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ARTICLE

Legal Philosophy as an Enrichment of Doctrinal Research – Part II: The Purposes of Including Legal Philosophy*

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Abstract

Many doctrinal legal research questions require making use of other academic disciplines or perspectives. This article explains the relevance of legal philosophy for doctrinal research projects. Often legal research questions have conceptual or evaluative dimensions that presuppose philosophical understanding. For research on the concept of democracy, the function of constitutional rights, or the possible introduction of a referendum in the Netherlands, questions of a philosophical nature need to be answered. Legal philosophy can supplement and enrich doctrinal research in various ways. In this article, we present seven purposes that legal philosophy may serve in the context of a doctrinal research project: conceptual clarification, exposition and reconstruction of fundamental normative principles and values, theory building, providing creative perspectives, structural critiques, evaluation, and recommendations. For each objective, we illustrate how to use relevant philosophical methods. Thus, this article complements our earlier publication 'Legal Philosophy as an Enrichment of Doctrinal Research – Part I: Introducing Three Philosophical Methods'.[1]

Keywords: legal philosophy, research methods, interdisciplinary research, conceptual analysis.

1. Introduction

This article is primarily aimed at legal scholars and law students without philosophical training. Its central thesis is that a philosophical component may often

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1 http://www.lawandmethod.nl/tijdschrift/lawandmethod/2020/01/lawandmethod-D-19-00006.

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enrich doctrinal research.[2] In some types of doctrinal research, legal philosophy can hardly be avoided. Often legal research questions have conceptual or evaluative dimensions that presuppose philosophical understanding. For research on the concept of democracy, the function of constitutional rights, or the possible introduction of a referendum in the Netherlands, questions of a philosophical nature need to be answered. This is also true when we want to study, for example, the distribution of decision-making powers among the various stakeholders in a company and how this distribution could be improved. For most doctrinal subjects, a philosophical dimension can be useful and provide more depth to the research. Although there may be good reasons to limit a philosophical component in one's research, such as the time or word limit of a project or article, our discussion here is purely content-driven. We investigate what are good reasons to include a philosophical dimension in order to complete a doctrinal legal argument.

Legal philosophy can supplement and enrich doctrinal research in various ways. In this article, we present seven purposes that legal philosophy may serve in the context of a doctrinal research project: conceptual clarification, exposition and reconstruction of fundamental normative principles and values, theory building, providing creative perspectives, structural critiques, evaluation, and recommendations.[3] For each purpose, we illustrate how to use relevant philosophical methods. These purposes partly overlap, and in actual research projects they are often combined. For example, in order to provide a conceptual clarification of democracy, we often need to discuss its fundamental principles and values, and the result is often a more or less elaborate theory. We may then also try to look at our domestic democratic order from a creative perspective, provide critiques and evaluations and give recommendations how to improve it. Even so, it is helpful to distinguish these purposes.

In this article, we consider what legal philosophy can add to doctrinal research, leaving aside interdisciplinary work with more disciplines. To avoid misunderstanding: we do not claim that legal philosophy is merely an auxiliary discipline to doctrinal research.[4] Certainly not. Legal philosophy can have many purposes, and it is an independent discipline in its own right. There are countless texts on legal philosophy, its purposes and its methods (e.g. Coleman, Himma & Shapiro, 2002; Giudice, Waluchow & Del Mar, 2017; Patterson, 2010). However, this article is addressed to doctrinal scholars who consider including philosophical analysis in a primarily doctrinal research project. We argue that this is often justified and feasible, even without philosophical training. The decision on whether to include a philosophical analysis in a doctrinal project should be made on the basis of the central research question. If that question raises issues touching on one or more of the purposes sketched below, a philosophical component should be considered. The extent of the philosophical analysis depends on the relative importance of the phil-

2 For doctrinal research, see Salter and Mason (2007) and Kestemont (2018).

3 Of course, other purposes could have been included. Our selection is based mainly on a combination of what seems most relevant to doctrinal researchers and most feasible for lawyers without a full philosophical training.

4 For a discussion of different forms of interdisciplinarity, see Taekema and Van Klink (2011).

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osophical subquestion in the larger project and, of course, also on available time and resources.

In the following text, we begin with a short discussion of philosophical methods (Section 2). Then we discuss each of the seven purposes in separate sections: conceptual clarification (Section 3), exposition and reconstruction of fundamental normative principles and values (Section 4), theory building (Section 5), providing creative perspectives (Section 6), structural critiques (Section 7), evaluation (Section 8) and recommendations (Section 9). Each of these seven sections has a similar structure. We discuss first the purpose and then the (combination of) methods needed to realize it, and illustrate this throughout with many examples. In order to show that legal philosophy can be relevant for all doctrinal research, we give examples from various fields of law. The discussion of conceptual clarification in Section 3 is quite extensive, not only because we illustrate it with an elaborate example, but also because many general remarks we make there need not be repeated every time. We end with a short conclusion (Section 10).

