Law, Society and Community

Socio-Legal Essays in Honour of Roger Cotterrell

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Chapter 7

Towards a Fruitful Cooperation between Legal Philosophy, Legal Sociology and Doctrinal Research: How Legal Interactionism May Bridge Unproductive Oppositions[1]

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1. Introduction

Roger Cotterrell advocates a broad interdisciplinary approach to law and legal theory. The title of one of his well-known articles is programmatic: 'Why Must Legal Ideas be Interpreted Sociologically?' Similarly, his book *The Politics of Jurisprudence* can be read as an attempt to understand legal theories sociologically – an approach that makes sense of seemingly outdated and unattractive positions in light of the historical conditions of their time. Although Cotterrell's 'strongest intellectual allegiance is to sociology of law, [he] gradually felt dissatisfied with the lack of concern of much legal sociology with any need to engage with legal philosophy' (Cotterrell 2008: 20). His general intellectual programme is nicely expressed in the following statement: 'Legal philosophy and legal sociology are co-workers in a common enterprise of legal explanation' (Cotterrell 2006: 29).

As legal theorists with a background in law and philosophy and a strong interest in legal sociology, we wholeheartedly agree with this advocacy of a broad interdisciplinarity. As co-workers, legal philosophy and legal sociology can fruitfully cooperate with each other in gaining a fuller understanding of law. Theorizing in legal philosophy can be greatly enriched by being empirically informed and tested. Studies in legal sociology may gain depth by being confronted by philosophical normative theories and may gain precision by relying on insights from analytical jurisprudence. Like Cotterrell, we are critical of rigid disciplinarity. Even if it may often be impossible to fully integrate legal sociology, legal philosophy and legal doctrinal research, we should attempt to combine them.

In the cooperative effort of disciplines, we have included legal doctrinal research as a third discipline. We believe that legal doctrinal research is an important partner for legal sociology and legal philosophy, and that the cooperation between these three partners is very fruitful for each of them. The translation of philosophical ideas and empirical insights into practical legal solutions is a good way not only to test the theories by bringing them into practice and to make them practically relevant, it is also enormously enriching for both legal philosophy and legal sociology. The practical

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wisdom and nuances of the legal professions and the mediating role of academic doctrinal research may also provide important starting points for socio-legal and philosophical research.

In this chapter we will mostly focus on the differences between sociological and philosophical approaches to law. For the purposes of this chapter, legal doctrinal research can usually be associated with legal philosophy – both deal primarily with ideas and the meaning, justification and practical implications of those ideas. Only where doctrinal research diverges substantively from legal philosophy, will we pay explicit attention to the differences.

Advocating interdisciplinarity is one thing, actually doing it is another. Interdisciplinary research is not easy, and there are many stumbling blocks to be found. Different disciplines know different methods, different conceptual frameworks, different objects of study, different research goals, different academic cultures. (Taekema and Van Klink 2011: 8–9; Vick 2004: 166–9) Certainly, there are overlaps and fuzzy areas between the disciplines rather than strict separations. Nevertheless, we may usually discern characteristic differences between the mainstream tradition of the various disciplines. Cooperation between disciplines often leads to mutual misunderstandings if we do not explicitly address those differences.

We want to address one important difference that often frustrates successful co-operation between legal sociologists, legal philosophers and doctrinal researchers. That difference is that they rely on different – implicit or explicit – understandings of law, on different concepts and definitions. This makes communication difficult. When lawyers and philosophers implicitly think of law as a coherent doctrine but sociologists rely on an understanding of law as a practice or as a general dimension of social interaction, they have a hard time understanding each other.[2] Of course, there is much variation within these disciplines themselves, as, for example, the debate between legal positivists and natural law theorists testifies. There are, however, important respects in which legal philosophers, sociologists and doctrinal scholars share more with the majority of their own discipline than with sympathetic members of the other two disciplines. It is especially the implicit background character of the differences that hinder a fruitful interaction between the three. The problem we therefore want to address is twofold: how can we make these differences explicit and understand them, and how can we combine the different perspectives on the concept of law without obscuring the insights generated within each perspective? Although we inevitably overgeneralize, we believe that in order to do this it may be helpful to use ideal typical distinctions to formulate the tensions clearly.

2. Four Oppositions

We can discern four basic oppositions regarding the understanding of law. The most basic opposition is that which has become known under the slightly misleading title of law in the books versus law in action.[3] On one side of the spectrum, there are those who conceive of law as the products or enactments of legal institutions such as legislatures and courts, and as the doctrine that can be constructed on the basis of these products. On the other side, there are those who see law as interaction or as a dimension of social interaction, exemplified in customary law or interactional

2 Cf. Cotterrell 2008: 18: 'The sociologists have failed to study law as a world of ideas and as subjective understanding of those ideas in action. The philosophers have failed to study law as a diverse, varied *social and historical experience* ....'

3 This is misleading because it suggests that law itself is an entity that can act rather than the interaction itself. 'Law as interaction' would have been a more adequate phrase. For a critique of Pounds' famous phrase, see Krygier 2012: 141.

law. Most legal philosophers and legal scholars may be found at the pole of enacted law, whereas many sociologists are at the pole of interactional law. As Cotterrell (2006: 45) argues, this is not a strict division of labour, and in our opinion, certainly not a normative distinction that should govern the practice of the various disciplines. Nevertheless, if we look at the work of mainstream legal philosophers and doctrinal scholars, on the one hand, and legal sociologists, on the other, there is a clear difference of focus either on enacted law or on interactional law.

