1. Introduction

1. ALL ENDS AND NO MEANS

Philosophical analyses of the nature of rules and the way they are interpreted usually centre around some paradigmatic rules such as ‘no vehicles in the park’¹, ‘no dogs allowed’ or ‘wills should be signed by three witnesses’.² These simple examples can help understand the more complicated legal rules that figure in a lawyer’s everyday life. They tell us, for instance, that legal rules refer to a category (all dogs) and prescribe or prohibit a concrete action. Therefore I also usually begin my lecture on the structure of rules with such examples.

But when I was asked to give courses to legislative drafters at The Hague I discovered that these examples can also be misleading. Nowadays, many rules are drafted that cannot at all be understood as – complex – variations of these paradigmatic rules, because they are fundamentally different. They do not tell us what should be done or omitted, but merely state what ends and goals should be achieved. They do not prescribe a concrete action but confine themselves to a description of a desirable state of affairs.

A typical European directive, for instance, starts by asserting:

The marine environment is a precious heritage that must be protected, preserved and, where practicable, restored with the ultimate aim of maintaining biodiversity and providing diverse and dynamic oceans and seas which are clean, healthy and productive.³

² The latter is Schauer’s favourite example. See F. Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (Clarendon Press, 1991).
³ Directive 2008/56/EC, see <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0056&from=EN> accessed 5 August 2015. For further analysis of such directives, see Mireille Bogaart, The Emergence of the Framework Directive in EU environmental policy: explanation of its function and
Such remarkable formulations are not confined to European legislation alone. Similar examples can be found in national legislation. Article 1 of the Wildlife and Natural Environment Act in Northern Ireland⁴ begins by pointing out:

It is the duty of every public body, in exercising any functions, to further the conservation of biodiversity so far as is consistent with the proper exercise of those functions.

The Dutch Flora and Fauna Act demands from all residents that they ‘take sufficient care of wild animals, plants and their habitat’.⁵

Nor is this tendency to stress desirable aims confined to environmental issues. Legislation concerning health and safety conditions or healthcare is drafted in the same way. The Dutch Working Conditions Act (1998) prescribes that the employer ‘takes care of the employees’ safety and health regarding all work-related aspects’ and shall ‘conduct a policy aimed at achieving the best possible working conditions’.⁶ The Swedish Social Services Act states that social services should be of ‘good quality’ and that ‘suitably trained and experienced staff shall be available’ to perform these services.⁷

I was intrigued by these acts: unlike traditional legislation in which the expression of desirable aims is confined to the Preamble, these acts do not seem to contain much more than a broad formulation of policy-aims. They hardly prescribe any concrete actions. These acts merely impose a duty to further the desired aim, and if addressees are explicitly mentioned (as in the case of employers), they are addressed in the capacity of rule-makers or policy-makers. They are required to ‘take measures’, ‘draft legislation’ or ‘conduct policies’. It is the task of these – often unspecified – addressees to translate the broad clauses into concrete rules, and to take measures in order to make sure that these goals are furthered and/or achieved.

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⁵ Flora en Faunawet 1998, s. 2.1: ‘Een ieder neemt voldoende zorg in acht voor de in het wild levende dieren en planten, alsmede voor hun directe leefomgeving.’
⁶ Arbeidsomstandighedenwet 1998, s. 3.1: ‘De werkgever zorgt voor de veiligheid en de gezondheid van de werknemers inzake alle met de arbeid verbonden aspecten en voert daartoe een beleid dat is gericht op zo goed mogelijke arbeidsomstandigheden, [. . .]’ (translation by the Netherlands Focal Point for Safety and Health at Work).
The formulation of such abstract duties of care has become known under the name of ‘principles-based regulation’, a name that emphasises that this form of regulation is characterised by a preference for abstract principles rather than precise and detailed rules.\(^8\) It seemed to me that despite the sudden popularity of principles-based regulation as a solution to all regulatory problems, this could hardly be called a new phenomenon. For decades, legislators have formulated vague standards (or: more sympathetically phrased ‘open norms’) that can only be applied if administrative bodies have worked out the details of what should be understood by evaluative terms such as ‘safe’ or ‘fair’.\(^9\) So what is new?

