THE IMPOSSIBILITY OF AN OUTSIDER’S PERSPECTIVE

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Abstract
Law is commonly seen as a system with definite borders, demarcating the outside from the inside. Although this view, often conveyed by the metaphor of the ‘house of law’, seems to capture quite a few important properties of law, we should not be tempted to be carried away by this metaphor and assume that the walls of the house also divides insiders (legal practitioners and scholars of legal doctrine) from outsiders (legal theorists such as economists, philosophers and sociologists of law). Such a divide ignores important differences between the inhabitants and overlooks important similarities between ‘insiders’ and ‘outsiders’. After an analysis of metaphors and their relation to concepts, it is proposed to allow for different concepts of law, depending on the different social practices in which law is understood and used. Legal philosophy has the task to critically examine the assumptions underlying the specific concepts and their relations in view of the problems experienced in such social practices.

Introduction

Discussions concerning the nature of law, the relation between rules and principles, as well as about the way to study law, are permeated by a vocabulary that suggests a strong and straight dividing line, separating the ‘inside’ from the ‘outside’. The dividing line is to be found in the positivist camp but is equally present in those who argue against legal positivism. It separates actors and activities, principles and perspectives, values and views.

Tempting as it is to divide the world into ‘us’ and ‘them’, it blurs other, equally fruitful if not more relevant distinctions. Differences between legislators and judges are overlooked, whereas similarities between the analysis of legal doctrine and legal theory are not even noticed. In this article I first explore the assumptions underlying the visual representation of law as a house the walls of which separate the inside from the outside. After that I will analyse metaphors by comparing them with syndromes. Both can be understood as a short referral to a cluster of conditions that are thought to hang together and which form the intension of a concept. Consequently, it will be argued that there is not one concept but many different ones which are all inspired and coloured by the various pursuits of those who think about law. The conclusion is drawn that legal philosophy should analyse and unravel the various inconsistencies underlying these concepts in view of the social practices in which they figure and the aims that are pursued.

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3 I use the term ‘legal theory’ as a collective term for different disciplines such as legal philosophy, sociology of law, anthropology of law, and law and economics. By analysis of ‘doctrine’ I refer to the study, analysis, and classification of positive law.
1. In and out

Nearly all important theorists of law—positivists and non-positivists alike—have made use of a spatial metaphor of law.\(^4\) Principles, persons, rules and values are either thought to be within or outside the legal system. The image may be used unconsciously, or it may be used intentionally.

In Luhmann’s theory\(^5\) the metaphor has become the supreme model in which law is conceptualized. Luhmann conceives of law as a system that converts input into output. His work can to a large extent be understood as the attempt to patrol the boundaries of the system and to understand what happens there. But also in the work of Kelsen, the boundaries function as barriers: they divide the legal official from the lay citizen.\(^6\) Already in Kelsen’s work, but more explicitly so in Hart’s, the divide also functions to differentiate between perspectives. Whereas the legal official is thought to adopt an internal point of view; the sociologist is thought to adopt an external point of view.\(^7\) Accordingly, insiders and outsiders also use different criteria. Insiders talk about validity; outsiders about efficacy. Both authors consequently struggle to reconcile the two criteria.\(^8\)

Not only positivists, also anti-positivists like Fuller and Dworkin cherish this visual scheme. Although Fuller rejects the view of a legal system as a collection of rules and principles, and conceives of law as an activity, he nevertheless distinguishes the activities of those within the system from those living outside the system. Consequently, the relevant moral criteria are divided in the same way. Notions of substantive justice are viewed as external morality. The requirements for a proper functioning legal system are called ‘internal’ morality. The problem then is to establish the relationship between a virtue such as generality (internal) and equality (external).\(^9\)

Finally, for Dworkin, the most important part of the debate concerning the status of principles revolves around the question whether they should be assigned a honorable place in the law or whether they are to be seen as external, informing ‘extra-legal preferences’\(^10\). Not an academic trifle: only if they are to be located inside the law, they are thought to be binding.

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\(^4\) See G Lakoff and M Johnsson, *Metaphors We Live By* (Chicago, University of Chicago Press, 1980). They call these ‘orientational metaphors’.

\(^5\) N Luhmann, *Zweckbegriff und Systemrationalität* (Frankfurt am Main, Suhrkamp, 1973); *Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie* (Frankfurt am Main, Suhrkamp, 1981); and *Rechtssystem und Rechtsdogmatik* (Stuttgart, Kohlhammer, 1974).


\(^7\) External to law, not external to humanity as such: that something counts as a norm or standard can only be understood from the internal point of view adopted by a human spectator, see HLA Hart, *The Concept of Law*, 2nd ed (Oxford, Oxford UP, 1994) 56.

\(^8\) See eg Hart (n 7) 102.


