International Theory (2021), **13**, 530–537
doi:10.1017/S1752971920000603

International Theory

BOOK SYMPOSIUM

On concepts, conceptions, and conceptors: remarks 'On the concept of law'

Knut Traisbach

Faculty of Law, University of Barcelona and Department of Society, Politics and Sustainability, University Ramon Llull, ESADE, Barcelona, Spain
Corresponding author. E-mail: traisbach@ub.edu

(Received 23 July 2020; accepted 17 September 2020; first published online 28 December 2020)

Abstract

In order to understand the concept of law, that is to understand what law is and does, Friedrich Kratochwil proposes to look at how we 'use' norms and relate them to actions. His approach promises less theoretical impasses and the ability 'to go on'. These comments contend that a focus on 'norm practice' can only provide a particular understanding of how law functions. The article further suggests that the proposition and contestation of conceptions of law, including the uses of law these conceptions enable and legitimize, form part of the social practice of law. This calls for a comparative perspective.

Keywords: Concept of law; conceptions; expertization; conceptual comparativism

The occupation of legal theory or jurisprudence, as it is often called, with the concept of law is according to Herbert L. A. Hart about answering the question 'what is law'.[1] Hart pointed out that despite decades of scholarly debates most people could easily name standard cases of what law was. Yet for doubtful cases, such as primitive law and international law, the question of 'what is law' was difficult to answer.

One has to look no further than to the debates between H.L.A. Hart and Ronald Dworkin to understand that descriptions of the concept of law – or, in Dworkin's words, that conceptions of law – are not merely an 'objective' description of reality. Dworkin famously argued that law was an interpretative concept and that many theories of law suffered from what he called a 'semantic sting'. He did not believe that 'lawyers actually have to accept roughly the same criteria for deciding when a claim about the law is true or there can be no genuine agreement or disagreement about law at all'.[2]

This sting persists, for also Kratochwil asks: 'What if "the law" consists of rules and norms that can have more than one characteristic, which several of them but not all of them share?'[3] He suggests an alternative approach that is well known to

[1]Hart 1994, 1, 3, 6, and 13.
[2]Dworkin 1986, 45 and 2006, 225–6.
[3]Kratochwil 2014, 53.

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https://doi.org/10.1017/S1752971920000603 Published online by Cambridge University Press

those familiar with his writings on international law: the centrality of the 'actual use' of norms. He writes:

> We do not need a 'truer' description but a clarification of how we actually proceed when we use norms and relate them to actions. […] [T]o understand what the law *is*, we must comprehend what it *does*, namely how it functions.[4]

Already here we may pause and ask whether the actual use of norms can really tell us more than a particular story of how law functions. Can we really understand what the law *is* and *does* when we look at how we use norms? We probably end up with a conception of law that is less complex and less plagued with theoretical impasses – which is, admittedly, no small feat – but it is likely also less 'useful'. After all, the actual praxis can give us only a crude impression of the nature of things, and, as always, we end up with multiple *praxes* but without any criteria to qualify them.[5] In fact, it probably is a central characteristic of law that all what it *is* and *does* shall precisely not depend on how we use it – like so many other things in life, including language and words.

Myres S. McDougal (often too quickly rejected by Kratochwil as a mere 'prolific writer') stressed the multiplicity of functions of (international) norms in his general course at The Hague Academy:

> Too often it is assumed that the technical rules which are said to constitute international law can in one formulation describe what decision-makers have done, predict what they will do, and prescribe what they ought to do. This multiplicity of functions, and ambiguity in reference, ascribed to legal rules is commonly concealed in an innocent-appearing insistence that the prime and unique task of legal scholarship is simply to ascertain and state 'what the law is'. In such a mode of discourse, the question 'what the law is' is made, explicitly or implicitly, to include the questions 'what the law was', 'what the law will be' and 'what the law ought to be'.[6]

McDougal suggested that lawyers need to acknowledge this 'normative ambiguity' and also embrace their role as policy makers. A position that motivates the often uncritical and over-generalized refusal of the New Haven School. When Kratochwil stresses the actual use(s) of law, he needs to embrace the 'practical ambiguity' that this entails, because the actual uses of law point to the multiple ways it functions.