2. Three Philosophical Methods

In a previous article, we discussed the nature of legal philosophy and three philosophical methods that might be relevant and feasible for doctrinal scholars.[5] These three methods are argumentation analysis, author analysis and reflective equilibrium. In this section, we give a very brief explanation of these methods; for a more elaborate discussion, we refer you to the previous article.

Argumentation analysis is the critical analysis of arguments and argumentations. It consists of three steps. The first is making an inventory or list, mapping all the arguments pro and contra a certain point of view and checking if there are arguments missing in the debate. The second step is an analysis of the separate arguments: are they sound and convincing? The third step is the analysis of the argumentation as a whole: is the argumentation sound and convincing? Argumentation analysis may help to uncover the (implicit) philosophical assumptions in legal research and practice, and it may provide philosophical counterarguments to legal statements.

Author analysis is the critical analysis of the work of one or more authors. In philosophy, we can stand on the shoulders of other scholars who have extensively reflected on certain issues and have come up with interesting ideas. A good starting point for analysis of certain issues is usually the study of other authors. We study certain authors and the critical literature on their work, and adopt their ideas if we find them plausible and well argued. Or we use the criticisms on those ideas to develop better ideas ourselves. In the end, it is not the authority of the authors that counts, but the plausibility and strength of their analyses and arguments.

Reflective equilibrium is a method in which we collect a set of plausible beliefs, confront them with each other to test, partly reject and refine them, until we have constructed a coherent theory. For example, we are strongly confident of our be-

5 Taekema and Van der Burg (2020). Some small fragments from this article have been included in the present one.

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liefs that citizens who earn more should also pay more taxes, and that citizens who cannot work for reasons of age or illness should get adequate state support rather than be left to die on the streets. Such beliefs are called considered judgements. They can be both general principles, like the two earlier examples, or very concrete judgements, like the belief regarding a concrete case that it is unjust to deny a woman dying of cancer full unemployment benefits, because she had not yet worked long enough.[6] We combine these considered judgements with knowledge about relevant facts and empirical theories, and knowledge about the legal order, and try to work out a coherent theory about, for example, a more just tax and social security system. We go back and forth between those various elements, and reflect on how to resolve the inconsistencies until we have a coherent set of judgements: an equilibrium. In the next section, we will illustrate how this method can be used.

In actual research projects, these three methods are usually combined, as illustrated in the following discussions. We should make one final remark about philosophical methods. There is a difference between the context of discovery and the context of justification and presentation. The process of discovery in which we reach an adequate understanding of an author or a full mastery of all arguments pro and con, can sometimes be partly unsystematic, as there is a subjective and creative dimension to this process. This process does not need to be reported in full. Similarly, we do not need to include all considered judgements and relevant facts that were the starting points of the process of reflective equilibrium. In the text for publication, the central task is to present the results of these processes and to justify them with good arguments, which is a selective process. It is like reporting on case law in a doctrinal chapter: we do not discuss all the cases that were studied (which would be repetitive and uninteresting for the reader), but select only the most relevant. While all cases had to be studied, the presentation can be limited to what is relevant for the argument. In philosophical research it works the same way: many elements and arguments that may have been essential in the process leading up to a coherent theory can be left aside in the presentation in order to focus on the most relevant points.

3. Conceptual Clarification

Legal philosophers often aim to clarify the meaning of central concepts. What is meant by justice or privacy? How should we define corporation or liability? Legal scholars usually answer these questions on the basis of legal sources. However, sometimes philosophical methods may be warranted, for example, if we need to develop new interpretations, try to reveal implicit or conflicting definitions, or want to go beyond positive law in order to criticize it.

The purpose of conceptual analysis is to provide a more or less elaborate conception or interpretation of the concept.[7] A conception may be very concise and consist of little more than a definition. If it is more substantive, a conception may

6 Rechtbank Arnhem 9 November 2021, ECLI:NL:RBGEL:2021:5972.

7 We use the distinction made by Rawls and Dworkin between concept and conception (Dworkin, 1978, pp. 134-136).

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become a full theory. The distinction between definition and theory is gradual: the more elaborate the definition of a concept and the more elaborate the explanation of the definition, the more definition shades into theory. This shows that there is a continuum between the purposes of conceptual clarification and theory building rather than a strict distinction. A full conception will often also include a coherent explanation and justification of the definition in terms of the underlying values and principles.[8] In that case, conceptual clarification shades into the purpose of reconstruction of fundamental normative principles and values.

Suppose we study the case law of the European Court of Human Rights on Article 10 of the European Convention on Human Rights (ECHR). We want to determine whether the Court's margin of appreciation allowing states to pose restrictions is too broad, especially regarding the question whether a restriction on a right is 'necessary in a democratic society'. To assess this question, we need to determine what a democratic society is. Staying within the confines of doctrinal sources probably does not give enough information for an answer. The Court itself may be vague about the concept of a 'democratic society' (Gerards, 2013; McHarg, 1999, p. 672) and doctrinal scholars may focus on the cases rather than on the general concept (Marks, 1996). Moreover, to answer this question, it is not enough to study case law – after all, we want to evaluate it. To remedy this, we may formulate a legal philosophical subquestion to the primarily doctrinal research: 'What is the best conception of democracy to underpin – or criticize – the reasoning of the Court?' Philosophical theories of democracy may then provide valuable insights.[9]