The second opposition is that between monism and pluralism. On the one hand, most legal philosophers and legal scholars still focus on law as one more or less coherent system, usually associated with the state and with a specific territory. Even when philosophers and legal scholars include distinct legal orders such as those of the European Union, and the Council of Europe in their analysis, they usually limit the number of competing legal orders to a few that are all connected with official law-making institutions directly or indirectly associated with the state apparatus. On the other hand, most legal sociologists are pluralists in a broader sense; they accept that there are many different kinds of legal orders, most of which are not associated with official law-making institutions.

The third opposition is that between a focus on the variable and changing characteristics of law and a focus on law as timeless or static. Legal sociology clearly belongs to the first camp, recognizing the importance of variation and processes of change in the study of law (Cotterrell 2008: 18 and 20). However, there is not one opposition here, but two. On the one hand, most philosophers tend to focus on the timeless or universal characteristics of law. For example, classical natural lawyers have tried to find universal normative principles or values underlying law. Many contemporary philosophers would probably agree with Julie Dickson, who argues that the core business of analytical jurisprudence is 'to isolate and explain those features which make law into what it is' (Dickson 2001: 17). She further argues that legal philosophy must analyze the nature of law, that is, 'those essential properties which a given set of phenomena must exhibit in order to be law' (Dickson 2001: 17. See also Shapiro 2011: Chapter 1). On the other hand, most legal scholars construct law as a static phenomenon in a different sense, by providing a construction of the positive law of a certain jurisdiction at a specific moment in time. The aim of legal scholarship is to provide the best picture of law as it currently is.

The fourth opposition is that between instrumentalist and non-instrumentalist views of law. On the one hand, we may regard law as a means to realize policy goals; on the other hand, as a guarantee of interactional norms. Those who focus on enacted law, have a tendency to see enacted law as an instrument in the hands of political institutions; those who focus on customary law or, as many legal professionals do, on law as a distinct and highly autonomous practice upholding values of legality, see institutionalization and codification as a way to guarantee that social norms are actually followed and that distinct legal values are upheld. This is an opposition that is somewhat different from the first three as its division cuts across both legal philosophy and legal sociology rather than between the two disciplines. There is a strong instrumentalist tendency in legal sociology: according to Cotterrell (2008: 21), we may even speak of 'pervasive instrumentalism'. A similar instrumentalism may be found in the works of many modern positivist legal philosophers as well as among law and economics scholars. On the other hand, there are a significant number of researchers, among legal philosophers, legal sociologists, and doctrinal scholars, who are anti-instrumentalist.

Of course, our characterization of these four oppositions provides an ideal typical sketch. Many theorists do not fit in and there are many intermediate positions. Nevertheless, the ideal types may be easily discerned as underlying many positions taken by legal sociologists, legal philosophers and doctrinal legal scholars. Moreover, it is clear that scholars on different poles for each of these

four oppositions will encounter difficulties in communicating and co-operating with each other, because they have different things in mind when speaking of law. Therefore, it is important to find ways to transcend these oppositions or at least to understand them as emphasizing different aspects of one common framework in order to transcend the divide between legal philosophy and legal sociology (Cotterrell 2008: 22).

Our claim is that legal interactionism provides such a theoretical approach. Legal interactionism accepts both interactional law and enacted law as law. Therefore, it is very oecumenical in spirit. This broad approach enables us to understand the different poles as part of a full analysis of law, and offers perspectives for integrating the partial insights that a focus on merely one pole can provide.

We will begin by elaborating the first opposition, as it is the most basic (Section 3). Then we will discuss the core tenets of legal interactionism and show that its inclusive approach can transcend this basic opposition (Section 4). In the next three sections, we will show how we may understand each of the remaining oppositions in terms of an interactionist framework, as foci of attention rather than as strict dichotomies (Sections 5 to 7). Finally, we will discuss the theoretical and methodological implications of our analysis for a successful cooperation between legal philosophers, legal sociologists and doctrinal scholars (Section 8).

3. Enacted Law and Interactional Law

What we need, first of all, is a theory that can transcend the unproductive opposition between enacted law and interactional law. These should not be seen as opposites between which we have to choose, but as sources or types of law that are both law in their own right. Here we build on Lon Fuller's ideas from his book *Anatomy of the Law*, in which he tried to transcend the opposition between natural law and legal positivism and to do justice to the valuable core of truth in both. Fuller makes an important distinction between implicit law and made law (Fuller 1968: 43–84). This analysis, in our view, provides a good starting point for understanding and bridging the difference between sociological and philosophical understandings of law.

Fuller does not explicitly define implicit and made law, but presents them in his discussion of two pure types of law, customary law and legislation, respectively. The two terms are, in our view, unfortunate. In a sense, all law is made law, because law is a human construct – this holds for customary law as much as for statutes. Moreover, the term 'implicit' suggests that once a norm is explicitly formulated – if only in order to explain to the newcomer what the norm is – it no longer counts as implicit law. For these reasons, we prefer two other terms that Fuller uses elsewhere: enacted law versus interactional law.[4] Enacted law is law that comes into existence as the result of an explicit enactment by a legal authority – for example, a legislature, a court, but also an official in an organization, such as the head of a university who makes rules regulating the behaviour of students or staff. Interactional law is law that comes into existence through a gradual process of interaction in which a standard of conduct emerges that is understood as giving rise to legal obligations. Thus, the two names refer to two different sources of law, enactment and interaction.

It may be helpful at this point to explore the characteristics of both ideal types of law in detail. In modern societies, enacted law takes the form of black-letter law, usually consisting of a set of

4 In *The Principles of Social Order* (1981: 232), Fuller uses the terms enacted law and authoritatively declared law as synonyms for made law. Interactional law is used in *The Morality of Law* (Fuller 1969: 221 and 237).

rules. Enacted law is explicitly produced as law by institutions that claim the authority to make law and to pronounce authoritative statements regarding its contents. The most important ones are, of course, legislatures and courts, but these are certainly not the only ones. Many government organizations and officials have delegated regulatory power and can produce regulations that are considered binding upon those who are subject to their powers. Moreover, in every organization of a certain scale, whether it is a governmental organization or a business, there are some officials or institutions that set internal rules for their employees and for those who are dependent on their services.