For Dworkin, these disagreements about the concept of law are an inherent part of the interpretative attitudes of members of an interpretative community regarding particular questions at a specific moment in time.[7] He stressed the hermeneutical baggage and contingency that interpretation carries with it through the interpreter as a participant in the very social practice that she or he interprets.[8]

[4]Ibid., 54.
[5]Bartelson 2016.
[6]McDougal 1953, 144–5.
[7]Dworkin 1986, 46 et seq. and 91.
[8]Ibid., 52 et seq.

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Also Kratochwil employs an 'internal point of view' from which he regards law as a shared practice. Wittgenstein plays an important role here, for he stressed practice and the use of concepts in *a* language over abstract and ideal theories.[9] Kratochwil's critical and pragmatic approach tries to eschew traps of ideal theory by not trying to solve the foundational riddles and contradictions.[10] Instead, he searches 'for new ways to "go on" with our lives and political projects, despite the fact that there is no ultimate foundation'.[11] This pragmatism allows him to look past certain riddles and dichotomies in legal theory (e.g. is-ought, apology-utopia, soft-hard law) that ultimately do not help us to move on. He encourages us to accept the mess as part of the game and as a necessary price in order to get to the 'interesting problems' or to what Wittgenstein called 'perspicuous representations'.[12]

How does law manifest in these supposedly more perspicuous representations and intermediate cases? Kratochwil suggests a number of criteria.[13] First, he writes, 'law concerns a choice process that is characterized by the principled nature of norm-use in arriving at a decision through reasoning'. This builds on his earlier work on *Rules, Norms and Decisions* and his understanding of law as a principled argumentative practice providing 'reasons for decisions instead of causes for actions'. In this argumentative practice, what counts as a valid reason and argument is circumscribed by law itself through substantive and procedural requirements of rule ascertainment – his second criteria. Finally, there has to be 'a group of authorized persons deciding what the law "is"'.

This conception of law stands closer to a form of pragmatic legal realism ('law is what we do') but one that is not restricted to judges, who attract again so much attention in current scholarship. Nor does he postulate a complete interpretative arbitrariness. The inherent circumscriptions of law manifest in the specific vocabulary and reasoning styles, as well as in the learned professional techniques and interactional appraisals that determine what is intersubjectively valid in light of past experiences.[14] The 'language game of law' is a learned skill informed by the past and applied to the present.

Kratochwil presents law as a particular tradition and form of life that 'accord[s] significance to facts by fitting them within a framework of meaning that is institutionalized in *an authentic canon of records*' which, despite being socially constructed, has to conform to coherence and plausibility 'known to and accepted by participants in the tradition'.[15] Here, one is reminded again of Dworkin and his 'preinterpretative' sense of fundamental conceptual ties within a community that form the 'plateau from which further thought and argument are built'.[16] It also reminds us of Thomas Kuhn's description of how a prevalent paradigm is accepted as 'authentic' by a scientific community and thus shapes scientific research.[17]

[9]Kratochwil 2014, 57–63.
[10]Kratochwil 2007; Friedrichs and Kratochwil 2009; see also Tamanaha 1997.
[11]Kratochwil 2014, 61.
[12]Ibid., 63.
[13]Ibid., 65–6.
[14]See Brunnée and Toope 2010; Kratochwil 2014, 66–9.
[15]Kratochwil 2014, 69 (original emphasis), citing Krygier 1986, 251.
[16]Dworkin 1986, 70, 90, 108–13.
[17]Kuhn 1962/2012.

https://doi.org/10.1017/S1752971920000603 Published online by Cambridge University Press

The result of Kratochwil's meditation on the concept of law is to understand law as a shared practice and to accept the flexible uses of norms instead of focusing on ideal characteristics of law in theory making. This, he claims, allows us to 'go on' instead of being caught in theoretical and epistemological conundrums that we try to 'solve'. But go on to where?

This question he does not really answer, and thus his meditation ends, in my opinion, without a moment of satori. True, one needs to read all meditations in conjunction and also place them in the wider picture of Kratochwil's writings on international law and the role of norms. Yet we are somewhat left alone with what these insights into the flexibility of norms 'mean'.