1. The first step in conceptual clarification is making an *inventory*: collecting different conceptions of democracy. We can include materials from legal sources; for example, although the ECtHR does not define the concept of a democratic society, it suggests some essential elements, such as freedom of expression and tolerance (McHarg, 1999, p. 686). However, for a fuller understanding of the concept, appealing to philosophical theories is often necessary.[10] A good start is to search libraries, Google Scholar and other scientific databases with terms such as 'democracy', 'concept of democracy', 'definition of democracy'. The search results can then be focused by searching for philosophical texts. To become acquainted with the most influential philosophers on a topic, it is useful to check encyclopaedias or research companions.[11] If a researcher masters different languages, searching not just for English terms but also for similar words in other languages is advisable. Literature sometimes offers explicit definitions but also useful examples or indications of essential elements, such as universal suffrage and an open public debate.

8 Sometimes, conceptual analysis will be inconclusive, as we see no conclusive reasons to choose between the remaining definitions and elements. This is also a valuable outcome. Returning to the ECtHR, we may find that in some decisions the ECtHR implicitly relied on definition A, and in other cases on definition B, and that we can explain an inconsistency or tension in the case law by this conceptual distinction.

9 The method described here is broadly the same method that one of the authors used in his PhD dissertation on democracy (Van der Burg, 1991).

10 McHarg (1999) is a good example of how this can be done; he considers philosophical theories of the public interest and uses Dworkin's theory as a basis for his argument about the ECtHR.

11 Useful online encyclopaedias are the Stanford Encyclopedia of Philosophy (https://plato.stanford.edu/) and the Internet Encyclopedia of Philosophy (https://iep.utm.edu/).

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At some point, we notice that additional texts largely repeat insights and suggestions of texts found earlier. A further search will probably not provide additional insights and suggestions.[12] This process may result in an inventory: a *long list* of possible definitions and elements of democracy.

2. The next step is *to make a selection, or a short list*, of plausible definitions and elements. In making such a selection, it is advisable to use existing categorizations. Overviews of the literature may compare different definitions and thus provide a starting point for a short list (e.g. Held, 2006). For example, some authors may reject the definition 'democracy is government based on the will of the people' as too indeterminate because 'the people's will' is a fiction in current pluralistic societies (e.g. Connolly, 1995; Näsström, 2007). Even so, an important insight to retain from this definition is that there should be some popular input. This way it is possible to assess all definitions, to select some and refine them. Each of the remaining definitions will have some plausibility but may also have its defects. We can make a short list of definitions and also of possible elements of a definition.[13] Some elements on that short list may be widely shared; others may be controversial but plausible and deserve a more extensive study.

At this stage, it is possible to construct a provisional definition based on widely shared elements. It may become apparent, for instance, that almost all theories assume that democracy is a decision-making procedure based on the majority principle in which all citizens can participate. Additionally, some theories supplement these three elements with political rights that are essential to democratic processes, such as suffrage and free speech.[14] These insights enable the construction of the following provisional definition:

> Democracy is 1. a political decision-making procedure, in which 2. all citizens have an equal vote, 3. decisions are based on a majority principle, and 4. political rights essential to democratic processes are guaranteed.[15]

However, there are also authors suggesting two additional components of democracy, namely, the rule of law and the protection of all human rights, such as freedom of religion.[16] Although they provide plausible arguments, we noticed that both suggestions are controversial. Therefore, in the next step, we may want to investigate whether the arguments to include them are convincing.

3. The next step consists of *revision and refinement* of the provisional definition. Here, the method of reflective equilibrium may be used. This involves testing the definition or elements against considered judgements with regard to democracy, such as 'a one-party state is not a democracy', 'free and pluralist media are crucial to a democracy'. In addition, it is useful to add judgements about what is *un*democratic, such as banning newspapers, and making it more difficult for minorities to

12 In empirical research, this is known as *the saturation principle* (Morse, 1995).
13 Whether we focus on a list of elements or a list of definitions may depend on whether the suggested elements and definitions seem mutually exclusive or rather complementary.
14 See Ely (1981).
15 For a more extensive description, see Van der Burg (1991, p. 59).
16 Dworkin (1985, pp. 57-69).

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participate in elections.[17] We may include other elements in the revision process, such as the meaning in ordinary language, social and political traditions in the relevant societies, and legal sources and authoritative legal treatises. Additionally, empirical insights on how democratic states actually function may be relevant. Some theories assume that people vote on the basis of rational self-interest, but if empirical research shows this to be false, that could be a reason to reject those theories (Druckman & Lupia, 2000). Even so, we could still conclude that the empirical data are inconclusive for a normative view on democracy – after all, people and societies may change.[18]

In short, we collect as many insights, facts and concrete and general considered judgements as possible to test our provisional definition and short list of elements. Sometimes this will lead to revisions and refinements, or even to rejections of certain definitions or elements. For example, we may have a strong considered judgement that persecution of religious and ethnic minorities is inconsistent with democracy but our provisional definition of democracy only includes procedural rights such as free speech. The revision process can then go both ways: we may broaden our provisional definition to include all human rights, but we may also conclude that our considered judgement is not sound after all and should be rejected.[19] We go back and forth between considered judgements, facts, and provisional definitions and elements until we have constructed an acceptable definition based on a coherent set.