Moreover, although these familiar abstract and evaluative standards may be applicable to the loose way of regulating and supervising the financial sector\(^10\) and may also be found frequently in all kinds of self-governance codes, the epithet ‘principles’ did not seem to fit the type of legislation which I mention above.\(^11\) The goals imposed by these acts are not always abstract. They can also be rather concrete. Such is the case for instance in the European WEEE Directive, which regulates the way electrical and electronic waste should be stored, re-used or recycled\(^12\).

Article 5.1 for instance states:

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Member States shall adopt appropriate measures to minimise the disposal of WEEE in the form of unsorted municipal waste, to ensure the correct treatment of all collected WEEE and to achieve a high level of separate collection of WEEE, notably, and as a matter of priority, for temperature exchange equipment containing ozone-depleting substances and fluorinated greenhouse gases, fluorescent lamps containing mercury, photovoltaic panels and small equipment as referred to in categories 5 and 6 of Annex III.

Despite the relative concreteness of the goal that is imposed here, I would be inclined to put the WEEE Directive in the same class as the directives regulating the marine environment or working conditions. What the concrete directive has in common with its more abstract sisters is that it focuses on the end-states to be reached. They all describe – in abstract or concrete terms – a state of affairs that is deemed desirable. They do not indicate how such end-states can be realised. It is this focus on goals and end-states that sets these acts apart from both the concrete no-vehicles-allowed rules and the abstract ‘fair and reasonable’ standards. Whereas the latter provide for (precise or vague) standards of behaviour, the new directives mainly describe end-states. Terms like ‘outcome-based’ or ‘result-driven’ regulation are therefore more to the point.\(^{13}\)

This is not to say that traditional action-prescribing laws are devised without a result, outcome or aim in mind. Most rules – including the ‘no-vehicles-allowed’ rules – are devised with an eye to some underlying justificatory aim. But whereas these underlying justificatory aims of traditional acts are at best stated in the Preamble, or just construed by those who interpret and apply the rules, the new directives seem to do no more than simply impose goals. Any reference to concrete actions is omitted. Whereas Fuller regarded law as ‘the emptiest of all sciences’; as ‘all means and no end’,\(^{14}\) this – relatively – new kind of legislation seems to be the very opposite. It is all ends and no means.


\(^{14}\) Lon L. Fuller, \textit{The Anatomy of Law}, (first published 1968, Pelican 1971), 10–11. This motto was criticised by Summers on the ground that law is more than technique, a point of view which is shared by Fuller! Cf. R.S. Summers, \textit{Essays on the Nature of Law and Legal Reasoning} (Duncker & Humbolt, 1992) Ch. 13.
2. THE PERFORMING STATE

The peculiarity of these directives is not so much their vagueness but their function. The acts described above, both the abstract and the concrete ones, appear to have no other function than to outsource further rule-making. By outsourcing I do not refer to the practice of Ministries to – occasionally – hire external experts in order to draft the rules that would otherwise have been drafted by ‘in-house’ legislative drafters.\(^\text{15}\) Nor do I refer to consulting practices, either online or offline, in which the public as a whole or just panels of experts are invited to give input to the legislative process.\(^\text{16}\) These forms of outsourcing are still within the traditional framework in which the legislature as a legal body formulates the law, signed by the Minister, and is only helped by outsiders. I refer to a much more radical practice in which the outsourcer confines herself to formulating the desired outcomes or end-states (‘the what’) leaving it to the outsourcees to formulate the ‘how’: the means by which these goals can be reached. Only the latter approach is responsible for the formulations which I quote above.

Since the 1980s outsourcing has become a widespread strategy in private organisations. Instead of relying on ‘in-house’ expertise, which is structured in a hierarchical way within the organisation, outsourcing means that contracts are made with parties external to the organisation. Outsourcing was expected to reduce costs and enhance expertise. Largely on the basis of the same expectations public services followed business practices.\(^\text{17}\) Inspired by Osborne’s and Gaebler’s seminal book\(^\text{18}\) many public institutions adopted a result-oriented and customer-driven


\(^{17}\) One should keep in mind, however, that strictly speaking the strategy of delegation of powers is far from new. For a critique of the rise of the administrative state in the US and its strategy of delegating powers to independent agencies, see the well-known, largely ideological but still insightful book by Lowi. Th.J. Lowi, The End of Liberalism: Ideology, Policy and the Crisis of Public Authority (New York, 1969).