This lack of orientation is no coincidence of course. In a Wittgensteinian tradition, Kratochwil 'stands there like a sign post. Does the sign post leave no doubt about the way [we] have to go?'[18] Of course doubts remain, but at the same time sign posts are not 'neutral' either. They are not a coincidental part of our common practices after all. Someone placed them where they are with the intention to guide, orientate, or 'nudge' our choices. Also Kratochwil's 'therapeutic' redescriptions are more than mere pointers.[19] They depend on us believing his diagnosis that we have been going in circles and are therefore tempted to follow the sign in the direction of *praxis*.

Conception-making

Before I discuss a possible direction, I want to propose a 'constructivist-ish' understanding of conception-making. Elaborating conceptions of law is a purposeful exercise, for many answers to central questions and many delineations in the discipline depend on it. The meaning and function of fundamental institutions, notions, and practices of law and the most fundamental questions of the discipline that have been debated by generations of scholars are intrinsically connected to a specific conception of law.[20] Thus, the different conceptions of law compete not only about whose description fits the perceived world better but also about how the legal order shall be.

Conceptions of law are deictic by nature. They are endeavors to delineate borders by which it is possible to determine what falls inside or outside the law. The borders, which have been drawn by scholars and practitioners between law and morality or between the international and the municipal legal system, are supported by particular conceptions of law. They have palpable and intentional consequences for our understanding of the international legal order as a 'coherent system', for the legitimacy of law-making processes, and for the very meaning and function of fundamental principles and institutions. Each explanatory model establishes new or moves existing borders within the discipline that determine which meanings, which legitimate practices and also who is included or excluded.[21]

[18]This quote from Wittgenstein's *Philosophical Investigations* (para. 85) appears in several of Kratochwil's writings, including in Kratochwil 2021, 589. He also included it as one of the epigraphs in *Praxis*.

[19]Kratochwil 2014, 49 and 203.

[20]Dworkin 1986, 91.

[21]In the territorial context, Kratochwil 1986 distinguishes between three types of exchanges that are mediated by boundaries: unit–general environment, unit–other units, and center of unit–periphery. He

https://doi.org/10.1017/S1752971920000603 Published online by Cambridge University Press

A central purpose of these borders and limits is to establish, defend, or alter decision-making competences. Borders are always about delineating 'who decides'.[22] The distinction between the international and the domestic legal system by dualism, for example, serves to protect the competences in the domestic. The altered conception of state sovereignty goes hand in hand with the legitimization of other sources of legal validity than state will. The fear of fragmentation and the quest for unity appear to be about securing the coherence and effectiveness of 'the system', but they are also about establishing and securing the competence of those who deem themselves to be on a universal and hierarchical higher level.[23] One consequence of this insight is that the focus widens onto those actors who draw these borders within the discipline of International Law. It is here that Kratochwil's take on the concept of law is extremely useful. The 'expertization' of international law and the discourses between these experts, who include legal scholars and practitioners, are thus of central importance to understanding contemporary conceptions of international law.[24] The occupation of legal theory with the concept of law is, therefore, not merely about answering the question 'what is law' but rather about 'delimiting what law is and ought to be for whom'.

Comparing uses

I believe there might be a comparative approach underlying Kratochwil's focus on *praxis*.[25] What I mean is a comparison that is based on a pluralistic understanding of different conceptions of law and encourages scholars and practitioners to compare not only uses of norms but also their conceptions of law.[26] This approach would build on some of the premises of Comparative Politics but has also distinct features. I do not refer to the comparison of domestic political institutions, processes, and policies of different countries but to the distinct comparative methodology that tries to eschew ideological battles and grand theories. The aim would be to develop mid-level theories which focus on specific phenomena, features, institutions, and developments.

Translated into the realm of international law this means that comparativists would avoid universalizing particular patterns as a humanization, as a constitutionalization, or as a pluralization. Instead they would look issue-specific for common patterns and differences in the production and use of particular conceptions of law. For example, they would compare and analyze the emergence of new areas of international law or the responses of different legal regimes to similar challenges, and they would look at the conceptions of law that support and legitimize these

further discusses two types of conflict management: moving the location of the boundary and manipulating the function of boundaries. While Kratochwil uses this distinction for a discussion of territorial boundaries, I believe this is a very useful differentiation also for boundaries around conceptions. Boundaries constitute and mediate the 'units', their 'environment', the 'other', the 'periphery', and their exchanges.