These three steps may result in an elaborate conception. We should assess the adequacy of a conception on the basis of four standards: (1) fit, (2) robustness, (3) justification and (4) usefulness.[20]

First, the result of the analysis has to *fit*, that is, to *match the considered judgements*, both on concrete cases and on general principles and values. Free elections and free speech are essential elements of democracy; a conception has to account for these. Dictatorship and one-party states are incompatible with democracy; therefore, conceptions should be able to exclude these. The Netherlands and the United Kingdom are democracies, but with different constitutions; a conception has to include both, but exclude countries such as Saudi Arabia. Russia is controversial: some will say it is at least partially democratic; others will contest this. A conceptual clarification should be able to explain the nature of this disagreement.

17 It is possible that in doing this, we reach the conclusion that some considered judgements or paradigm cases are not as unambiguous as we believed, and even have to be rejected. Classic Athens is seen as the cradle of democracy, but women and slaves did not have political rights. Perhaps we have to accept that Athens was not a full democracy after all, even though it did have some core democratic features.

18 Cf. Carole Pateman's critique on Dahl and Schumpeter. She argues that we can educate citizens to internalize democratic attitudes and thus change how our democracies actually function (Pateman, 1970).

19 Note that we are discussing here only the conceptual question whether human rights are part of the best definition of democracy. Whether human rights are justifiable is a different question. It is possible to defend human rights, without accepting that they are part of the concept of democracy.

20 Two of these criteria are similar to Dworkin's criteria of fit and justification for legal interpretation (Dworkin, 1978). Robustness is especially important in the context of theory building; if possible, scientific theories should be generalizable over a wide range. Usefulness accounts for the fact that different definitions may be useful in different contexts and for different purposes.

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Second, a conception must be *robust*: it should apply to the widest possible domain. A conception of democracy is insufficiently robust when it only applies to the Dutch state. Out of two competing conceptions, we should choose the more robust version. For example, one conception only applies to states, whereas the more robust one can also be used in contexts like university democracy and the European Union. A robust conception should also be able to handle future developments.

Third, a conception needs to be *substantively justified*. Many concepts refer to an underlying goal, principle or ideal. In order to choose between alternative conceptions of democracy, we have to refer to the ideas behind the concept, the values and ideals on which democracy is based. There are also philosophers who argue that substantive justification can never be part of a purely conceptual clarification, but we find their arguments unconvincing.[21] When analysing normative concepts such as democracy, it is necessary to link the concept to other normative ideas and justify and elaborate it in light of these.

Fourth, a conception must be *useful*. It must be able to serve our purposes in a specific context. A definition of democracy used to analyse ECtHR case law may emphasize different elements than the definition used in monitoring democratic elections in the context of observation missions of the Organization for Security and Co-operation in Europe (OSCE) . The latter must be operationalized in terms of empirically verifiable criteria, whereas the former may focus on more abstract values and principles.

This point about context underscores the remark we made earlier about the extent to which extensive philosophical research is necessary in a doctrinal project. Here, we have sketched an extensive approach, but in many cases it will be sufficient to rely on existing definitions and to compare the most influential ones in light of the research context. Time constraints and the relative importance of the philosophical component in the research may be good reasons to forego a lengthy reflective equilibrium process.

4. Exposition and Reconstruction of Fundamental Normative Principles and Values

For many legal topics, we can ask 'why' questions. Why do we have democracy and rule of law (Tamanaha, 2004)? Why is a corporation organized in a way that shareholders have the most power (Stout, 2007)? Why is private property regarded as a basic right in private law (Waldron, 1990)? Such questions aim to uncover the normative justifications of legal arrangements and principles. 'Why' questions can also be empirical and aim at historical or sociological explanations. Why does Sweden have an extensive right to paid parental leave (Almqvist, Sandberg & Dahlgren, 2011)? Why is Dutch administrative adjudication only partly integrated in the standard judicial organization (De Poorter, Hirsch Ballin & Lavrijssen, 2019)? Such questions require different disciplines than philosophy.

21 This links to the debate on purely descriptive or conceptual theorizing in legal philosophy; for discussion, see Himma (2015).

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However, if we are interested in the justifications of a legal principle or arrangement, we ask normative 'why' questions. Sometimes it is inevitable to address such fundamental questions. To answer the question whether a restriction of free speech is necessary and proportional in a democratic society, we first have to know why democracy and freedom of speech are valuable and how they are related. These underlying justifications are often not explicitly formulated. Philosophers can make these implicit backgrounds explicit and expose the underlying normative justifications. *Exposition*, as used here, can be seen as a systematic presentation of all justifications for the law, including the implicit ones.

