at the surface level of the law.

The wording of an argument for justification in an actor-specific text shows the legal actor's actual use of language and way of conducting legal argumentation at the surface level of the law. He or she composes a certain set of words and collocations in a certain order to create meaning in the individual case. The actor thus discursively expresses his or her view of the correct course of action through the legal order [2, p. 80].

Reconstruction of the legal actor's supposition and fundamental supposition about the correct course of action focuses on the implicit and fundamental implicit components, with which the actor has composed his or her argument for justification in the actor-specific text. The argument is the legal actor's answer to the legislator's substantive validity claim in the legal norm within a certain legal order. Which explanation(s) can there be for the appearance and design of the actor's supposition and fundamental supposition? My article is based on a certain view of the legal actor's linguistic (sub)competence. Point of departure is the language of the law [2, p. 80].

In my view, there are two concomitant ways to speak of law and language; partly law and language in the literal sense, partly law and language in the figurative sense. The law as a legal order can be analysed as *if* it were a language of its own [2, p. 81].

In this article, *the language of the law* is used both regarding the written material at the surface level of the law and regarding a set of words and collocations in the legal culture and in the deep structure of the law, respectively, which are combined according to certain grammatical rules. A certain vocabulary and certain patterns of argumentation exist at each respective level of the law within the fragmented legal order. The words, collocations and grammar at the surface level of the law, are viewed in this article as *parts of the language of the law* at the surface level of the law. The elements of the legal culture and the deep structure of the law, respectively, are viewed in this article as *parts of the language of the law* in the sub-surface levels of the law [2, p. 81].

In this article, *words* is used to denote the conceptual element of the legal culture and the conceptual element of the deep structure of the law, respectively. In addition, *collocations* is used to denote the normative element of the legal culture and the normative element of the deep structure of the law, respectively. Lastly, *grammar* is used to denote the methodological element of the legal culture and the methodological element of the deep structure of the law, respectively. Grammar pertains specifically to the set of *linguistic rules* for justification of interpersonal courses of action that the legal actor has knowledge of and which govern the actor's composition of suppositions and fundamental suppositions about the correct course of action [2, p. 82].

In my view, there are two concomitant ways to speak of the legal actor's knowledge of the levels of the law and language; partly knowledge and language in the literal sense, partly knowledge and language in the figurative sense. The actor's knowledge of the fragmented levels of the law can be analysed as *if* it encompasses both discursive and practical knowledge [2, p. 82].

The legal actor has a certain *linguistic performance*, in the sense of his or her actual use of language at the surface level of the law in the concrete case. This is apparent in the form of

the actor's argument for justification. The wording of the argument is built up of explicit components, i. e., words, collocations and grammar. When the legal actor uses his or her discursive knowledge of the language of the law at the surface level, this is done in the original guise, i. e., as a politician, a lawyer or an expert [Cf. 1, p. 4, p. 8, 6, p. 12, 2, p. 45. 2, pp. 82-83].

The legal actor has a certain *linguistic (sub)competence*, in the sense of his or her practical knowledge of the language of the law in the sub-surface levels of the law. The actor has a certain *linguistic competence*, in the sense of his or her practical knowledge of the words, collocations and grammar in the legal culture. This is apparent in the form of the legal actor's supposition about the correct course of action. This is, in turn, built up of implicit components [Cf. 2, pp. 46-47. 2, p. 83].

The *implicit linguistic conceptual component regarding justification* shows the legal actor's practical knowledge of the words in the legal culture. The *implicit linguistic normative component regarding justification* shows the actor's practical knowledge of the collocations in the legal culture. The *implicit linguistic methodological component regarding justification* shows the legal actor's practical knowledge of the grammar in the legal culture. When the actor uses his or her practical knowledge of the language in the legal culture, this is done as a representative of a certain legal community [Cf. 2, pp. 46-47. 2, p. 83].

The legal actor also has a certain *linguistic subcompetence*, in the sense of his or her practical knowledge of the words, collocations and grammar in the deep structure of the law. This is apparent in the form of the actor's fundamental supposition about the correct course of action. This is, in turn, built up of fundamental implicit components [Cf. 2, pp. 46-47. 2, p. 83].

The *fundamental implicit linguistic conceptual component regarding justification* shows the legal actor's practical knowledge of the words in the deep structure of the law. The *fundamental implicit linguistic normative component regarding justification* shows the actor's practical knowledge of the collocations in the deep structure. The *fundamental implicit linguistic methodological component regarding justification* shows the legal actor's

practical knowledge of the grammar in the deep structure of the law. When the actor uses his or her practical knowledge of the language in the deep structure, this is done as a legal subject [Cf. 2, p. 50. 2, p. 83].