[22] Onuf points out, referring to Kratochwil, that disciplines impose boundaries on knowledge, see Onuf 2021, 523.

[23] Koskenniemi 1997.

[24] Bueger 2021; Werner 2016.

[25] Kratochwil 2014, 287–8; see also Peltonen 2021.

[26] D'Aspremont 2012; see the volume edited by Roberts, Stephan, Verdier and Versteeg 2018.

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activities. This conceptual comparativism would approach different conceptions of law with a comparative mindset in order to find different explanatory possibilities and compare these.[27] Through the identification and study of the different manifestations of norm use and their supporting conceptions of (international) law, we could develop a better understanding of the different normative purposes, functions, and methods that particular conceptions, schools, and approaches presuppose and promote. This includes a deeper analysis of the interests behind each conception and the altered meanings of fundamental legal institutions they advance. Through this study, valuable connections could be established between different explanatory models that rely on common intellectual histories and show congruencies in propositions and conceptualizations.

The epistemological result would be what Price and Reus-Smit call 'small-t' truth claims as opposed to 'Big-T' Truth claims. They argue that, because there cannot be a neutral objective knowledge of the world and, therefore, 'Big-T' Truth claims about the world necessarily fail, 'small-t' truth claims are nevertheless possible. These 'small-t' truth claims are:

> logical and empirically plausible interpretations of actions, events or processes, and they appeal to the weight of evidence to sustain such claims. … [They are] self-consciously contingent claims made specifically in relation to particular phenomena, at a particular time, based on particular evidence, and always open to alternative interpretations.[28]

Conceptual comparativism would thus avoid the representation of the social world of international law in terms of a particular conception that is allegedly based on an objective description of observable 'facts'.[29] I am aware that also comparisons are not 'neutral' or free of theoretical battles, but the 'small-c' comparativism could avoid the 'either…or' mentality that proclaims a move 'from' one paradigm (e.g. Westphalia) 'to' another (e.g. humanity or community). The aim is not to advance a particular theory or version of the social world but to enable a more integrative understanding of explanatory possibilities, norm uses, and conceptions of law.

[27]I thank Antje Wiener for a discussion about this point. The underlying rationale is not to sanction a particular approach for the production of social knowledge. This was aptly formulated by Richard Ned Lebow 2007, 3: 'We must pursue our quest for political knowledge as equals because none of our preferred epistemologies are problem free – quite the reverse. Despite inflated claims by partisans of particular approaches, none of them can point to a string of unalloyed theoretical and empirical triumphs that rightfully leave adherents of other approaches frustrated and envious. We can all benefit from a more thorough understanding of each other's assumptions, strategies, practices, successes and failures, and reasons for pride and self-doubt. Such *comparison* reveals that many of the epistemological and methodological problems we face cut across approaches and fields of study' (emphasis added); there is also a connection to the 'eclectic' approach of Katzenstein and Sil 2008.

[28]Price and Reus-Smit 1998, 271.

[29]I thank Nicholas Onuf for an exchange on the social conditionality of 'facts'. I refer here to factual postulations about the social practice that support specific conceptions of international law, such as that particular international institutions and normative arrangements are 'factual' evidence for a constitutionalization.

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I see this as an additional layer to the critical pragmatism that Kratochwil employs and that draws him to practice. When we put ourselves 'in the middle of things' and look at 'actual use', as he suggests, we probably also need to accept the theoretical and conceptual conundrums as part of the game instead of circumventing them. It is our 'use' of norms and conceptions of law that cause these conundrums. Kratochwil is too smart to show us 'the way' but he gives us tools to assess our journey and options – perhaps also by comparing our itineraries.

Acknowledgements. The author wishes to thank Nicholas Onuf, Hannes Peltonen, and three anonymous reviewers for helpful comments on an earlier draft. The usual disclaimer applies.

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Cite this article: Traisbach, K. 2021. "On concepts, conceptions, and conceptors: remarks 'On the concept of law'." *International Theory* **13**, 530–537, doi:10.1017/S1752971920000603

https://doi.org/10.1017/S1752971920000603 Published online by Cambridge University Press