Often there is reason to go beyond this basic normative exposition. The implicit normative justifications may be incomplete and controversial or even internally contradictory. Frequently, when a law is introduced or a case is decided, an explicit formulation of the normative justifications is absent. This may be because the law or decision is a compromise between political groups or judges with different ideologies. In addition to differences in opinion at the time the law was created, social views and circumstances may have changed; these changes are sometimes so radical that the original arguments for the law no longer apply. In such situations, scholars can present the best possible *reconstruction* of the normative justifications for the legal order. A reconstruction explicitly identifies the inconsistencies and tensions between various principles and values, and may suggest how those tensions can be resolved.[22]

For example, most Western legal orders protect animals against cruelty but do not recognize animal rights. A reconstruction can therefore include a principle of protecting animal welfare to explain and justify current animal law, but it cannot (yet?) include animal rights as a fundamental legal principle. Even so, the fact that a legal order does not recognize animal rights could be an issue of fundamental critique (see Section 6) and give rise to recommendations that these rights should be recognized as fundamental principles (Section 8).

For exposition of fundamental normative principles and values, legal sources (including sources such as parliamentary proceedings) will usually suffice. A reconstruction requires more extensive literature research and author analysis. Imagine a doctrinal research project about responsibility of private property owners for environmental sustainability. In this context, a question may arise concerning the normative justifications for the right to private property. A first step is to search for authors that provide arguments for private property. Starting with a legal philosophy text by Jeremy Waldron (1990), it becomes apparent that there are certain philosophers whose ideas have influenced the debate for centuries: Locke, Bentham, Kant and Hegel. With the help of secondary literature, it is possible to summarize their main ideas and argue that these are linked to general moral theories of individual rights in society (Lehavi, 2012). It turns out that there is also a debate whether property is a natural right or a right derived from the constitution of a political order (Mack, 2010; Singer, 2013). Depending on the purpose of the broad-

22 The distinction between exposition and reconstruction is a gradual one and varies with fundamental philosophical theories. A Dworkinian constructivist would possibly formulate the distinction differently than a positivist (compare Dworkin, 1986). As this discussion is not crucial to our essay, we leave it aside.

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er research, it may be interesting to highlight one of the debates because it frames the central research question more clearly.

Thereafter we should further analyse the arguments in these theories. Are the arguments sound and plausible? Are they really core arguments, necessary and sufficient for justifying, or are they merely subsidiary? Individual autonomy is an argument for recognizing private property as a natural right, but there are important alternative justifications based on economic or social-contract arguments (Ryan, 1984). We can apply argumentation analysis to each of these arguments. We could, for example, argue that the concept of autonomy is a problematic justification from a moral point of view and therefore should not be used as a fundamental justification of private property; we can, however, use other principles such as responsibility, distributive justice and basic needs.

In this reconstruction, we could use the method of reflective equilibrium again. Whereas in exposition, requirements of fit are predominant, in reconstruction, requirements of justification and especially robustness play a larger role. While doing reconstruction, we are less bound by traditions and positive law. Marriage used to be seen as a commitment of husband and wife; this was also Dutch law up until 2001. Stating that this restriction was not supported by good philosophical arguments, and therefore matrimonial law should acknowledge a marriage between two men or two women, was not a good exposition of the basic principles of Dutch family law in 1990. There was not enough fit. However, reconstruction can be more critical towards positive law. Even in 1990, researchers could have argued that the principle of equality is fundamental for Dutch law and therefore, there was a strong – even if not yet conclusive – argument for allowing marriage for same-sex couples. A reconstruction might then have shown a tension between different fundamental principles of the Dutch legal order, even if the equality principle was not yet deemed weighty enough at the time to justify a judicial decision to allow marriage between same-sex couples.

5. Theory Building

What does a fair tax system look like? What is the best way to organize the decision-making processes in a corporation (O'Riordan, 2017; Sacconi, Blair, Freeman & Vercelli, 2011)? How should liability for damage by artificial intelligence be organized (Sullivan & Schweikart, 2019)? Questions like these cannot be answered with a few sentences or principles; they require a more elaborate answer, a theory. A theory is a coherent and relatively complete set of propositions on a certain subject. It includes answers to both general and more concrete questions, such as: does a referendum fit in a representative democracy, and if so, what kind of referendum? How should we realize workers' influence in companies? Why and how do we hold persons liable for damage? In formulating and interpreting fundamental concepts, values and principles, we are already developing an elementary theory. The distinction between this and the first two purposes is therefore only gradual.

Developing a novel theory in the context of a limited doctrinal project is usually unrealistic and unnecessarily ambitious. It is often possible to start with an existing theory, study it extensively and reconstruct it. Therefore, the primary meth-

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od for theory building is author analysis. The publications of academic philosophers are usually a good starting point, which themselves usually start with mapping the available literature. Frequently, they will conclude that there is already a good theory and that they do not have anything substantial to add. Even in those cases, philosophers can still interpret the theory, partly reconstruct it in light of new contexts and apply it to concrete issues.