Gerald Postema explains the concept of enacted law (or, in his terminology, made rules) as follows:

> Made rules are given canonical verbal formulations by a determinate author at a reasonably precise date. The practical force of made rules depends on the authority of their makers or the offices they occupy. Thus, made rules presuppose both authors and relations of authority and subordination. (Postema 1999: 256)

Enacted law emerges out of vertical relationships. It need not be the commanding authority of an absolute dictator, but the relationship is one between lawmaker and subject. Of course, in a democratic legal order, as a voter the legal subject can influence the lawmaker indirectly; moreover, the person or persons constituting the lawmaking institution are also subjected to the rule of law. However, the institution that produces the law, the legislature, stands in a vertical relationship of authority to citizens. This implies that the enacted rule appears as given, as not negotiable, to citizens.

Enacted law therefore depends on authoritative institutions that claim to have law-making and law-enforcing authority. Usually, this type of law can be described in the familiar frameworks of legal positivism, as a union of primary and secondary rules (Hart 1961/1994) or as an institutionalized system claiming authority (Raz 1979). However, for a full understanding of enacted law, we need to go beyond legal positivism, because the reason why enacted law has obligatory force cannot be fully understood from within a legal positivist framework (Postema 1999: 260). In most forms of enacted law, particularly democratic laws, the vertical order is embedded in a more horizontal order. To understand this, we turn to Fuller, who argued that enacted law is embedded in a reciprocal pattern of interactions between citizens, legislators and other officials. Before this relationship can be explained, we need to have a better understanding of what interactional law is.

For a description of interactional law (or implicit rules), we may again turn to Gerald Postema:

> [I]mplicit rules arise from conduct, not conception. Verbal formulations may more or less accurately capture the rules implicit in the conduct, but the formulations are always post hoc and strictly answerable to the conduct. No formulation is authoritative in virtue of its public articulation alone. Although implicit rules arise from the conduct of determinate agents, typically they have no precise date of birth and no determinate authors. They presuppose no relations of authority and subordination; thus, their practical force depends neither on authority nor on enactment, but on the fact that they find "direct expression in the conduct of people toward one another".[5]

The crucial point here is that, in social interaction, we must be able to rely on the predictability of at least most of the actions of other individuals (and of the state). Otherwise we cannot achieve our

5 Postema 1999: 257, quoting in the last sentence Fuller 1981: 232.

own purposes and guide our own behaviour. Therefore, social interaction requires 'relatively stable mutual expectations of behavior' (Postema 1999: 257). These expectations 'emerge over time from a process of mutual accommodation and adjustment of expectations and actions of interacting agents' (Postema 1999: 258).

It is this ongoing practice that is the basis for the obligatory force of interactional law. Interactional law is usually implicit in the interaction, but it can be made explicit by formulating the rules and putting them on paper. For example, the continuing relationship between business partners can be laid down in a contract, and this may acquire a certain legal status in its own right.[6] However, often the contract will not be followed to the letter because the underlying practice requires adaptation and both partners will understand the need for these adaptations. For the partners in the contract, the implicit interactional law is more authoritative than the written contract. As long as this orientation to the underlying practice is considered to be the basis of the obligatory force we can speak of interactional law, even if the norms have also been formulated in contracts, treaties, codes or even statutes.[7]

Contract can therefore both be regarded as enacted law, and as interactional law. However, it is important to note that the contract itself is also a source of law in its own right. Once it has been signed, it constitutes a relatively autonomous legal order, based on mutual consent. The terms of the contract are the primary sources of the obligations following from it; both the underlying interactional law and the enacted law on contracts are, from this perspective, only secondary sources. So there are three perspectives on the meaning of the contract. Each of them can claim to give an explanation for why the contract can create obligations; each of them provides part of the truth.

4. Legal Interactionism

In our view, legal theory must recognize both interactional law and enacted law, as well as other sources such as contract and treaty, based on the possibility of creating obligations by mutual consent. The theory developed here may be called legal interactionism.[8] In an oecumenical spirit, legal interactionism takes seriously interactional law, but tries to do justice to enacted law as well. For legal interactionism, the concept of law refers both to the interaction of legal actors and to the various practices in which legal norms emerge, as well as to the norms themselves, and to the legal doctrine that emerges from these practices. Our account has close affinities with the interactional account of international law recently presented by Jutta Brunnée and Stephen Toope (Brunnée and Toope 2010); however, it differs from their view in developing a more inclusive approach, in line with the later work of Lon Fuller.

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6 See Fuller's analysis of the interactional foundations of contract law in Fuller 1981: 244f. Contract also has strong elements of made law; see Fuller 1968: 70–71.

7 However, when, and in so far as the written texts become an independent source of obligatory force we are leaving the domain of interactional law and replacing or supplementing it with enacted law or contract.

8 Fuller's theory has been called interactionist by various authors, e.g., Brunnée and Toope 2010: 24, and Witteveen 1999: 31–2. Witteveen argues that interactionist views on law can also be found with Montesquieu, American pragmatism and the sociology of Georg Simmel. Brunnée and Toope use the term 'interactionalism' for their own position. As our account is closer to Fuller's than to Brunnée and Toope's, on those points where they differ, we prefer the word interactionism. To emphasize that it is a theory about law and not about human interaction in general, we have added the word legal. Legal interactionism is strongly embedded in American pragmatism and symbolic interactionism.