approach which aimed at decentralisation and at outsourcing services: a policy of ‘steering’ rather than ‘rowing’. New Public Management (NPM) was not confined to museums or hospitals. It did not take long before state bureaucracy itself was also captured by the new entrepreneurial spirit of outsourcing services, partly in an attempt to modernise bureaucratic procedures, as was mainly advertised in the Netherlands, partly from the desire for cutting governmental budgets, as was emphasised in the UK.¹⁹

Depending on the specific culture of the country, different bodies qualify as outsourcees. They may be decentralised governmental or semi-governmental bodies, but may also consist of expert panels, supervisory boards, audit committees or field parties. In Sweden rule-making is usually outsourced to public bodies, whereas in the Netherlands there is an articulated preference for private institutions or clusters of field parties.²⁰ It would therefore be a mistake to analyse outsourcing under the banner of privatisation. Private bodies may be involved as rule-makers and rule-enforcers, but many tasks are also outsourced to public institutions and the public-private divide is in my view less important than sometimes assumed. Moreover, many different intermediate forms are practised, ranging from ‘self-regulation’ to different mixtures of ‘co-regulation’. I will return to these intermediate forms in Chapter 4.

We might safely say that the heyday of the NPM-movement is over now.²¹ Yet, much of its spirit lingers on and the general discontent with anything that reeks of bureaucracy remains to this day.²² ‘Governance’, the banner under which aversion to state bureaucracy is sold, may have become a mere buzz-word but has not lost its attraction.²³ Governmental

¹⁹ See Radaelli and Meuwese, supra note 16, 639–54.

In recent years there is a trend, at least in the Dutch Ministry of Education, towards more or less arbitrarily inviting experts and stakeholders. See Prof. dr. R. van Schoonhoven, ‘De wet op het lerarenregister: enkele aandachtspunten bij uitbesteding van wetgeving op grond van een voorbeeld’ (2017) Jaarvergadering Nederlandse Vereniging voor Wetgeving <http://www.nederlandseverenigingvwor tgeving.nl/jaarvergadering-uitbesteding-van-wetgeving/> accessed 15 June, 2017.
²³ In the 90s of the previous century ‘governance’ was mainly defined in negative terms as ‘governance without government’, or ‘policy-making without politics’. See James N. Rosenau and Ernst-Otto Czempiel, Governance without Government:
bodies should be small, slim and smart; its offices – glass walls, hotspots – designed to facilitate flexibility and transparency. The reasons for this untainted popularity of outsourcing go a bit deeper than the advantages that are advertised openly in the reports advocating ‘smart’ or ‘better’ regulation. Outsourcing rule-making not only promises to reduce administrative burdens. It simultaneously promises to solve the problem, that was pointed out by Hayek decades earlier, that legislators cannot be expected to have the required knowledge to effectively steer society from one central and distant point.24 This problem has been felt to be more acute in the EU than in the US, probably as a result of its high regulatory ambitions. The more the EU tried to harmonise the rules of the various member states, the more it became clear that this was not only a time-consuming and expensive enterprise, but that at the central level regulators lacked the knowledge necessary to effectively steer local affairs. It was thought that by involving local actors, regulation would become better adapted to particular circumstances. By decentring law-making25, and by involving a ‘network’26 of ‘regional or local actors’27 one would be able, so it was thought, to maximally benefit from local expertise.

We should keep in mind that Hayek’s knowledge problem is intensified if we have the ambitious legislator in mind who is characteristic of the regulatory welfare state.28 When in post-war Germany the very first

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 contours of such a Sozialstaat became visible, Forsthoff observed that such a state is a performing state, a role which is difficult to reconcile with the role of the Rechtstaat which mainly functions as a neutral arbiter.\(^{29}\) We do not need to take over Forsthoff’s classical liberal position and to distinguish (too) sharply between socio-economic positive rights and negative liberty-rights in order to see that there is a grain of truth in Forsthoff’s assertion that the sheer extension of tasks implies that states have acquired the duty to perform.\(^{30}\) This might lead to more emphasis on the ways in which these aims can be realised and policies executed than on political deliberation concerning the prioritisation and ranking of these policies. As had already been noted by the Dutch legal scholar Koopmans in 1970 there is a marked tendency to avoid these discussions by a mere juxtaposition of lofty aims\(^{31}\) and to confine oneself to the implementation of these aims. Outsourcing can only present itself as a serious option on the basis of such a performance-conception of politics. As Blankenburg remarked: ‘Regulating by procedure and leaving substantive rules to be worked out over time has always been the technique of the wise legislator when entering new fields of regulation.’\(^{32}\)

3. LAW AND REGULATION

The phenomenon of outsourced regulation, and the way this practice is reflected in the structure and functions of the rules and principles to which the practice gives rise, has gone virtually unnoticed in legal philosophy.