Because of lack of time, researchers will often focus on the theory of one author. This can be legitimate, but we do have to justify the choice for the particular theory and the focus on this specific author. We must also analyse critically whether the theory is applicable to the specific subject of our research project. For instance, many legal scholars now consider what the development of artificial intelligence (AI) means for legal systems. An important question, which first arose in relation to self-driving cars, is how to organize liability for AI (Schellekens, 2015). Because AI is self-learning, it is not obvious that the producer or the owner of the car is liable. AI thus makes it necessary to study the theory behind tort liability. A starting point for this could be the philosophy of tort law that uses the idea of corrective justice to justify liability (Owen, 1995; Weinrib, 2012). In this case, there is specific philosophical literature addressing the theory of liability that can be used.

Sometimes mere interpretation and application is not enough. Maybe the author has not written anything on the specific subject. For example, Ronald Dworkin never applied his theories of law and rights explicitly to the European Union or the ECHR; yet the central ideas could be highly relevant. John Stuart Mill never considered online disinformation in his theory of free speech, but his ideas on an open exchange of ideas could be valuable (Mill, 2015, Ch. 2). If we believe that an older theory offers a good general framework, we must reconstruct the theory in light of these new contexts and phenomena. Sometimes there is already secondary literature that does this. For instance, some European legal philosophers have applied Dworkin's theory to the ECHR (e.g. Letsas, 2004). If there are no secondary sources, we can use the method of reflective equilibrium. We select highly plausible core elements from the older theory; these can function as considered judgements. We add factual information about specific problems and contexts, additional considered judgements with regard to these, and so on, and then we go back and forth until we have reached a new equilibrium, resulting in a revised theory.

Sometimes, there are multiple authors that provide useful ideas that can complement and correct each other. Then we may be able to develop our own theory by combining elements from different theories. We analyse arguments for and against each theory to decide which elements from which theories to retain and which to discard. Again, we can use the method of reflective equilibrium: the choice for certain elements has to be made in light of concrete empirical and legal contexts by going back and forth between considered judgements and the relevant facts.

6. Providing Creative Perspectives

Sometimes the best approach to a doctrinal problem requires thinking outside the box: a radically different way of understanding it or a novel idea to solve it. How should the law – and which law! – deal with the use of algorithms by Facebook and

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Google? Who should bear the costs of removing the plastic soup in the oceans? For doctrinal scholars, this may be a difficult challenge, as they are trained and socialized to stick to the legal framework, to think like a lawyer. How can we learn to think outside the box, when we are so strongly embedded in legal doctrine?

There are many possible approaches here, and it depends on the researcher and on the topic studied which approach is to be chosen. A familiar approach is that of comparative law.[23] Comparative law may help us to look at our own legal order from a different perspective; namely, that of foreign legal orders. It may also help to get creative ideas; solutions that have emerged in other legal orders may also be useful for our own legal order. Law and literature or, broader, law and the arts is another approach to stimulate creative thinking and perhaps find novel solutions to the problems of our own legal order.[24] Science fiction such as Star Trek may present challenging fictive cases and images of different legal orders.[25]

Philosophy is also a good approach to promote creativity. Many philosophers have constructed theories for an ideal society and reflected on how such a society could be organized and what role law should play.[26] This may both stimulate critical thinking about our own society, as well as suggest solutions to actual problems. Philosophers also often invent challenging fictitious cases and reflect on what they tell us about our moral intuitions and theories.[27] A type of comparison that may be extremely productive for legal researchers is looking at ethics (or moral philosophy).[28] Law and morality have much in common, and the same holds for the disciplines that study them. Reflecting carefully on the differences between both disciplines and studying ethical theories and case studies may help lawyers to reflect creatively on law.[29]

Turning to philosophy may provide novel insights, but it may also help to improve creative and critical thinking. Philosophical analysis is often highly abstract, complex and technical, and requires complex systematic thinking. This skill is also important in doctrinal analysis. In our experience, studying difficult philosophical texts is a good way to train systematic and creative thinking. This may be especially helpful if we need to go beyond doctrine, and not only suggest novel ideas but also think systematically about their implications.

23 See, in general Reimann and Zimmermann (2019) or Siems (2018), handbooks for single disciplines (e.g. Dubber & Heller, 2020; Rosenfeld & Sajó, 2017), or on methodology (Monateri, 2014).

24 See, in general, Ward (2008) and for more recent contributions Anker and Meyler (2017), Dolin (2018) or Gaakeer (2019).

25 Barad with Robertson (2000).

26 For example, Rawls (1971).

27 Famous examples in ethics are Jim and the Indians (Smart & Williams, 1973) and the trolley problem (Thomson, 1976). A number of interesting cases can be found on www.philosophyexperiments.com. Some of these have been derived from actual legal cases, like the Dudley case. The legal theorist Lon Fuller has also invented a number of challenging cases, such as the case of the speluncean explorers (republished in Suber, 1998) and the grudge informer (Fuller, 1969).