We see then that the frontier that divides the inside from the outside is used to demarcate binding rules and principles from non-binding ones, but also to differentiate between kinds of actors, between different sets of criteria and even between different sets of values and moralities. The line may be drawn differently (as is clearly seen in the case of equality which, unlike Fuller, Dworkin allows to be central \textit{in} law) but the line is drawn. All these writers, their differences notwithstanding, seem to cling to the visual representation of a dividing line separating the inside from the outside.\footnote{The question whether there are frontiers that separate the legal system from its surroundings should be distinguished from the question whether it is possible to conceive of legal systems which do not draw the boundaries between appropriate and inappropriate behavior. This latter question is addressed (and answered negatively) in the interesting article by H Lindahl, Boundaries and the Concept of Legal Order, in (2011) \textit{2 Jurisprudence} 73–97.}

2. The house

If you think that I am now making fun of the attempts of serious legal theorists who tried to come to terms with legal phenomena, I should plead guilty and admit immediately that I myself gratefully made use of the spatial metaphor, which I usually prefer to concretise into the well-known metaphor of law as a house.\footnote{Lakoff and Johnson (n 4) refer here to container-metaphors. They also speak about houses, but then as a metaphor for a theory.} The temptations of the house-metaphor are hard to resist. Students immediately recognize what you are after if you tell them that they are usually working `inside' the house of the legal system and that you invite them to come out of that house and to adopt an `external point of view', furnished by legal theory. Apparently, law `feels' like a house, to which one is familiarized. And conversely, legal theory `feels' like either fresh air or, depending on the intellectual temperament of the student, as a bitterly cold wind.

Probably, one of the reasons that the metaphor of the house `feels' right, is that it evokes quite a number of characteristics that are often attributed to law. I do not say that they \emph{should} be ascribed to law, but merely try to explain the attractiveness of the metaphor by noting that the following properties \emph{are} often seen as crucial to law.

\begin{itemize}
\item \textbf{a)} \textit{Unity:} Law, like a house, has many rooms and even wings, but is nevertheless to be regarded as one identifiable house
\item \textbf{b)} \textit{Solidity:} Law, like a house, has foundations, thought to consist in `rights' or basic `principles'.
\item \textbf{c)} \textit{Autonomy:} Whether law is open to the outside world is a matter of choice, just like the choice to either open or close the window. It is therefore perfectly possible to reconcile the idea of a responsive or open system of law without ever be forced to question the solidity of the walls, or for that matter, to question the adequateness of the line that divides `in' and `out'.
\item \textbf{d)} \textit{State-centeredness:} Law, like a house, is tied to the territory on which it stands. Occasionally, one may be aware that there are other houses in the
\end{itemize}
same street, just like one is aware of the legal systems of neighbouring countries.

e) Systematicity: Law, like a house, can only function properly if there is a certain internal ordering that should exhibit a minimal degree of consistency.

f) Universality: The idea that different legal systems all share a set of basic properties or a basic structure, that is typical for law, just as there are many different houses, that can nevertheless easily be recognized as houses.

g) Continuity: Law, like a house, may survive the ages. In order to survive, maintenance, restoration and a moderate degree of renovation is called for (the flexibility of law, necessary to adapt to changing circumstance) but it still functions as a stronghold against the changing tides of politics and changing morals.

This is quite a list. I should add, therefore, that it is not necessary for users of the image that they share all the assumptions that it evokes. To talk about law as a house not necessarily commits one to thinking that law is autonomous, continuous, universal, systematic, and state-centered. I myself, for instance, always doubted and criticized the idea that law should be seen as having (or should be criticized for lacking) ‘foundations’. But if the metaphor captures a sufficient number of properties that are usually referred to in discussions concerning a certain phenomenon, I would say that it is a successful one.

3. Metaphors as syndromes

To talk about successful metaphors implies that we have an idea about the function of metaphors. Only then are we able to say whether a metaphor succeeds in carry out that task. Now, much has been written about metaphors and I am not pretending to even summarize that vast field of inquiry. But it seems to me that generally, the question is overlooked what the point is of using a metaphor. Why do people revert to houses in explaining law?

Certainly not in order to find similarities. As Searle correctly pointed out, similarities can help us understanding the metaphor, they can also help producing one, but the meaning of metaphors cannot be explained as pointing out similarities between objects as widely differing from each other as houses and legal systems.

What then is the point of using a metaphor? I think that that can only be elucidated in a metaphorical way, by comparing metaphors with syndromes. If a person exhibits 6 out of 10 characteristics of the DSM classification of psychological disorders, one may call him a sufferer of the syndrome of ‘Asperger’. Metaphors function in the same way as syndromes in the sense that the names of such syndromes suddenly seem to make sense of these 6 characteristics, that were first experienced as unconnected properties. This is one of the reasons for the popularity of such names. (‘I always thought that my son was lazy and aggressive, but I now see that he suffers from ADHD!’). It makes sense of otherwise disjoint properties by

suddenly seeing that these properties are related to each other.\(^\text{14}\) The metaphor has the same unifying power. It gives us, in one simple image, an idea of how several unconnected properties hang together.

That is also the reason why syndromes and metaphors are such excellent heuristic devices. The generative power of metaphors and their capacity of developing new perspectives have been noted by several authors.\(^\text{15}\) After having recognized features 1, 3 and 5 of the DSM-list as salient character traits of John, one will go on exploring whether properties 2, 4 and 6 can equally be found. The same applies to metaphors. Metaphors frame the relevant questions to be asked. The house-metaphor directs the discussion to matters such as the role of principles, (‘are they foundations?’) or the degree to which law is autonomous (‘to what extent is one free to open and close the windows?’).

There are drawbacks to this heuristic potential. The selective quality of metaphors obviously implies that a host of other questions are not addressed, and overlooked.\(^\text{16}\) The other danger is that one is tempted to push the comparison too far. One stubbornly keeps investigating properties 2, 4 and 6 without any indication that such a search might be fruitful.

These similarities between metaphors and syndromes are all the more remarkable, since in fact they work in opposite directions. Metaphors help to explain that which is unfamiliar by means of an image that is more familiar, that is easily accessible, and which conveys the coherent set of properties at one glance. Syndromes explain familiar traits by means of unfamiliar ‘scientific’ terms that should be studied before they can be applied. The effect, however, of these translations, is roughly the same.