It is, however, widely studied by academics from other disciplines. Economists and political scientists are busy studying as well as devising new and alternative ways of regulation in which broad policy aims can be concretised and they are engaged in disputes concerning their legitimacy, effectiveness and efficiency.

These debates are largely conducted outside the law schools. The mere title ‘regulation’ seems to have banned these new forms of making and applying rules from the consideration of lawyers, at least the theoretically inclined lawyers working in academia,33 who usually consider regulation as at best marginally linked to their domain and distinguish between law with a capital L and ‘mere’ regulation.34 Legal philosophy, a discipline which is commonly taught from within the law schools and by people who received a legal education, usually shares this lawyers’ point of view. Its perspective is often judge-oriented. If legal philosophers deal with ‘law in action’ at all, they are mainly occupied with court decisions, and focus on ‘hard cases’ such as ‘wrongful birth’ in which legal and moral arguments are intertwined. Their interest in legislative matters is minimal35, and I do not know of any philosopher who is interested in a subject as mundane as regulation.

I only became aware of this great divide between law and regulation when one of my – legal – colleagues exclaimed upon having learned what I was doing: ‘Oh, but in that case you are not a proper philosopher of law, but a philosopher of regulation!’ In a sense he was right: I was largely studying regulation. Framework directives and other goal-acts cannot be studied in isolation. As we shall see in Chapters 2 and 3, they not only give rise, but also presuppose and build upon a whole network of regulators, supervisors, auditors, private and public bodies who are in the business of concretising and implementing the imposed goals. It is their joint enterprise which breathes life into these otherwise sterile formulations of noble

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33 A brave exception is Morgan Bronwen and Karen Yeung (eds), An Introduction to Law and Regulation: Text and Materials (CUP, 2007). However, even these authors decide to cling to a state-centred conception of law. Generally speaking, my colleagues from administrative and international law are more inclined to take regulation seriously than academics working in other areas of law.

34 In view of the abundance of literature concerning the different definitions of regulation, I confine myself to quoting only the overview paper by David Levi-Faur, ‘Regulation and Regulatory Governance’, Jerusalem Papers in Regulation & Governance, Working Paper No. 1 (2010).

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aims. We cannot, therefore, confine ourselves to an analysis of norms like ‘the marine environment should be protected’. Regulatory practices have to be taken into account.

But of course, this is also the case with the ‘no-vehicle-allowed’ rule, which also should be – and is – analysed in relation to how they are interpreted and applied by institutions. So why would we maintain a wall of separation between genuine and proper Law and ‘mere’ regulation (‘a mere bunch of rules’ as another colleague formulated my subject)? The distinction seems to rest entirely on the difference in legal status. Since regulatory rules and arrangements are mostly drafted, applied and enforced by a great variety of actors who cannot always be regarded as ‘officials’ in the usual sense of the word, they enjoy a doubtful legal status; they may be developed by regulatory agencies, or supervisory bodies, but can also be drawn up by professional or by private organisations. Moreover, not only do a wide variety of actors create and apply these rules, but also a wide variety of regulatory tools are employed. The formulation of best practices, the use of benchmarks, standardisation procedures, they are all novel if not exotic to the legally trained academic scholar.

From the legal perspective, therefore, the original abstract goal-act as issued by the legally competent legislator may be ‘genuine’ law, but the ensuing bulk of regulation that accompanies these goal-acts is mere ‘regulation’ or at best considered ‘soft’ law. Most legal academics are interested in the question of whether such examples of soft law should be regarded as valid and binding\(^36\), but they hardly address the question of what the emergence of soft law means for the legal system as a whole.\(^37\) Of course, the focus on validity is understandable if we keep in mind that legal scholarship is closely linked to legal practice. For a practising lawyer, only valid rules can serve as valid reasons for decision-making (or for appealing, litigating, enforcing). But as I shall argue in Chapter 7, there is no reason to confine legal scholarship to that practical point of view. For a philosopher of law, who is theorizing about law, it is not only unnecessary but downright undesirable to delineate one’s ‘proper’ domain of research on the basis of such practical considerations. It would simply discard from analysis an important quantity of rules which have a great impact on the daily life of citizens and institutions and which may more thoroughly

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affect people’s lives than the formal legal rules on divorces, wills or crimes, which affect most citizens only once in a lifetime.