The language of the law in the sub-surface levels of the law has a *constitutive effect* on the legal practices and their mediation of, inter alia, the relation of justification between the levels of the law. The words, collocations and grammar in the sub-surface levels of the law are constitutive for the legal actor's composition of his or her supposition and fundamental supposition about the correct course of action (cf. the relation of constitution between the levels of the law). The language of the law in the sub-surface levels of the law has a *limiting effect* on the legal practices and their mediation of, inter alia, the relation of justification between the levels of the law. The language both opens the door for and simultaneously closes the door for significantly deviating linguistic performance by the actor at the surface level of the law (cf. the relation of limitation between the levels of the law) [2, pp. 84-85].

#### 4. Future Research

This second part of this article has an inherent potential for development. It has been written based on a constructive ambition. My gaze has been directed at the future throughout in the following way. My intention has been to create the preconditions for and open the door for future research in legal science regarding legal science and legal scientific method.

The research problem in question was partly in what way the substantive validity of legal norms within a certain legal order are determined, assessed and tested, partly the possible connection between the substantive validity of a norm and its efficiency in application in the legal practices in concrete cases. This was dealt with by presentation of legal scientific starting points and method tools for critical substantive validity testing of legal norms within a certain legal order [Cf. Section 1.2].

The legal scientific starting points were legal philosophy as a branch of legal science and a critical-practical-legal philosophical approach. The method tools were the analysis of the structure



of an argument, reconstruction and linguistic (sub)competence.

The presentation of legal scientific starting points and method tools creates the preconditions for and opens the door for future research in legal science. The legal scientific starting points and method tools are only drafts. This relationship itself creates the preconditions for and opens the door for future research in legal science with regard to theory and method development. An example is potentially existing sub-branches of legal science and their tasks.

The legal scientific starting points and method tools can also provide the basis for deepened discussions in legal science because of their appearance and design. An example is critical substantive validity testing of legal norms in the legal practices.

In summary, the second part of this article has an inherent potential for development. The presentation of legal scientific starting points and method tools for critical substantive validity testing of legal norms creates the preconditions for and opens the door for future research in legal science. It is my hope that this potential shall be realised in theory and in practice.

#### NOTES

<sup>1</sup> This article was written during my stay as a visiting researcher at the Centre for Studies in Legal Culture (CRS) at the Faculty of Law at University of Copenhagen. I would like to express my gratitude to CRS and the Faculty of Law for making possible the writing of this article. This article was first published in *Retfærd. Nordic Journal of Law and Justice*, Vol. 39, No. 4, 2016, pp. 38–56. *Retfærd* is published by Djøf Publishing. This article is published in *Legal Concept* by permission of Djøf Publishing. All rights are reserved.

<sup>2</sup> In the second part of this article, *legal norm* or *norm* and *critical substantive validity testing* or *validity testing* are used, for reasons of expediency. See further in Section 1.1.

<sup>3</sup> In the second part of this article, *the legal analytical tool* or *the tool* is used, for reasons of expediency. The tool was elaborated in Study II of my doctoral dissertation titled *Unga på hem för vård eller boende. Om rättssäkerhet, legitimitet och tillit vid beslut om ungas vård* (2014). The dissertation deals with legal security, legitimacy and trust with respect to decisions on the care of young persons in placement at homes for care or residence according to Swedish social legislation. The monograph titled *Critical substantive validity testing of legal norms. The example of homes for care or*

*residence* (2016) is an adaption, development and translation into English of Study II in my doctoral dissertation. The presentation of the legal scientific starting points and method tools for critical substantive validity testing is performed with point of departure in the research performed within both monographs. In the second part of this article, the page references are, as long as possible, made to the monograph in English, for reasons of expediency [See 3, pp. 215-573, 2, pp. 13-130].

<sup>4</sup> The tool was elaborated during my stay as a visiting researcher with Tuori at the Faculty of Law at University of Helsinki in 2011-2013, in his capacity as an assistant supervisor for my doctoral dissertation [Cf. 3, p. 19, 2, p. 22].

<sup>5</sup> In the second part of this article, *legal practices* or *practices* is used, for reasons of expediency [Cf. Section 1.1, 2, pp. 13-130].

<sup>6</sup> In this article, *legal argumentation* or *argumentation* is used partly about a coherent sequence of arguments for or against the legislator's suggested course of action in a legal norm, partly about ways of conducting legal argumentation at the surface level of the law [Cf. 5, p. 18, 7, p. 99, pp. 101-102, 2, p. 67].

<sup>7</sup> In this article, *argument* and *answer* are used synonymously [Cf. 5, p. 18, 7, p. 99, pp. 101-102, 2, p. 67].

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