4. Normative insiders and detached outsiders

Because of their heuristic qualities, metaphors are expansive. One is tempted to get carried away with a good metaphor. This is particularly the case with the law=house metaphor. Although there are good reasons to apply the metaphor to the object (the legal system), the house-metaphor also threatens to dominate the debate on the proper methods to be used in order to study law. The house-metaphor divides not only legal phenomena from non-legal ones, but as we have seen, it also distinguishes its inhabitants from the outsiders. The insiders are thought to adopt an internal point of view, the outsiders are free to view law from an external perspective.

Again, I am guilty of adopting this scheme myself as well. In an article on the proper legal methodology,\(^\text{17}\) I compared the activity of legal scholars to my mother’s

\(^{14}\) See also D Schön, ‘Generative Metaphor: A Perspective on Problem-Setting in Social Policy’ in Ortony (n 13) 254–83; at p 264.

\(^{15}\) D Schön (n 14); M Black, ‘More about Metaphor’ in Ortony (n 13) 19–43; at p 40.

\(^{16}\) See AJ Wolthuis, De Formele Kwaliteit van een Politiek Debat (Den Haag, Boom Juridische uitgevers, 2005) 58–68. He follows Schön here (n 14).

frantic reorganization of drawers and cupboards whenever a new item for the household was bought. I argued there that legal scholars, working in the house of law, are mainly and primarily busy at restructuring and reorganizing legal concepts and categories in order to fit in some new development in such a way that the new ordering is practical and coherent with the existing classificatory schemes.

My account was welcomed by those who advocate a proper (normative, practice-oriented) methodology for legal scholars. But it was resisted by those who had grown dissatisfied with legal doctrine over the years. Those who advocate a fresh and empirical, non-normative methodology protested at my attempt to lock them in the house of law. They said they preferred ‘out of the box thinking’.

Neither of these two opposite camps, however, questioned the demarcation wall itself that is erected between normative, practice-oriented insiders and neutral, disinterested outsiders. The image of the legal inhabitants with their practical and normative concerns is mirrored by the image of non-legal outsiders who are supposed to study law in a way that is truly scientific, empirical, and detached. Yet, if I am honest, I have to admit that although an outsider myself, I am not disinterested and neutral at all. I am indignant about certain forms of legislation, about the instrumentalisation of rules, about the loss of legal certainty. What does that imply? Can I honestly say that I am normative in a different way? In a way befitting the outsider? Where am I? Standing at the threshold of the house? Uncomfortably hanging out of the window?

5. Who belongs?

It is here that the first fissures emerge in the house metaphor. The house may be an appropriate metaphor for the concept of law, but does it capture in an adequate manner the activities that are carried out by insiders and outsiders? The dividing line seems to overlook differences and fails to notice similarities.

Legal scholars, working at the departments of universities, are usually seen as inhabitants of the house of law. Yet they only marginally share the practical concerns of lawyers, judges and legislators. It may be true that they think that they should reconstruct the legal system, its concepts, categories and principles in a way which is useful to those who make use of these items, but that only entails that they share a concern with practitioners.

But even among the practitioners there are vast differences which are overlooked by gathering them into one big family. The differences between lawyers and notaries are vast, both in professional habitus and outlook, the way they define their trade as well as in the virtues they cherish and the principles they adhere to. Judges and legislators not only cherish a different professional outlook, but also have

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a different set of criteria to their disposal. Legislative jurists tend to prioritize effectiveness and efficacy over legal certainty and equality.\footnote{See the various contributions about professional autonomy in (2011) 172 Rechtsgeleerd Magazijn Themis, thematic issue no 4.}

Finally, there are many examples of questionable membership. Some\footnote{Ch McCrudden, ‘Legal Research and the Social Sciences’ (2006) Law Quarterly Review 632.} seem to include philosophers and historians of law in the household family. Others maintain that philosophers, by the fact that they try to answer different questions, hover above the houses in search of their similarities in structure and building-plan, able to discern in an objective way the essential traits of law, of all law.\footnote{Hage combines this view with conventionalism. See Hage’s contribution to this volume.}

In fact, the only firm position here is occupied by the social scientists. They are unequivocally and always positioned on the outside. They never belong to the family. It is here that the divide is at its most poignant. Speaking of law and social sciences, Mc Crudden, after a nuanced exposition of the ways in which law might benefit from a social science perspective, suddenly betrays himself by repeating that it is them and us, and that they (the social scientists) should also be willing to learn something from us lawyers, instead of the one way traffic to which interdisciplinary research so often boils down to.\footnote{See McCrudden (n 20).}

It seems then that the crude dichotomy between insiders and outsiders, between ‘us’ and ‘them’ may meet a psychological need but does not do justice to the variety of pursuits and persons who are somehow involved in law. It does not differentiate between the various insiders, nor between the overwhelming variety of outsiders. By attributing objectivity to outsiders and normativity to insiders it moreover fails to notice that also outsiders have their normative concerns.

6. Types of questions

In order to avoid the caricatures of insiders and outsiders, we should no longer be led astray by the view that the method one is supposed to follow should only be informed by the particular features of the object. We should also inquire into the aims\footnote{D von der Pfordten, What is Law: Aims and Means, Archiv fur Rechts- und Sozialphilosophie (2011, Band 97, Heft 2. vol.2), 151ff} that are pursued by the various actors, i.e., we should keep in mind the different kinds of questions that are asked by all those who study and practice law.