28 Van der Burg (2011).

29 For example, Tjong Tjin Tai (2011) confronts ethical and legal approach to duties of care.

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7. Structural Critiques

Doctrinal research is often more than mere exposition: it also involves critical analysis. The basis for these criticisms is often formed by the basic principles, values and theories discussed in Sections 3 and 4, but there can also be more fundamental forms of critique. Some critiques do not merely criticize elements of the legal order but focus on more structural biases. The most famous (or infamous) approaches are, of course, the various strands of Marxist critique of the capitalist legal order (Hunt, 2010; Tushnet, 1983). Other critical approaches are those based on authors such as Foucault and Habermas (Baxter, 2011; Foucault, 1995; Habermas, 2018; Turkel, 1990), or on feminist legal theory (Levit & Verchick, 2016; Olsen, 1995), queer theory (Fineman, Jackson & Romero, 2016; Valdes, 1995) and critical race theory (Delgado & Stefancic, 2017; Long, 2018). In the United States, various critical approaches are grouped together under the heading of Critical Legal Studies (Kelman, 1990; Christodoulidis, Dukes & Goldoni, 2019; Unger, 2015).

Within those theories, it is important to distinguish between critical analysis and suggestions for change. We can accept important insights from the former without being committed to the corresponding reform or even revolutionary agenda. Legal scholars should study critical theories to get different perspectives on law, but even if they are convinced of (parts of) the analysis, that does not imply that they should also support the political reform stances suggested by some authors. It can be highly illuminating to use such critical perspectives on law, to expose and better understand dimensions of law that usually cannot easily be illuminated by standard doctrinal research. How to translate critique back to doctrinal understandings of law, or to an actual reform agenda, is a complex theme, to be discussed under Section 8. Certainly, transforming a critical analysis into practical recommendations is not always necessary. Sometimes it is sufficient to think critically of the legal order and to focus on providing the arguments for wholesale critique.

There are many different critical theories. Which perspectives are most helpful depends on the topic. For socio-economic topics such as labour law and company law, Marxist perspectives (and everything inspired by it) may be helpful. For family law, queer and feminist perspectives are the most obvious. Even so, Marxist approaches can also be relevant for family law, and feminist perspectives for company law. In our view, there are many perspectives that can give us partial insights in the complex and multidimensional phenomenon called law. The most important challenge for doctrinal scholars may be to choose among the theories, assess whether they are plausible and see whether the usually very abstract categories and technical language make sense and can be applied to the topic they are interested in. This may require a lot of effort and time. The risk of amateurism is high here, so it is usually advisable to consult philosophers who have studied these theories, to check whether we have understood them well or only have a superficial or distorted understanding.

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8. Evaluation[30]

Is the income tax system fair? Is the current power distribution in a corporation good? Do the advantages of a bill reforming criminal procedure outweigh the disadvantages? Sometimes these questions are the core of a research project, but in many theses and dissertations, they are only discussed in the final chapter, after the main research with a more doctrinal or empirical character.

Evaluation requires evaluation criteria.[31] Some of these criteria are internal to law, such as the basic principles of the legal order or consistency. Such an evaluation can be executed by doctrinal researchers. Other criteria refer to the effects of law in society, for example, whether the law is accepted and enforced. For assessing this, empirical research is needed. Finally, there are criteria that directly refer to values such as justice or the rule of law. For clarification of such values and evaluation in light of them, legal philosophy is needed.

In scholarly work, evaluations should be based on arguments. The obvious method here is argumentation analysis, starting with an inventory of the arguments on the quality of, for example a statute, a judicial decision or a bill. If we have done doctrinal or empirical research, this has probably already resulted in a number of relevant insights, but we may want to supplement them with additional arguments. In order to do so, we should reflect about the possible relevance of other insights for a comprehensive evaluation of our research topic.

There are three clusters of relevant arguments. The first cluster is of an internal legal nature. Does a new legal rule fit into the system of the law; is it consistent with other laws, treaties or fundamental principles like the rule of law? Is the formulation of the rule clear and understandable; are the legal arguments for the decision sound and plausible? Doctrinal research can answer some of these questions, but to determine whether a statutory rule conflicts with legal principles or underlying values we have to specify the meaning of these values and principles. Merely stating that a bill against terrorism introducing broad powers to the government conflicts with the rule of law is too vague; we must specify in which respects it violates the rule of law and which understanding of the rule of law is the basis for this assessment. To do this, we need an elaborate theory of the rule of law.

The second cluster of arguments refers to social reality. What are the effects of a law? Is there enough support for a bill, among the population, but also among the direct stakeholders and those who have to implement and enforce the law? Is effective enforcement possible? The answer to these questions usually requires empirical research, or at least a literature study of empirical studies on similar phenomena, to deduce plausible hypotheses for our subject.

The third cluster of arguments refers directly to fundamental normative principles and values such as justice or privacy. That is the domain of normative legal philosophy. Sometimes only philosophical analysis is required to justify certain conclusions. Based on a philosophical analysis of equality, we can demonstrate that

30 For a more elaborate analysis of evaluation and normative recommendations as aims of legal research, and for further references, see Van der Burg (2019).