Legal interactionism, in the account advocated here, holds that the obligatory force of enacted law and contract is embedded in an interactional pattern. In a sense, therefore, it regards interactional law as primary because without a general pattern of interaction in which enacted law is accepted as obligatory, enacted law may come close to being merely the exercise of brute force. However, legal interactionism, as we understand it, does not reduce the obligatory force of contract or enacted law to that of interactional law. Both may generate legal norms which have obligatory force once they have been adopted. We do not deny that enacted rules may function directly as guides to behaviour and the basis for law enforcement. Therefore, interactional law is not the sole foundation of enacted law or contract. However, the obligatory force of each of these legal sources is reinforced when there is congruence between the deeper interactional law and the black-letter law of enacted law and contract.

Legal interactionism does claim that enacted law that is not embedded in an interactive practice is not fully law in the sense that a legal order cannot completely depend on enacted law only. There must be some congruence between interactional law and enacted law; otherwise the obligatory force of enacted law is weakened. Enacted law is embedded in a broader interaction and in that sense we could say that interactional law is primary (Fuller 1981/2001: 250). Enacted law without any basis in interactional patterns simply is hardly law, or even no law at all but mere fiction. If someone claims that he is the supreme legislator and everyone should listen to his laws, while no one does, there is simply no law and, instead, the presumed legislator is probably just a lunatic. There must be at least some minimal practice in which individuals act according to what is claimed to be law, underlying the claim to authority. Thus, enacted law not only depends on the formal processes of lawmaking by the relevant authority, but also on underlying interactional expectations. Interaction plays a role in the vertical relationship, because legislature and subjects of the law mutually expect each other to abide by rules. To link it to Fuller again: these expectations are based on the role taken and the internal morality that goes with that position, in the case of enacted law, the principles of the rule of law. However, enacted law is also linked to horizontal interactional patterns, because the rules of enacted law may become part of the reciprocal expectations of citizens among themselves. Ideally, citizens expect each other to conform to enacted law and themselves live up to these expectations. Of course, one of the main insights of legal sociology is that the link between enacted rules and interactional practices is much more complicated (e.g., Moore 1978).

Interactional law and enacted law may give rise to different legal orders that are relatively autonomous in relation to each other; examples are societies in which indigenous groups have strong customary law, which is largely unconnected to the official enacted law of the larger society. Usually, however, they are strongly connected, and their relationship is best regarded as that of two different sources or types of law in the same legal order. They may overlap, they may largely converge, but they may also diverge. Usually, in a relatively stable legal order, there is considerable congruence between interactional law and enacted law. There may, however, be tensions between the two sources of law, as full congruence is rare.

5. Relative Pluralism

The second opposition is that between most legal sociologists usually accepting some form of legal pluralism, and most legal philosophers focusing on one coherent legal order, usually associated with the state. Interestingly, doctrinal legal scholars in Europe increasingly seem to take an intermediate position willing to embrace a narrow form of pluralism, consisting of the competing, and partly interwoven, legal orders of domestic law, EU-law, Council of Europe Law and international law

(Nollkaemper 2011: 10–15; Krisch 2010: 10). The notion of legal pluralism has taken on different meanings, and there have been many attempts to distinguish different forms of pluralism. Here, we distinguish between the narrow pluralism of recognizing a limited set of potentially conflicting official legal orders, on the one hand, and the broad pluralism of recognizing a wide range of conflicting and interacting official and unofficial legal orders, on the other hand.

Legal interactionism embraces a broad form of pluralism, but it tries to address some of the concerns of legal philosophy with authority, unity and coherence. The acceptance of multiple sources of law leads to a broad form of pluralism; each of these sources can be the basis for a multiplicity of legal orders. However, we do not see the broad pluralism of multiple legal orders as necessarily implying conflict and competition between legal orders. In many instances, pluralism is relative and can be accommodated within a larger, open, legal order.

Of course, the most important source of enacted law is that of state legal authorities like legislatures, regulatory bodies and the judiciary and the focus on this type of law as the predominant source of all law is easily understandable. Especially in the Civil Law tradition, this fiction of the legislature as the ultimate source of all law is easily upheld and most civil codes contain provisions declaring customary law and contract only valid under certain conditions, thus claiming that all law ultimately derives its obligatory force from legislation. This may be a legitimate internal perspective of the legal order as held by judges who have to rely on internal, institutional criteria of what is to count as law. (Nevertheless, we should note that, with the rise of the EU, the Council of Europe and international law, this nineteenth-century model of one sovereign legal order claiming ultimate authority in its territorial jurisdiction is rapidly losing its explanatory power.) However, from a broader perspective there is no reason to limit enacted law only to enactments by state legal authorities. For authoritative enactment the association with the state is not necessary. Every institution that has authority over a group of persons can produce enacted law. Church authorities, boards of associations, as well as international organizations such as the FIFA, the IOC or a multinational company can also create law in their own right.[9]

More importantly, once we accept that there may be other sources of law, such as interactional law and contract, legal pluralism seems inescapable. Whenever people interact and their patterns of interaction become denser, interactional law may gradually emerge. This is obvious for ancient customary law as well as for international *lex mercatoria* and public international law, all forms of interactional law that emerged outside the sovereign state legal order. It may even hold true in the global and virtual world of the Internet where possessions in virtual games may be the object of property, or where bitcoins may be accepted as valid money in exchanges. With regard to contract, it is obvious that a contract based on free and mutual consent may give rise to its own legal norms and even to a mini-legal order, whether or not this legal order is also recognized as valid by e.g., state legal orders, and enforced. In this respect the recognition of a contractual legal order established between two parties is not categorically different from the recognition of a foreign state legal order under the rules of private international law.