In order to clarify what I mean by this, it is useful to refer to the ambiguous position that is occupied by those researchers who engage in comparative law. As inhabitants who regularly walk over to the neighbours, their position is precarious. The question arises: is the comparatist to be regarded as insider or as outsider? Bell responds to this question by saying that the comparatist ‘has to present the foreign legal system in a form which is faithful to what it looks like from the inside, even though the comparatist is not his or herself an insider’.\footnote{Bell (n 19), 168.} Insiders, according to Bell, describe what should be done from a legal point of view; they do not make normative
But is this an informative statement? The problem is: it takes for granted that everybody knows what it means to reason from a ‘legal point of view’. But this is far from clear if we examine the various motives for people to do comparative research. Let us examine some possible reasons for people to study other legal systems:

a. The legislator who struggles to implement a European directive might want to pay a short visit to other European legal systems, just in order to know which legal instruments are used there in order to fulfill the requirements of the directive.

b. The legal scholar who struggles with the same directive may also study other legal systems in order to find out to what extent the European directive can be made to fit in the national system in a coherent way. His visit should probably last a bit longer, taking in view not only a particular solution but also the way this solution interacts with other parts of the system.

c. Still another form of comparative analysis is undertaken by my PhD-student who sets out to study goal regulation in both Sweden and the Netherlands in order to assess the effects of this form of regulation on accountability. Her investigation is inspired by the theoretical concern to understand how a certain style of legislation affects different jurisdictions.

d. Finally, comparative research may be conducted to answer an even broader question, for instance: ‘to what extent can goal regulation be seen as privatization of public law’.

It is clear that these four questions as motives to engage in comparative analysis cannot neatly be parcelled out on the basis of the inside/outside dichotomy. Bell may want to differentiate statements that are made ‘from the legal point of view’ from statements concerning to what should be done ‘all things considered’, which is deemed proper to a philosophical, external point of view, but I cannot draw that line in the given four examples. Where does my PhD-student become a philosopher? Where she studies the relation between goal regulation and accountability? Or where she broadens her subject to cover privatization of public law?

One may reply to this by saying that these questions are not philosophical questions at all, since they are about existing matters of fact and relations, not about desirable matters of fact and relations. According to such a view genuine philosophers ask themselves whether privatization of public law is truly desirable. Apart from the fact that there are reasons to discard this image of philosophy as too narrow, I don’t think that there is a fundamental difference here. When we ask ourselves whether privatization of public law is desirable, we need to rely on criteria in the light of which something should be seen as desirable. We may parcel out some criteria as ‘legal’ and others as ‘non-legal’, but again, that is question-begging, for it assumes

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25 Bell (n 19), 166.
26 AW Enequist.
that we know how to draw the boundaries of a legal system, that separates it from the outside world.

But whatever we do, we certainly do not adopt an `all things considered' perspective. Also philosophers have research questions in mind that determine, constrain and limit the kind of things that are considered and also philosophers have criteria in mind that determine how they are considered. These criteria are to a large extent informed by the questions asked and the aims pursued. That means that one’s position (inside/outside) and the perspective to be adopted (internal/external) does not depend on the object (law) but on the questions one may want to answer. 27

7. Not entities but concepts.

So far we have seen that the metaphorical line between insiders and outsiders is too crude and does not allow for differentiation on either side. But at the same time we have come across very useful qualities of metaphors as well. Metaphors, like syndromes, make sense of what is already known by the fact that they show how the various features of a certain phenomenon hang together. Just as the Asperger-syndrome reveals the interdependence between such otherwise disjoint features as: making wild gestures, talent for mathematics and the incapacity to make friends, the house-metaphor draws attention to the possibility that autonomy and unity, continuity and solidity hang together. The upside of metaphors is that they unify and show relationships, the downside is that they thereby tend to blur some vital distinctions. The question that therefore arises is how we can reap the benefits of metaphors without allowing them to wash away all distinctions.

I think that a possible answer to this question is given by exactly the comparison with syndromes. The comparison of metaphors with syndromes (which in itself is a metaphor for a metaphor) points to the dangers of invoking the metaphor uncritically. All is well as long as the syndrome functions as a short referral to a number of characteristics that in different combinations may hang together. It then functions as a heuristic device. But uncritical use of DSM-classifications may convey the illusion that syndromes not only refer to a set of variable features but stand for an entity, a well-defined disease, a disease that you do or don’t have, a disease that no longer allows for a variety in features. In such a capacity syndromes often hinder ongoing research (although they may be useful for other purposes; they can be used to prescribe medicine, or to apply for special insurance-money or whatever.)

So what we should keep in mind is what metaphors (and syndromes) stand for. Metaphors may evoke the image of an entity (house), but that does not mean that law is a house or that legal systems should be compared with houses. The metaphor only unifies—in one image—various different properties. These properties are to be understood as conditions that should be met in order to qualify as an element of a

27 See also J Hage, ‘The Method of a Truly Normative Legal Science’ in van Hoecke (n 17), ??, 22.
certain category. Such conditions are commonly regarded as the intension of a concept. Also syndromes are not entities, but concepts. A syndrome just points out that if one exhibits 6 out of 10 listed features, one can be included the category of Asperger patients. The description of the syndrome forms the intension of a concept whereas all existing Asperger patients form the extension of a concept. In the example adduced by Jaap Hage in this volume, the question whether whales are mammals or fish is determined by conventional criteria that should be met in order to qualify as a member of one of these categories. The criteria specify the conditions that should be met in order to be counted as an instance of such a category. So we might say that metaphors, like syndromes, specify the intension of a concept. And they do that by unifying these conditions in one image or term. The danger is reification: one tends to forget that the image or scientific term does not stand for an entity but for a collection of conditions.