31 Such criteria are often derived from a normative framework, see Taekema (2018).

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excluding same-sex couples from marriage is unjust. However, in most cases, we must support a theoretical analysis with empirical data or legal arguments. In order to assess a tax law, we usually need quite detailed knowledge not only of the effects of specific rules but especially of the combination of those rules, that is, of how the tax law system as a system affects specific groups. Perhaps, at first glance, a very progressive tax rate seems unfair for the highest income groups, but this is often compensated because those groups make more use of tax deductions. Thus, a good evaluation usually needs more than arguments derived from only one of the three clusters. The clusters complement each other.

A complete evaluation takes all relevant evaluation criteria into account and weighs them against each other. For a comprehensive evaluation we need a philosophical analysis about which criterion is most important in the specific context. This presupposes a comprehensive theory on how the different values and interests that are at stake relate to each other, both in general and in a specific case.

Of course, such a comprehensive evaluation is often unfeasible. An acceptable alternative is a partial evaluation, also called *pro tanto*. A partial evaluation evaluates the research subject in the light of one or two specific values or principles. For instance, doctrinal research may have demonstrated that a proposed new investigative method in criminal prosecutions would violate the fundamental right to a fair trial; the *pro tanto* evaluation merely holds that the bill conflicts with this fundamental right, and therefore should be rejected.

In a *pro tanto* evaluation, we should explicitly justify our choices and note their restrictions and implicit biases. Insufficiently justified general conclusions should be avoided. On the basis of a *pro tanto* evaluation using only one evaluation criterion, we cannot conclude that a law is defective as such. At most, we can state that the law is unjust with regard to the specific criteria used and that further research is necessary for a comprehensive evaluation. However, in doctrinal research, a *pro tanto* evaluation can sometimes suffice. If we have convincingly demonstrated that a statute conflicts with European Union law or with a fundamental right included in the ECHR, we can conclude that the law is invalid – for such a judgement, additional philosophical or empirical studies are not necessary.

9. Recommendations

Legal research frequently concludes with recommendations for reform. Our research may have identified specific problems. How can they be solved; how can we improve the law? Maybe we should change the law with regard to organ transplants, referenda, the liability of board members of companies or whatever the subject of the research project was. If possible, this general statement should be made more concrete with detailed suggestions for reform. Interdisciplinary research is often advisable when making recommendations. How much we should include depends on the research questions: do we only aim to improve the legal system from an internal doctrinal point of view, or do we also want to make broader recommendations? Justifying a recommendation for legal reform may require an analysis whether a recommendation fits in the system of positive law (a doctrinal question), whether there is sufficient popular support for the recommendation

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(a sociological question), whether it is likely to be effective (also a sociological question) and whether the expected advantages outweigh the negative effects, which requires reflection on the underlying values (a philosophical question).

Before proposing possible solutions, we must analyse the problem thoroughly and formulate it as precisely as possible. This may require conceptual clarification, as well as an analysis of the arguments why something is perceived as a problem. A good specification of the problem and a good literature review often already point to possible solutions. Usually, there are multiple alternative solutions to choose from; these solutions can sometimes supplement each other, but they may also contradict each other. Most importantly, it may be necessary to think outside the box.

Here, the method of argumentation analysis may be used with an extra preliminary step. We should start with creative reflection to draw up a *long list* of possible solutions. We scan each of the alternatives superficially and eliminate some of them. Maybe there is not enough political or popular support for the suggested solution, maybe it will be difficult to enforce, or maybe the solution violates European rules or fundamental rights. This selection process will lead to a smaller set of solutions, a *short list*. This not only means selecting but also refining the alternative solutions. The alternatives must be formulated as specifically as possible. 'A just tax rate' is too vague and should be replaced by something like 'an increase of the income tax rate for the highest tier with five percentage points'.

The next step is the proper argumentation analysis. For each alternative, we make a list of arguments pro and contra and then analyse the plausibility and relevance of each argument. To which fundamental values does the argument refer? May we reasonably expect that the intended goal will be realized, or is it mere wishful thinking? Using the method of reflective equilibrium, we can examine whether certain arguments are consistent with considered judgements and with legal sources and fundamental legal principles, and whether they are realistic in light of social reality.

Making recommendations requires a comparison of the different alternatives. Sometimes one possible solution seems to be the best alternative. But more often, there are multiple possibilities, each of them plausible and attractive. If so, our recommendations should include multiple solutions and present the pros and cons of each alternative. That way, readers can examine step by step if they find the argumentation sound, plausible, and convincing and share the conclusions.

10. Conclusion

The contribution of legal philosophy to a doctrinal project can vary greatly. In this article, we have distinguished seven purposes for which legal philosophy can be enlisted. This distinction is not a separation. Actual research projects often combine different purposes. Moreover, to fully realize each purpose, we often need additional disciplines as well; consequently, more extensive interdisciplinary research may be needed. In actual research practice, many projects are carried out by research teams, combining expertise in different disciplines. This is a way to over-

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come the limitations facing an individual researcher, although new problems of communication and translation across disciplines are sure to arise.

For doctrinal scholars, including legal philosophy in their project may not be always easy, but it is feasible. Whether a philosophical component should be included in doctrinal projects depends on the research question and on the available time and resources. In our view, however, it can greatly enrich doctrinal research and, therefore, it is worthwhile to explore the possibilities for doing so.

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