9 As we are still for most practical purposes stuck in the paradigm of national legal orders, lawyers may uphold the fiction that these organizations derive their legal authority from the domestic legal order in which they are formally based, such as Switzerland or the Cayman Islands. Thus doctrinal law can make a closure and provide for effective incorporation of alien legal orders in a state legal order. However, in reality, of course, those organizations were created independently of Swiss or Cayman Islands law and only used the domestic legal orders instrumentally to provide a legal framework for their activities. From a sociological perspective, the legal order created by those organizations is primary, and the domestic legal order is subservient to their purposes.

We may conclude that legal interactionism, in line with Lon Fuller, accepts a wide variety of legal orders (Fuller 1964/69: 125; cf. Berman 2007: 1172). However, this is only one half of the story. Although we claim that legal pluralism is broad and pervasive, it is not necessarily a strong form of pluralism in the sense of separate legal orders competing for normative dominance. In many ways, pluralism is better seen as relative: legal orders are not fully autonomous; they interact in many ways with each other, at times depending on, reinforcing or conflicting with another order. They are embedded in a network of legal orders. Each legal order is relatively autonomous, partly autonomous and partly open to other legal orders. The degrees of autonomy and openness may vary. The legal order of a religious sect will usually be highly autonomous vis-à-vis the state legal order, whereas the internal legal order of state agencies will usually be so strongly embedded in the state legal order that their autonomy is minimal. In fact, the autonomy of the latter may even be so small, and the congruence between the internal norms of the state agency and the official state legal norms so strong, that it is artificial to speak of distinct legal orders. Although theoretically they might be called distinct legal orders (Macdonald 1999), for most practical uses, the norms within the state agency are mere variations within one common state legal order.

In a sense, from a theoretical point of view, it does not matter whether we regard the agency's internal norms as a relatively autonomous, but highly embedded legal order, or as merely a part of the state legal order.[10] There is a continuity from two almost completely separate legal orders to complete identity, somewhere in between it may be helpful no longer to speak of two autonomous legal orders but of one dominant legal order with distinct sub-orders. A confederation of states may slowly evolve into a federative state; there is no clear cut-off point sociologically or philosophically at which it is better to say that there is one legal order rather than a collection of closely intertwined orders, embedded within a confederate order. At this moment, the relation between the EU and member states can best be regarded as a densely knitted network of semi-autonomous legal orders embedded within the EU legal order, but this may gradually change in the future.

Let us take a concrete example of how this might work when the relation between the state legal order and interactional norms is involved. In the past decades, many cyclists in the Netherlands, frustrated by the seemingly purposeless long waits for red traffic lights, have increasingly ignored those lights. It seems that there is an interactional norm emerging that cyclists (and pedestrians) may ignore red traffic lights as long as there is no danger and they do not hinder other traffic, for example when taking a right turn. Prosecution of those traffic lights violations will incidentally occur, but is certainly not a prosecution priority. We may structure this conflict between interactional norms and the state legal order in two ways. Traditional legal sociology would structure it as a conflict between state law and living law as if there were two distinct legal orders. We think this is a theoretical overkill: to conceive of one norm as constituting a distinct legal order unnecessarily complicates the picture. It is better to structure it as a conflict within the state legal order between norms enacted by parliament and competing interactional norms emerging from the actions of citizens. This conflict is not authoritatively solved by the state legal order because of its erratic prosecution policies. In fact, the Dutch state tried to accommodate the interactional practice by introducing a new traffic sign that allows cyclists to ignore traffic lights when taking right turns. However, this traffic sign was placed only at a small minority of traffic lights, and it seems the effect of this attempt for partial accommodation while retaining acceptance of the statutory norm for the rest, has remained futile.

10 From the internal perspective of a state judge or a doctrinal scholar, it may, but we will discuss that later.

The advantage of this notion of relative pluralism is that it enables us to study variation and gradual change, both between and within legal orders, instead of succumbing to rigid theoretical oppositions. It does accommodate broad pluralism, but it allows for the openness of legal orders embedded in a network of legal orders. And it also allows for pluralism within legal orders, to see that there are legal suborders, or competing norms, rather than treating a legal order as one coherent body of norms. By allowing variation of orders and suborders, doctrinal and philosophical concerns with the unity and coherence of legal orders can be recognized, although unity and coherence cannot be realized completely in practice. Thus relative pluralism allows us to accommodate a large variability in legal orders.

6. A Dynamic Understanding of Law

The third opposition is that between a variable and dynamic understanding of law and a timeless and static understanding. Sketching the extremes of the opposition, we can say that legal sociologists have emphasized the dynamic and variable character of law, while legal philosophers have concentrated on uncovering characteristics of law which are true of law in all times and places. As we stated in our introductory comments, doctrinal legal scholars to some extent side with the legal philosophers, but with a different emphasis, not on the universal or essential characteristics of law, but on a legal system as a coherent body of norms. The latter implies that law is described as static, at a certain moment in time. Legal change is not a process, but a series of different descriptions. The gulf between the legal philosophical and the sociological sensibility is not easily bridged, and neither is the divide between the sociological and the doctrinal position, although the first may be more problematic than the latter. In this section we contend that a legal interactionist position can introduce variability and dynamics without giving up the concern for general concepts and accurate descriptions of present law.

Legal interactionism combines pluralism of legal orders (legal pluralism) with a pluralist understanding of the concept of law (conceptual pluralism). Rather than looking for the essential properties of law, we should study the richness of legal phenomena with an open mind to variation as well as change. We should not try to frame all legal phenomena on a Procrustean bed of essential properties. Moreover, even if it were possible to construct some necessary and sufficient legal characteristics – which we doubt – they would likely be such minimal and abstract traits that they would not tell us much that is interesting about law.