8. Description of conditions

So the intension of a concept specifies the conditions that should be met in order to qualify for membership of the corresponding category. For instance, the concept ‘pizza’ enumerates the conditions ‘made of dough’, ‘baked in an oven’ and ‘containing cheese and tomatoes’. If an item fulfills these conditions, it may be considered to belong to the category ‘pizzas.’

Concepts may say something about the number of conditions that should be met, about the level of abstraction in which they should be described, about the status of these conditions and about their respective weight. Finally, they are often accompanied with a paradigmatic or central case as instance of the category.

a. Number: It may be possible that a concept merely enumerates all the relevant conditions to be fulfilled in order to qualify as member of the category and leaves open the question which combinations of conditions are fulfilled; but it is also possible that it indicates clusters of conditions that should be fulfilled.

b. Degree of abstraction: it is possible that the concept refers to these conditions in a concrete way (ham, anchovies, olives) or in a more abstract way (topping).

c. Status: It may be possible that a concept differentiates between necessary conditions to be fulfilled in order to qualify as a member (made of dough) and merely accidental conditions (containing ham).


29 Of course, it is possible to entertain a concept of law which sees law as a system. But then, ‘law’ is still a concept. See J Raz, The Concept of a Legal System, 2nd ed (Oxford, Clarendon Press, 1980).

30 Cp GA Miller, ‘Images and Models, Similes and Metaphors’ in Ortony (n 13) 201–50; at p 209. Miller seems to hint at the same connection between metaphors and concepts, but unfortunately does not work out that short reference in the rest of his article.

31 I don’t commit myself to the view, expounded by Rey, that concepts should be analysed as a set of necessary conditions that together are sufficient. The colouring of the entire concept is brought about by accidental features as well. See G Rey, ‘Concepts and Conceptions, A Reply to Smith, Medin, and Rips’ (1985) 19 Cognition 297–303.
d. Weight: It may be possible that a concept prioritizes conditions by assigning weight and relevancy to each of them (tomatoes more important than anchovies). The weight and status of the conditions are often exemplified by a concrete instance that ‘stands for’ the category as a whole. (The paradigmatic pizza is of course the Marguerita.)

Whereas membership of categories such as mammals and fish is decided by conventional criteria, about which a certain consensus has been established, this is not the case with concepts like ‘law’ or ‘principle’, let alone ‘justice’ or ‘the good life’. The extent to which people disagree about the conditions that should be met in order to count as an instance of ‘law’ can be assessed more precisely once we keep in mind the four dimensions that were distinguished above. At all four dimensions, people might disagree. They may disagree about whether the list of conditions is complete or not, which conditions should be added or discarded; about the degree of abstraction of description; about whether conditions are accidental or necessary; and about the relative importance or weight of each of the conditions. These disagreements will eventually combine in a different choice of paradigmatic case.

Usually, the debates concerning a particular concept exhibit all four kinds of disagreement. For instance, in the Hart–Fuller debate we see that a) Fuller’s set (including Fuller’s eight criteria for good lawmaking) comprises many more conditions than Hart’s. b) Also, Hart’s description (secondary rules) is more abstract than Fuller’s. As to c) both Hart and Fuller agree that law serve as point of orientation in the mutual adjustment of people’s actions, but for Fuller this is a necessary condition and for Hart it is not. Regarding d) it is not difficult to imagine the two authors would rank the shared criteria differently. Unlike Hart, Fuller favours two paradigmatic cases: customary law as well as contract law.

This fourfold division enables us, I think, to assess more precisely the nature and degree of agreement or disagreement. We might assess whether the disagreement is only about the number of conditions included, about the level of description, about the necessary or accidental status of conditions, or about the way they are prioritized.

9. Contested concepts

If we allow for a refined assessment concerning the nature and degree of disagreement, there is no need for the a priori assumption that differences notwithstanding, the users of a particular concept share a common understanding of some basic features of the concept. There have been several attempts to defend that assumption.

Gallie’s well-known distinction\textsuperscript{32} between concepts and conceptions assumes that although we may disagree on criteria and consequently cherish different conceptions, we can nevertheless be said to share the same concept. The problem with this view is that although the term ‘conception’ is clear, the term ‘concept’ is vague. Dworkin does his best to elucidate the distinction metaphorically, by

comparing concepts with the trunk of the tree on which we all agree, and conceptions with the finer branches on which we no longer agree. But although we may understand these finer branches and think of conceptions as different combinations of criteria that are assigned different properties and weight, the question remains how we should understand that trunk-concept. As the subset of conditions that happen to overlap, no matter the weight that is assigned to them? Or as merely the conditions that are regarded as necessary by all? I do not think that we can arrive at a defensible choice between these possibilities.

There are quite a few people who believe that a sandwich with a topping of tomatoes and cheese, put in the microwave for 5 minutes, is to be regarded a pizza. I would object to that view. For me, the paradigmatic pizza is the one I once enjoyed in a Venetian restaurant. Are we all sharing the same concept `pizza’? I doubt it. We may as well say that people who disagree on such matters cherish different concepts. That does not make disagreement and debate illusionary, as is maintained by Rey. That would be the case if the two concepts would entail mutually exclusive sets of conditions. As long as there is sufficient overlap, there is something to disagree about. What exactly should be regarded as `sufficient’ is difficult to assess. The emergence of new terms, such as `regulation’ or `governance’, seems to indicate that overlap is no longer felt sufficient.