4. THE TOOLKIT APPROACH

One may nevertheless wonder why it would be necessary to study regulation from a legal or even legal philosophical perspective. If governance and regulation are indeed so intensely studied by economists and political scientists, why would we bother to draw lawyers and legal philosophers into this field?

I think that the legal theoretical perspective is important because it helps to study regulation as a comprehensive normative order. In many economics studies, regulatory arrangements are mainly regarded as a toolkit\(^38\) of strategies that should be ‘smart’ and which are judged and evaluated for their efficiency and effectiveness in achieving the desired policy-aims.\(^39\) The economic perspective is useful – and for policy-makers naturally an overriding concern – but effectiveness and efficiency are not the only criteria that count. Emphasis on these criteria is the result of political choice and needs to be explicated and justified rather than taken for granted.

In the contributions by political scientists more criteria are used: not only effectiveness but also legitimacy and transparency figure as desirable virtues of different forms of regulation. However, the close reader will find that these virtues are often advocated as preconditions that should be met in order to ensure people’s cooperation and to induce them to achieve policy aims. Legitimacy is not understood as the degree to which a certain legal arrangement meets legal principles such as legal certainty or equality but as the chance that people will voluntarily comply and contribute.\(^40\)

Despite the fundamental differences in perspective, both approaches

\(^{38}\) Julia Black is one of the very few writers on regulation who criticises the simplified toolkit-view.


\(^{40}\) See Rubin, supra note 30 at Ch. 5. This also explains the popularity of T. Tyler, Why People Obey the Law (Princeton U.P., 2006).
to regulation have one thing in common: they do not analyse regulation as a normative order, as a more or less coherent whole with a dynamic of its own, capable of serving and reconciling multiple ends. In most studies of regulation, rules are mainly analysed as tools. Or, in the revealing vocabulary of Gunningham and Sinclair: ‘as not all regulatory instrument combinations are equal, it is incumbent upon policymakers, in seeking to introduce a broader range of regulatory solutions, to carefully select the *most productive instrument combinations*’.41 As I will point out in Chapters 3, 4 and 8, the focus on the instrumentality of rules excludes from consideration many other – coordinative, reason-giving – functions which rules have; functions which clarify why lawyers attach so much importance to legal certainty, generality, stability and consistency. It seems that whereas legal scholars have a blind eye for regulation because of their overriding concern with formal validity, regulation specialists often have a blind eye for the relative autonomy42 and multi-functionality of law and regulation because of their overriding concern with effectiveness.

In this book, the phenomenon of legal outsourcing will be studied from the perspective of the philosophy of law. I hesitate to use the word ‘philosophy’, because the philosophy of law is pervaded by the perennial demarcation problem between law and morality and the very label ‘philosophy’ is enough to suggest a deeply normative approach: an approach which not only studies law as a system of norms but also seeks to evaluate that system. Although I am far from claiming that I will be neutral to the virtues and vices of this new mode of legislation, it is not my intention to engage in a search for moral justificatory principles. The reason why I nevertheless advertise this book as offering a philosophical perspective is that I adopt a point of view which is external to both regulatory practice and legal discourse. Since I am not a legal expert myself, I do not need to defend the legal profession or legal expertise and since I am not a policy consultant or an economist, I am not preoccupied with cost-benefit analyses or compliance-rates. Although I have familiarised myself to a moderate extent with part of the abundant literature concerning

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On the other side of the continuum there is the radical – Neo-Kantian – view that *all* instrumentality (in the sense of an arbitrary relation between means and ends) is morally deficient. See Ferdinand Tönnies, ‘Zweck und Mittel im sozialen Leben’ in M. Palyi (ed.), *Erinnerungsgabe für Max Weber*, Bd I, (Dunker & Humblot, 1923) 236–70.