We should, therefore, aim for a dynamic and variable understanding of the characteristics of law. Sociological, historical, comparative and philosophical analysis may provide us with insights into both characteristics of law that are fairly general, and characteristics that only some specific legal orders possess. Wittgenstein's idea of a family resemblance is illuminating here. Blond hair may be present in almost all current members of the family, the big nose in only two of them. None of the characteristics is present in all. Both Wittgenstein and the secondary literature discuss the family metaphor in terms of an existing set of family members. However, we can obtain a richer understanding if we realize that families are dynamic phenomena. Families expand and decrease in size. New members are born into the family, other members die. Some members are adopted into the family; in-laws become part of the family too. For example, when we speak about dynasties such as the House of Orange or the Kennedy's, the in-laws like Queen Maxima or Jacqueline Kennedy are as much a part of the family as those who are a biological part of the family – though in a different way. As a result, some family traits may disappear and others emerge.

This dynamic understanding of the family resemblance metaphor is illuminating when applied to the phenomenon of law. Older types of law, such as customary law, may become less important while newer types, such as state bureaucratic law and international law, may emerge. Those types of law that continue to exist, such as constitutional law, may change in important ways, e.g., by becoming intertwined with international human right treaties and European Union treaties and, thus, forcing us to rethink the concept of the constitution of a sovereign state. Perhaps in the future, completely new types of law will emerge that we can hardly imagine today, think of the emerging law of virtual networks. It is important to have a concept of law that is open to such variation and dynamics. A concept that focuses on essential properties is simply not adequate to the task at hand. A more pluralist concept based on the dynamic metaphor of family resemblance is much more productive because it does not, in advance, exclude new types of law.

The concept of law proposed by legal interactionism does not provide a clear definition of what counts as law, but rather a set of characteristics that can be present to a greater or lesser degree. The key to a legal interactionist perspective on the concept of law is the insight that law can exist in degrees and encompasses a wide range of phenomena. A normative order can be more or less law. The idea that a legal order need not be fully law to be at least partly law holds true as much for the legal order of a weak or failing state as for the legal orders constituted by the global climate regime or a professional medical association. Interactionism implies a gradualist conception of law. Therefore, most interactionists eschew a clear demarcation criterion of law, because it would not do justice to the gradual processes underlying the emergence or decline of a legal order. So, what we need is a dynamic conception of law which is sensitive to these degrees of existence. What developing an ideal type of law may help us to reach is a fuller understanding of its variation.

In an interactionist view, law is a normative order. It emerges from intermeshing normative expectations between persons, embedded in a practice of legality. As Selznick has argued, law is a normative practice oriented towards the ideal of legality. We should add that law is not only oriented towards the ideal of legality, but also towards other distinctively legal ideals such as justice, and to ideals that are not distinctively legal, such as democracy (Taekema 2003: 190). In this practice of legality, the normative expectations may gradually thicken (or weaken) and the institutional character of the legal order may also become thicker (or weaker). Secondary rules and law-enforcing institutions may emerge, the implicit rules may be explicitly formulated (if only to make them more easily accessible to all parties and to newcomers), and specific legal institutions may emerge such as adjudication and legislation.

Now, if this is the ideal type of a mature legal order, we can also see how various other elements that are often suggested as distinctive characteristics of law might fit in as contributing to a well-functioning legal order. In a complex society, relying on gradual processes of change may not be very effective. Therefore it may be necessary to have institutions or rules that govern how the contents of the law will be determined, how it will be changed, and how it will be applied. Moreover, for effective discussion about the legal norms, it is helpful if these rules are explicitly formulated. Therefore, in a complex society, law will usually be black-letter law, whether in the form of state law, in the form of contracts or in other forms of private regulation, such as the norms of certification schemes like ISO. Furthermore, it will improve the efficacy of law enormously if there are effective sanctions and institutions that enforce those sanctions. However, it is worth remarking that in the ideal typical description there need not be a connection with the state; effective enforcement can be guaranteed in many ways.

This leads us to the following ideal typical description of law. Law is a normative order, embedded in a practice of legality. There are secondary rules of recognition, change and adjudication. The norms are explicitly formulated, usually as black-letter law, and there is congruence between

enacted norms and interactional norms. There is an effective enforcement mechanism and sanctions may be applied.

However, if law can exist in degrees, there are various respects in which it can be less law. Effective sanctions and enforcement mechanisms can be missing, as is often the case in international law. Explicit formulation of the norms may be absent, as is often the case in interactional law. Even a practice of legality may be largely absent, as may be true in state bureaucracies, where internal regulations seem more like general commands, and in dictatorial regimes. Finally, a well-known pathology of legal orders is that there is little congruence between enacted law and interactional norms. In all those situations we may still say that there is law, but that it is lesser law.

Of course, if all those characteristics are missing, there is no law at all. So the question remains: what is minimally necessary in order to characterize a normative order as legal? From the analysis above it will now be clear why we cannot give a general answer to this, let alone suggest a simple cut-off point below which there is no law. Not only would every cut-off point be arbitrary, but it is also true that it is all these characteristics together that justify calling a normative order law, so that various combinations of characteristics in different degrees may be minimally sufficient to call a phenomenon law. Therefore, we cannot construct one universal definition of law, but we may stipulate a definition in light of the purposes for which we need it and the context in which it is to be applied.

This concept of law transcends the opposition between analytical jurisprudence and legal sociology. It incorporates the various characteristics suggested by philosophers as essential for the distinctly legal, but regards them as general rather than as universal traits. They are often present in developed legal orders, in which case they are important for understanding these orders, but they are not universal or essential. It also allows for variation and change, because its conceptual framework allows law to exist in degrees, and it allows elements of the legal order to exist partly and decline or develop.