The only way to save the notion of a concept on which we all agree is to decide that the level of abstraction (b) should be very high. If we describe the conditions in a very abstract way, it is easy to view them as necessary conditions and we might then say that these necessary conditions together form the trunk-concept. If we say that it is a necessary condition of a pizza that it is `something to eat’, we do not disagree. The price to be paid for such agreement is that concepts tend to become uninformative. There is agreement because there is—literally—nothing to disagree about.

Dworkin’s own distinction between so-called `criterial’ (e.g. `bachelor’) and `interpretive’ concepts (e.g. `justice’) seems to serve the same end as Gallie’s: to maintain the view that underlying the disagreement on conditions, there is a consensus on a certain core-meaning. By the term `criterial concept’ Dworkin seems to refer, in the same way as I do, to the conditions and criteria that should be met in order to count as an instance of a category. He mentions `bachelor’ as such a criterial concept. If I understand Dworkin correctly here, the criteria that allow for membership are not only conventional but also shared. Next to this, however, he

34 See G Rey, Concepts and Stereotypes, (19832222) Cognition 15, 237–62, at p 249: ‘If the features by which I identify birds have to do with their songs, while those you go by have to do with their feathers, then, since you and I have different sets of properties ‘in mind’, you and I have different concepts associated with `bird’. That is—to recall precisely the work concepts are to do in their Stability and Linguistic roles—you and I could not have beliefs and preferences with the same content [bird]; our uses of the word `bird’ would be mere homonyms; our agreements and disputes about birds illusory’.
reserves a special place for what he calls ‘interpretive concepts’, such as ‘justice’. He writes: ‘Sharing an interpretive concept does not require any underlying agreement or convergence on either criteria or instances. […] They share the concept because they participate in a social practice of judging acts and institutions just and unjust and because each has opinions […] about what the most basic assumptions of that practice, its point and purpose, should be taken to be.’\footnote{Ibid 224.}

The problem is: what are these most basic assumptions? Dworkin answers that question by referring to a shared social practice, a practice which, by the way, is in his eyes not only inhabited by lawyers but also by philosophers who are all engaged in interpreting law `in its best light’ and with an eye to its underlying purposes.\footnote{Dworkin (n 33), 75.}

I think that Dworkin is asserting here the somewhat obvious truth that we cannot sensibly use and debate the concept `pizza’ without ever having eaten one. But that does not resolve matters. We might have difficulty explaining what a decent pizza is like to someone who never visited a real pizzeria and whose practice of pizza-eating consists in buying pizzas at the supermarket. His practice of pizza eating is very different from the practice of the Venetian pizza-eater. Then I would say that these two pizza-eaters entertain different concepts of pizza, stipulating different conditions that reflect the different practices. They only happen to use the same word `pizza’.

I suspect that the only reason to assume a trunk-concept is the desire to prioritize one of these two concepts. Dworkin just wants to defend the view that there is only one genuine, proper pizza (probably the Venetian one).\footnote{That objectivism in taste exists is exemplified by the unforgettable landlord of the British B&B who served me cooked breakfast while exclaiming: ‘so here you are, love; the proper mushroom!’ In fact, the metaphysical existence of `real’ properties forming `the’ concept as distinguished from conceptions which only flow from perceptions, is presupposed in the criticism expressed by G Rey, Concepts and Stereotypes, \textit{Cognition} 15, 237–62, at p 249.}

10. Different roles and different tasks

What applies to `pizza’ equally applies to `law’. The term stands for a multitude of concepts, which—at least at a certain level of concreteness—are distinct from each other and at best exhibit a certain family-resemblance, just as `game’ in Wittgenstein’s famous example.\footnote{L Wittgenstein, \textit{Philosophical Investigations, 3rd ed}, transl GEM Anscombe (Oxford, ?? 1978).} The intension of each of these concepts overlaps to some degree with the intension of `neighbouring’ concepts, without there being one necessary element that is shared by all and that can be seen as the core.

The reason for the lack of such a core condition is precisely that concepts are embedded in social practices. Dworkin is very right in stressing the importance of social practices. Concepts are not only representations, but are used in order to do something, and in the case of `law’ that activity is collectively undertaken. The categories for which concepts are the gatekeepers are used to order the world with a
particular end in view. These ends in view determine to a large extent the level of concreteness in which conditions are described (dimension b). The practical uses of concepts therefore make it impossible to choose such abstract conditions (like ‘something to eat’) that one can sensibly speak of a core meaning. But the ends-in-view also determine the other dimensions: the number, status, and weight of conditions.

Let me mention just a couple of such social practices, in which the various specific ends-in-view arise that inform the various concepts of law. The ingredients of these concepts—the conditions—are rendered in italics.

**Adjudication:** Officials that have to solve concrete cases, like judges, are obviously primarily interested in the question: ‘how to solve this case’? If judges who do not merely rely, like Salomon, on their own wisdom but on a set of rules, refer to ‘law’ they refer to a reservoir of instruments (rules, contracts, precedents, principles) that enable them to perform this task. These instruments only work when they are supposed to be valid and are assumed to have binding force. Since they are required to give reasons for their judgment, they see rules as reasons for a fair solution.