42 In Ch. 7, I will explain in what sense I understand law to be relatively ‘autonomous’.
regulation and governance, I am not a regulation specialist, I am not committed to its conceptual framework and this book is certainly not meant as an empirical contribution to that field.\footnote{See for instance the regulation network <https://listserver.cc.huji.ac.il/listinfo/regulation> with regular updates on coming events and publications. See also the journal Regulation and Governance, John Wiley & Sons <http://onlinelibrary.wiley.com/journal/10.1111/(ISSN)1748-5991>.} This is not to say that I will act as the freischwebende Intelligenz proposed by Karl Mannheim,\footnote{Karl Mannheim, Ideologie und Utopie (first published 1929, 8. Auflage, Klostermann 1995).} or that I will be neutral. My perspective is informed by philosophical reading and my point of view will therefore mainly, though not exclusively,\footnote{I will also occasionally borrow from the social sciences, since one cannot rely on conceptual analyses alone if one deals with an institutional practice of this complexity, but I will do so sparingly in view of the abundant literature on the subject.} be influenced by philosophical insights into the structure and function of law. But above all, I think that it is a philosopher’s task to describe and analyse a certain discourse by unravelling assumptions which usually remain tacit, or simply taken for granted.

5. A STYLE OF REGULATION

One such assumption is the central ideal of alternative modes of governance, ventured in many official reports\footnote{Commission of the European Communities, supra note 27; in the Netherlands we may refer to the influential Ruimte voor Zorgplichten (Ministry of Justice, 2004); For a much more succinct version, see ‘Principles of good regulation’ by the UK ‘Better regulation Task Force’ <http://webarchive.nationalarchives.gov.uk/20100407162704/http:/archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/principlesleaflet.pdf> accessed 8 August, 2015.} that ‘outcome-oriented’ or ‘principle-based’ regulation is a ‘better’ or ‘smarter’ form of legislation. It is suggested that the same activity is carried out, but just in a more efficient or more effective way. I think that this view ignores the structural differences between traditional legislation and these alternative forms. Differences which surface both in institutional practice as well as in the way people think and talk about that practice, the values they cherish and the kind of problems they perceive. The differences in forms of legislation may at first sight seem to be merely technical and a question of formulation rather than of substance, but I will argue that these apparently innocent changes have brought about a legal landscape that is entirely different from the one we used to inhabit up to the 1990s. In this book I
hope to show that the ways in which legislation is drafted and regulation is organised have a great impact on how rules are used, how legal scholarship is conducted, as well as how democracy and the Rule of Law are shaped.

In order to trace the way in which all these elements hang together I think it is useful to stop thinking about law and regulation as sets of ‘things’ such as rules, precedents and principles. I share Lon Fuller’s assumption that law is above all an activity. Rules are devices that enable us to carry out different activities. As will be argued more fully in Chapter 7, rules typically connect consequences to conditions. They make it possible to look for the presence of particular conditions, to conclude from that investigation whether certain consequences should be drawn, and if so, to turn these legal consequences – rights, obligations, permissions – into reality. Rules and principles are therefore not entities but provide possibilities for action: litigating, decision-making, enforcing. Rules and activities move in ‘circles of interaction’. activities call for rules to guide those activities, and once these rules are there, they give rise to activities that would not have been carried out without the rules.

As soon as we recognise a legal system or, more generally, a normative order not as a bag of rules but as a framework for activities, a new avenue is opened up: we can explore the manner in which these activities are carried out. The ‘legal order’ is then clearly not an entity which is different from a ‘social’, ‘moral’ or ‘religious’ order, as if they were objects separated in space; the term ‘legal’ merely denotes a specific technique, a specific manner of acting. This is not a very novel insight; Kelsen had already referred to law as a special technique by means of which power is organised. Fuller and Kelsen may have differed in their characterisation of what this activity consists in (‘guidance by rules’ versus ‘organization of power’) but they shared the view that it is an activity. Outsourcing the law is such an activity. To formulate goals and to outsource further rule-making is a specific manner of exercising power; it is so to speak a different

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50 An early formulation of this insight can be found in Judith N. Shklar, *Legalism* (Harvard University Press, 1964) 55 who differentiates between ‘legalistic’ and ‘non-legalistic’ forms of behaviour.

Introduction

style of regulation. Just as we can speak of different styles of other activities such as dressing, doing research or painting, we may distinguish different styles of regulation.52

I hasten to add that I use a wider notion of style than the one which was introduced by Robert Kagan.53 He used the concept of style to describe a special way of enforcing rules. Nor do I refer only to a style of policy-making, as intended by Richardson.54 Still less do I refer to style as merely a theoretical perspective.55 As we shall see, the new style of outsourcing the law affects a wide range of activities and is discernible in how rules are made, interpreted, enforced and studied. The advantage of the concept of ‘style’ is that it illuminates how characteristic elements hang together, and this dimension would be missed by focusing on just one such activity.