It can also do justice to the attempts by legal practice and legal doctrinal research to construct law as if it were a static phenomenon. A fully evolved legal order is embedded in a practice of legality, which means that it is oriented towards legal ideals such as legality, justice and legal certainty. Legal certainty can only be provided if law is coherent and does not provide contradictory injunctions. Therefore, it is important for the effective functioning of legal orders that they are modified and reconstructed as much as possible as if they provide a coherent, timeless doctrine, and as if they provide one right answer. Authoritative declarations by judges often provide such a closure, and help the law to work itself pure, the famous dictum Ronald Dworkin derived from the common law (Dworkin 1986: 400). Doctrinal treatises and handbooks similarly provide such a construction as if the law is a coherent static doctrine. So both in practice and in doctrinal research there is a tendency to construct law as timeless or static. Such constructions serve admirable legal and social purposes, but in a legal interactionist perspective they are only temporary and functional sketches of law, which put the variations and changes of law between brackets. As long as the possibilities of change and of unexpected incarnations of law are acknowledged, doctrinal constructions are an important component in making sense of the messy and variable phenomena of law.

7. Pragmatist but not Instrumentalist

The fourth opposition we address is that between instrumentalist and non-instrumentalist views of law. For this opposition, we take our cue from Cotterrell's criticism of law and society scholarship. One of the corollaries of a law and social science perspective has been an instrumental view of

law; at the moment, most visible in law and economics research. However, as Cotterrell argues, the instrumental view of law and society scholars has been implied in the projects of legal sociology: supporting or criticizing government policies by means of evaluation research and being engaged in legal reform. Cotterrell criticizes sociology of law for being 'less concerned to *appreciate* the social (and the legal within it), exploring it in its diversity' (Cotterrell 2008: 21). Tamanaha extends this critique of socio-legal studies to legal scholarship broadly: in many different forms, theories of law presuppose that law is an instrument for extra-legal goals (Tamanaha 2009). These may be the policy goals of governments, the utilitarian preference-satisfaction of law and economics, or the political powerplay that is highlighted in critical legal studies.

This broadly held instrumental view of law subordinates the legal order to external ends, and evaluates law in terms of its contribution to such ends. Legal rules are seen as inducements for particular behaviour or as constraints limiting behaviour. The sociological question that needs to be answered from this perspective is whether legal norms are a successful means to achieve this and what causes there might be for law failing to reach such objectives. The underlying premise of such an instrumental view is that any type of end served by law is generated outside of the legal order. Ideally, possible goals are derived from economic modelling or empirically grounded policy research, after which legal rules are designed (and tested) in order to further these goals. Law, in such a view, is a flexible, substantively empty set of norms that can be tailored and tweaked for any purpose.

Such instrumentalism is most easily argued for from an external perspective on law, held by those who observe the legal order from the outside. Things look different from an internal point of view from within the legal practice (compare Taekema 2011). Although it is possible to work within a legal order with the idea that the norms can be used to further external ends, the more common way to link legal norms and ends is to derive purposes from the legal system itself, by reconstructing underlying purposes from the norms or sets of norms themselves. A good example of this line of reasoning is Dworkin's theory of law, in which legal norms and the political morality underlying them are interpreted as an integral whole (1986). Another is Fuller's theory with its idea of an internal morality of law (1969).[11] In such an internal view, law primarily serves its own intrinsic purposes rather than externally formulated goals. Moreover, law is seen as providing the stability and guarantees that make orderly society possible.

Although legal interactionism is closely related to the Fullerian view of law as answering to its own internal purposes, it acknowledges that both aspects of, what we could call, law's purposiveness are important ways of regarding law that are not necessarily at odds. However, to combine the idea of law as an instrument with law as the guarantee of legal purposes and values, the idea of instrumentalism needs to be refined. For this, the pragmatist strand in legal interactionism can serve as a basis. Pragmatism in its classical form highlights scientific inquiry, i.e., systematically examining conditions and consequences; it is focused on problem-solving, i.e., trying to achieve a particular end; and it stresses the flux, change and adaptability of social life. Most importantly, pragmatism's rejection of the dualism of means and ends counters any easy argument about law as primarily instrumental. The basic idea is that ends should be viewed as ends-in-view, that is, as rather particular and tied to the activity at hand. What is an end in one activity might become a means in another. Ends are therefore not fixed, and neither are means. For law, this implies that it depends on the context whether legal norms appear as means

11 As Kristen Rundle shows, Fuller was concerned about the one-directional reasoning of instrumental views of law (Rundle 2012: 194). He also developed an argument against the divorce of means and ends that owed much to John Dewey's ideas (Fuller 1981/2001: 61–78).

or as ends-in-themselves. Another important point, which also follows from the approach of scientific inquiry as a form of problem-solving experience, is that ends are subject to critical scrutiny and evaluation in a similar way as the instruments used. The tendency to take ends as given (e.g., as preferences) is mistaken from a pragmatist point of view because we should also consider what the consequences are of adopting that particular end. (Dewey 1988: 179) The broad instrumentality involved in problem-solving also applies to law: law is not an instrument for independently determined goals, but a tool to serve a variety of purposes.

Pragmatism provides a subtle picture of the way in which legal norms are instrumental: both the rules and the purposes they serve, should be critically evaluated, not in light of some theory, but in the light of their practical use in changing social circumstances. The ends of law are not fixed, nor are they set by legal officials; they arise in the context of a dynamic social environment. The emphasis placed earlier on change and variation is also relevant here. As Selznick points out, in pragmatist theory both ends and means are instrumental, both are valuable in themselves, and the determination of an end depends on a valuation of the means necessary to achieve it (Selznick 1992: 328). Pragmatism therefore sees law as a tool and as an end itself, at the same time.