**Legislation:** Legislative jurists have to implement policies in a legal form. They are confronted with the demands of the minister and of parliament as well as with the demands of the legal system. They are interested in the question: how can law be used to realize policies? When they refer to law it is as an instrument that can help to steer and regulate society and its members to the ends that are pursued. Law should be enforced, compliance rates should be maximized, therefore effectiveness and legitimacy are its prime virtues. Apart from that, new laws should fit in the overall legal system. For legislators, rules are not reasons but sign-posts. Law is not seen as different from regulation.

**Academia:** In general, legal doctrinal scholars are interested in the question: how can we order the existing legal material? In this respect the primary concern of academic doctrinal lawyers is pretty much like that of the librarian who is interested in finding a practical, and coherent and consistent classification of the legal material. However, there are differences in orientation, depending on the kinds of visitors they have in mind. Scholars engaged in administrative law are closer to the perspective of the legislator and for that reason probably more willing to inquire into the effectiveness of law than private lawyers.

**Legal theory:** What applies to legal scholarship, applies even more to legal theory. I use the term legal theory to encompass positivist as well as non-positivist philosophy of law, logical analysis as well as socio-legal studies. The questions legal theoreticians want to address are very much dependent on the roles and social practices with which they identify. The bulk of legal theory is judge-centered. People like Dworkin

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see law as a reservoir of rules and principles. The debate on the status of principles (‘in’ or ‘out’, legally or morally binding) should be understood in the light of this preoccupation.

It is however, also possible to identify with the legislator. It is a point of view that I myself adopt, and which gives rise to a completely different set of questions: namely, what is the relation between styles of legislation and forms of control and enforcement; or: how can traditional values of — judge-centered — law be reconciled with regulatory demands?

Third, legal theory can regard itself as the assistant of legal doctrine. Philosophical and logical analyses of fundamental concepts such as ‘competence’, ‘ownership’ as well as the way they relate are carried out in order to understand better the nature of the legal material that is organized by the librarian-scholar.

Finally, legal theory can take the point of view of the norm-addressee. Since the time of Ehrlich, sociologists have often taken this perspective. For them, law is primarily the way by means of which people interact, a special or formalized variety of social rules. The relationship between social rules and legal rules is studied, not with an eye to the effectiveness of legislator, but with an eye to understand the social fabric of society. Here law is seen as a specialized form of social control.

These roles are sketched in a crude and unrefined way. It is not my intention to assign people to a predetermined and fixed role. Neither is it my view that every role or aim is accompanied by one well-defined concept. It is possible that one and the same concept plays a role in addressing different questions. For instance, both the legislative jurist and the sociologist may be interested in effectiveness and both see effectiveness as a necessary condition for the existence of law. Yet, effectiveness in itself is understood differently. For the legislator it is the degree to which laws successfully realize policies. For the sociologist it is the degree to which laws affect people’s daily lives. The same applies to the term ‘system’. For the judge the system is a reservoir of reasons that can be given for a particular solution. For Luhmann the term is used to conceptualize the way law interacts with other systems such as economics, politics or morality.

Because of this overlap in images and terms, it seems as if a term has a shared meaning. But there are differences lurking underneath. To see these differences, we should note the obvious fact that conditions are often concepts themselves. As soon as we ask ourselves: what do we understand by ‘effectiveness’ and inquire into the conditions that are stipulated by that concept, disagreement may arise. The fact that the same words arise is not sufficient reason to assume that the users partake in the same social practice. In order to see that, we should ask which questions these people address and understand concepts as tools to answer these questions.
11. Coloured concepts

If we take a look at the terms that are rendered in italics we see that the various concepts of law can be seen as networks of a number of conditions that are assigned more or less weight and which are interrelated to each other. In this scheme, the conditions and concerns of legislators are indicated in red; those of the judiciary in blue. Common concerns are indicated in purple. It should be noted that the weight of the conditions stipulated by the concept, as well as the proximity of the conditions to each other, depend on the specific concerns shared of the participants of the various social practices. The ways in which the conditions and criteria are linked up with the others determine the ways in which they are coloured and understood.

If we analyse the conditions mentioned above (effectiveness, fairness), it looks at first sight as if they are definitely more normative than the conditions of a syndrome like Asperger (‘good in mathematics’ or ‘inability of understanding other
people’s feelings’). But at a closer look the conditions for Asperger are not that drastically different.

They share with the legal criteria the fact that they allow for degrees. Just as someone may be extremely good in mathematics and extremely unable to understand other people’s feeling and can therefore be counted as a paradigmatic example of Asperger’s syndrome, we may have law which is extremely effective in securing compliance. From the point of view of the legislator such an effective law is paradigmatic, whereas for the judge it may be an aberration; it may not even be counted as ‘law’ at all.46

One may object to this that still, in the case of Asperger, it is much easier to establish whether the conditions are fulfilled and to what extent. That may indeed be the case. For that reason legislators are eager to develop tests that enable them to measure effectiveness either ex ante (regulatory impact assessment) or ex post (evaluation). But we should not forget that in such tests (whether in legislation or in psychology), such an assessment is thoroughly influenced by the selection of what is observed and by which methods. And this selection is inspired by the aims and concerns of the testers.

Still, we might think that there is a vast difference left. We might want to maintain that Asperger is not a normative concept because it is not something people want to realize. There is no ‘point or purpose’ in Asperger. That is true. It is something which is regarded as an abnormality. But that does not turn it into a neutral and descriptive concept. On the contrary. Underlying the identification of conditions for Asperger, there are strong normative convictions of how a normal, non-Asperger human being should behave.