Nor do I use the concept of style as just a manner of doing things.56 In the literature on enforcement styles, but also, for instance, on leadership styles,57 ‘style’ is mainly employed in order to refer to an attitude, as in a ‘paternalistic’ or ‘authoritarian’ leadership style. In such accounts the assumption is that the activity (‘to lead’) remains the same but is only carried out in a different manner. I think that that is a needlessly impoverished concept of style. It may be adequate for describing fashion but already in art, style is more than just an attitude or just a form. Monet’s waterlilies are not ‘just’ waterlilies, but depicted in an impressionist manner. Styles affect the very way in which things are seen, regarded and valued. Compared to naturalists, impressionists appreciate light and colour differently. They have different criteria for what counts as a good painting. Even the activity itself is seen in a new light. If painters adopt a new style, they are not just painting in a new way, but the activity of

52 I use the term ‘regulation’ but we may also speak of ‘guiding human action’ as Fuller did or ‘exercising power’ as Kelsen did. The definition of what the activity consists in is not a neutral one and is in itself dependent on the style that is adopted.


54 See Jeremy Richardson (ed.), Policy Styles in Western Europe (Routledge, 2013).


57 See e.g. Peter G. Northouse, Leadership: Theory and Practice (Sage Publications, 2007).
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painting itself is redefined. Paintings that are not executed in that style are sometimes not even considered as ‘genuine’ art, but as ‘illustrations’, ‘decorations’, ‘applied art’ or even ‘degenerate art’. It is therefore not pure coincidence that ‘law’ and ‘regulation’ go by different names. They indicate that lawyers and regulation-specialists have different notions of what their activity consists in and should consist in.

The choice between competing styles is not an arbitrary one. As a fashionista told me once: ‘the style comes to you because it fits best with who you are’. This probably also applies to collectivities. The group which adopts a particular style has a particular view of itself and its position in the world, its function, and, as a corollary, how to fulfil that function, which paths should be pursued and avoided. Style is inspired by a vision of what this activity consists in, what is important and unimportant, desirable and objectionable.

In this broad sense, the notion of style resembles the notions of ‘paradigm’ or ‘disciplinary matrix’ 58 as developed by Thomas Kuhn who used the term in order to indicate a comprehensive conceptual framework underlying a (set of) scientific theories. There is a rather extensive literature on styles as well as scientific paradigms and research-programmes, 59 and much debate on which elements can be discerned in such a paradigm or style. This discussion is interesting but the answers are often guided by what kind of style one has in mind. Metaphors for instance, may be an important ingredient of both scientific and regulatory styles, but are lacking in artistic styles. I think, therefore, that we should not try to define constitutive elements such as ‘models’, ‘symbolical representations’ and ‘world-views’: they may or may not be applicable to regulatory styles. 60

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58 Kuhn originally used the term paradigm both for a comprehensive framework and for shared exemplars; in the postscript of the 2nd edition he distinguished the two meanings. See T.S. Kuhn, The Structure of Scientific Revolutions (University of Chicago Press, 1970) (1962).


60 I am inclined to think that Kuhn’s enumeration of isolated elements of paradigms explains the confusion about the concept. M. Masterman has distinguished 21 different definitions of the term ‘paradigm’. In fact, these are all ingredients or aspects of paradigms that can also be found in styles. See M. Masterman, ‘The Nature of a Paradigm’, in I. Lakatos and A. Musgrave (eds) Criticism and the Growth of Knowledge, (CUP, 1970).
Instead I think it is a more promising strategy to unravel and contrast the characteristics of a style by focusing on the connections and the similarities between the ways in which rules are made, monitored and enforced. A scientific paradigm is discernible in the entire range of scientific activities, it is revealed by its methods, by the way experiments are set up, the ways in which results are tested, in its theories and assumptions as well as values and beliefs, favourite examples and metaphors. Fashion styles are not only revealed in the type of dress, but also in type of shoes and bags, and even in the way in which a tie is knotted. If a style is only partially adopted, one refers to that as a rupture de style, a stylistic break. So styles should not be described as a set of elements, but as a characteristic way of doing things, which is informed by beliefs, values, and assumptions and which is consistently applied and discernible in all its manifestations.