Importantly, a pragmatist legal interactionism broadens the range of actors involved in using law as an instrument. Legal instrumentalism in its usual forms sees the goals of law as defined by government or legislature, and law as an instrument to be used by government officials. This is not implied by pragmatism: anyone engaged in the solving of a practical problem in need of a legal solution can use legal norms as tools for decision making. It is a democratic idea: all participants in legal practice can make use of it. This form of pragmatist instrumentalism may add something to an interactionist view: an account of how changes in norms get started, namely by a participant of the practice engaging with a problem and challenging the rules (compare Webber 2006: 177).

For legal interactionism, then, law is instrumental to people's own endeavours in a social context. Such a view of legal instrumentality makes law part of everyday life, and by that token, the social interactions and activities that form the core of everyday practices are primary. In one sense, law is even more pervasively instrumental than in the standard, policy-oriented form of instrumentalism, because law is tied to a variety of goals of various actors. Focusing on the underlying interactions of law makes it possible to include instrumentality as a central way in which people may use norms in their lives. However, it also softens the edges of instrumentalism by rejecting the isolation of ends outside of legal discussion and connecting social ends to legal values. Such a view does not do away with the tension between instrumentalist thinking in current politics and scholarship and a value-oriented interactionist view. It will probably not convince hard-core utilitarians or legal economists. However, it makes it possible to see the enterprise of law as embedded in the purposes of everyday life.

8. Conclusions: Implications for Interdisciplinary Research

Taking our cue from Cotterrell, we believe that legal philosophy, legal sociology and doctrinal legal scholarship can and should be co-workers in order to gain a full understanding of law in all its facets. In order to make cooperation meaningful and fruitful, it is essential to have a common concept of law. Such a concept needs to be broad enough to give room to the various concerns of the three disciplines, and we have argued that legal interactionism can offer such a concept. It can do so because it provides an integrative perspective with regard to the four oppositions we have identified, which can explain the importance of the poles of the opposition while also providing a

basis for linking them. In these concluding remarks, we want to sketch some implications our view has for interdisciplinary research.

By using a legal interactionist concept of law, three different possibilities for cooperation between the disciplines present themselves. Firstly, the disciplines complement each other: they all contribute in different, but necessary ways to understanding law. Although to some this may sound as a matter of course, it is important to realize that as long as legal sociology and legal doctrine each see a different pole of the law-in-the-books/law-in-action opposition as the right way to view law, this bars any understanding of the other discipline as complementary to one's own discipline. Softening this opposition is therefore essential for cooperation, even in the form of only providing complementary insights. However, once the oppositions are seen as parts of a larger interactionist picture, contributing disciplines can recognize that the other discipline may be relatively correct. Although the dynamic character of law as studied by legal sociology must be recognized, it is necessary to provide a static account of law at some point to gain an accurate description of a complex legal problem. As long as this account is complemented by historical and sociological research into the origins and development of law, the reduction implied in the static view of doctrinal law is useful.

Another illustration of complementariness is provided by our analysis of the opposition between instrumentalism and non-instrumentalism. We have argued for a rich, pragmatist understanding of instrumentality in which legal norms can be seen both as means and as ends-in-themselves. Theoretically, these two dimensions can be integrated. However, in a pragmatist approach, it depends on the context whether legal norms appear as means, as ends-in-themselves or as both. The same contextualism holds for researchers engaging in research design: they cannot abstract from a particular research setting. Therefore, it depends on the specific purposes and on the specific context – including disciplinary skills – of a research project which of these understandings is emphasized. In many sociological research projects, a feasible research design may require that legal norms are only regarded as means. Such restrictions are often legitimate for specific research purposes and may provide partial but valuable insights. Similarly, philosophers, lacking empirical research skills, will sometimes legitimately abstract from the instrumentalist dimension of law and focus on the internal morality of law in order to design feasible research projects. Consequently, in real life, philosophical, doctrinal and sociological researchers will often have to choose different but complementary research designs. As long as they recognize that each of these projects only provides partial insights that may complement the results from other disciplines, such a restriction may be perfectly acceptable.

Secondly, and slightly more ambitiously, disciplines can learn from each other: they can mutually correct each other's mistakes. Again, relating the poles of the oppositions helps to achieve this. When legal philosophers are searching for universal characteristics of law, the empirical variations found by legal sociologists may help them to see that the focus on the universal may be traded for a focus on the general, making it possible to acknowledge that some variations may simply be outliers. Providing a general philosophical theory of law that accounts for the majority of legal phenomena may be good enough.

Thirdly, research may attempt to fuse the insights from different disciplines into a synthesis. From the legal interactionist point of view, recognizing the tensions within the four oppositions means that a fusion of disciplines is never completely achievable, but will be partial at best. In practice, this third form of cooperation will be an ideal that is never completely realized. However, as a regulative ideal it is important, because aiming at joint research helps to make the most of the cooperative effort. An illustration where we see possibilities for a partial synthesis can be found in the way legal interactionism bridges the opposition between pluralism and unity through the notion

of relative pluralism. It combines the insights of doctrinal scholars studying the intertwinement of national, regional and international legal orders with the broader ideas of legal sociologists about informal, non-state legal orders. However, in emphasizing relativity and partial intertwinement, it also incorporates the concerns of traditional lawyers and legal philosophers about coherence and unity. This enables us to study variation and gradual change, both within and between legal orders. Although we are only at the start of developing it in relation to multi-level legal orders, this integrative concept of relative pluralism offers promising prospects for a real interdisciplinary study of the emergence of such forms of law.

However difficult cooperation between disciplines may be in practice, engaging with each other's work across disciplinary lines is necessary for theory development, for understanding law in context and for engaging with law normatively. Of equal importance, in our view, is what it brings us, and demands of us, as researchers: learning to see things differently, realizing what are the flaws and blind spots of our own perspective, and really trying to incorporate what others do to create something new.

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