If we take these considerations into account, it might be possible to say something more about the so-called objectivity of legal theory. That objectivity is usually defended by saying that theorists do not share the practical normative concerns of the legal practitioner. In the first place, we have seen that that is only partly true. As I pointed out earlier, they may have identified with or oriented themselves towards a particular social legal practice. But even if their concerns are ‘merely’ theoretical, that does not diminish the level of normativity. Legal theorists might be interested in such diverse matters as the relation between law and fundamental values, between law and other forms of social control, or the relation between natural facts and institutional facts. These theoretical interests, not less than practical concerns, inevitably colour the concepts that are used, the selection as well as the relative weight that is attributed to the conditions. If there is a difference between the bias resulting from a practical interest and the bias that results from a theoretical interest, that can only be a gradual one.

12. Legal theory about what?

46 When I once told a member of the Dutch Supreme Court that I was interested in the structure of European directives, he remarked: ‘But that can hardly be called law at all!’
Concepts are used as tools in order to answer a particular question, either practical or theoretical. The conditions that are stipulated in such a concept are selected in the light of their relevancy for the problem at hand. This means that in this respect there is no fundamental difference between the concepts used by legal practitioners, legal—doctrinal—academics and legal theorists. There is no dividing line that distinguishes insiders from outsiders. There are only lines demarcating—vaguely—the various social practices and these lines are not parallel to a divide between objective and subjective, or between descriptivistic and normative.

The question then remains to what extent we may cling to the view that legal theory has a subject or task of its own. I noted above that many legal theorists are inspired by the problems that pertain to a specific legal social practice. But does that imply that legal theory is either the handmaid of the judge or the servant of the legislator or the spokesman of the lay citizen?

On the one hand I think that legal theorists should not shy away from such an identification with the problems of social practices. There is nothing wrong with theorizing about the problems that are encountered by legal officials of all sorts and who are often unable to spend enough time to reflect on these problems.47

On the other hand, we should not identify too readily with the concerns of judges, legislators and citizens. Confining myself now to that branch of legal theory which is my own field, legal philosophy, I think that philosophers should certainly not succumb to the wishes of many practitioners that we supply them with high and noble philosophical foundations. There should be room for a proper philosophical way of inquiring into their problems. This `proper philosophical way' does not consist of contemplating the house of law from an external point of view and neither do I propose to fly above the houses of law in order to unravel structures and streetplans. When I think of a proper theoretical point of view I am thinking of that ugly term `aboutness'. Overzealous identification can be avoided by being aware of the fact that from a philosophical point of view we are able to think about the tools we use and the tools other people use.

As I argued in this article, the relevant question is not: what `is' law, nor `what is law `made of'. Such questions assume that law is a definite entity. If we understand `law' as a concept, the legal philosopher has a different task, and I think a more important task to carry out. The question then arises: how can people use these concepts in a coherent and useful way in view of their purposes?48 It is the task of legal philosophy to think about the ways people think about their problems. For instance: if legislators repeatedly say that overregulation is brought about by the principle of equality, it is high time to investigate the concepts of equality and overregulation that lead them to

47 Fuller wrote: ‘The object of legal philosophy is to give an effective and meaningful direction to the work of lawyers, judges, legislators, and law teachers. If it leaves the activities of these men untouched, if it has no implications for the question of what they do with their working days, then legal philosophy is a failure.’ (L Fuller, ‘The Needs of American Legal Philosophy’ in Kl Winston (ed), The Principles of Social Order: Selected Essays of Lon L. Fuller (Durham, Duke UP, 1981), 249–50)
think so. If judges complain about the way scientific experts exceed their limits, it is time to explore these judge’s assumptions about science and the relation of science to their own expertise.49

Aboutness does not require a detached point of view, or a bird’s eye view. Aboutness does not imply objectivity nor presuppose an objective mind. Aboutness requires a standpoint, sufficiently close to the object of investigation to understand the way problems are experienced and conceptualized, a minimum of logic and analytic power and above all much common sense.

13. Conclusion

The ways people argue about law are diverse and depend on what they do in life. They may defend clients, issue licenses, work out contracts or study the emergence of international law. These tasks inspire the way law is conceptualized. More precisely: these tasks and aims help selecting the conditions and—often normative—criteria that should be met in order to count as ‘law’. The diversity of pursuits implies a diversity of concepts of ‘law’. There may be a certain overlap in conditions and criteria. But this overlap should not *a priori* be understood as agreement about ‘the’ concept. Shared vocabulary might hide underlying differences about either the number of conditions, the status or the weight of these conditions as well as about the way they should be described. It is to legal philosophy to analyse implicit assumptions, and to unravel inconsistencies. In order to be critical, legal philosophy should not be too submissive; but in order to be relevant, it should not be too remote from the daily concerns of the various legal practices that are studied.

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49 See I Berlin, ‘The Purpose of Philosophy’ in H Hardy (ed), *Isaiah Berlin, Concepts and Categories: Philosophical Essays* (London, The Hogarth Press, 1978): ‘The task of philosophy, often a difficult and painful one, is to extricate and bring to light the hidden categories and models in terms of which human beings think (that is, their use of words, images and other symbols), to reveal what is obscure or contradictory in them, to discern the conflicts between them that prevent the construction of more adequate ways of organising and describing and explaining experience (for all description as well as explanation involves some model in terms of which the describing and explaining is done); and then, at a still ‘higher’ level, to examine the nature of this activity itself (epistemology, philosophical logic, linguistic analysis), and to bring to light the concealed models that operate in this second-order, philosophical, activity itself.’ (page2222) 33