Styles can only be grasped by comparing them with other styles. The Egyptians who were only familiar with their en profil drawings did not conceive of their art as being executed in a certain style. It was just the thing to do. Styles cannot be grasped if they are not contrasted with other styles. So in my description of outsourced law I have to revert to the – no doubt – simplistic notion of ‘traditional’ law thereby obliterating differences within ‘traditional law’ (between common and civil law and between different areas of law). Of course, there is no such thing as ‘traditional law’. Although lawyers – at least in civil law countries – boast an unbroken continuity of the legal order since Roman times, and although it is true that law generally has a longer life than political regimes, the idea of a fairly constant legal system is an illusion. Think only of the emergence of administrative, European and international law during the last decades. Familiar demarcation lines separating private law from public law have been shifted, sometimes even obliterated. The same applies to the boundaries between criminal law and private law. But in order to appreciate fully the characteristic features of outsourced law, these nuances and internal tensions have to be suppressed temporarily. I will therefore simply contrast traditional law (to be abbreviated as TL) with Outsourced Law (OL) and hope that the reader will bear in mind that reality is much more complex than this opposition suggests.

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6. THE ORGANISATION OF THIS BOOK

New styles may advertise themselves by means of explicit programmatic writings and manifestos – Cobra, Bauhaus, or the White Paper on Governance\textsuperscript{64} – but this is not necessarily the case and probably they are not the most important bearers of styles. A chair that is designed in the Bauhaus-style instantly reveals what Bauhaus is about and conveys the style better than any manifesto. In science, research styles are often just conveyed by means of what Kuhn called ‘exemplars’: successful experiments, important turning-points that implicitly and tacitly tell the student what is important and what should be avoided. According to Kuhn ‘the existence of a paradigm need not even imply that any full set of rules exists’.\textsuperscript{65}

Law and regulation differ from art and science in the important respect that their products are themselves rules and principles. Whereas in art there is a difference between the product (Monet’s picture of waterlilies) and the stylistic requirement to abstain from black contours, the products of regulatory styles \textit{consist} in such rules. These principles and rules are not only directed to citizens but also to official legal actors: to legislators, judges and enforcers. Legal rules typically have a double norm-addressee.\textsuperscript{66} A rule stating that ‘X is an offence’ not only expresses that citizens are forbidden to do X but also tells the judge how to react to non-compliance. In OL this ‘problem of the double addressee’ is even more articulated since citizens and institutions are addressed in their capacity of rule-makers. Rules of evidence, certification procedures, but also more abstract legal principles (\textit{nemo tenetur}, \textit{stare decisis}, \textit{ne bis in idem}, etc.) as well as OL’s principles of subsidiarity and proportionality are therefore not only to be regarded as products that reveal an – implicit – style but function at the same time as explicit stylistic requirements. The analyst of regulatory styles therefore has a wealth of information at her disposal which is not available to the art historian who analyses artistic styles.

In order to understand outsourced legislation as a regulatory style it is worthwhile, therefore, to approach it at different levels: it can be studied by analysing its products (i.e. the types of rules that are produced), by the way people actually use these products, by analysing underlying

\begin{itemize}
  \item Commission of the European Communities, \textit{supra} note 27, accessed 6 June, 2017.
  \item Kuhn refers to Michael Polanyi’s concept of tacit knowledge here, Kuhn, \textit{supra} note 58, 56.
\end{itemize}
aspirations and to what extent they can be realised, and by examining the many intended or unintended changes that are brought about by the adoption of that style. In the following chapters I will analyse OL at these different levels. In order to avoid unnecessarily artificial language, I will limit continuous references to ‘style’ or ‘stylistic elements’. In the next chapter I will start by examining the products and investigate the particular structure of the rules that are developed in OL. In Chapter 3 I will investigate more in depth to what extent these rules are different from the exemplary no-vehicle-allowed rule which is paradigmatic for TL. In Chapter 4 I will examine the particular function of these rules for the different actors that work with them. More particularly, the relation of OL to self-regulation will be explored, which serves to evaluate the ideals of proximity and participation. Chapter 5 investigates whether OL allows for more possibilities of democratic control than representative democracy. In Chapter 6 attention is paid to the role of the judiciary in OL, whereas Chapter 7 investigates the way in which academic legal scholarship is challenged by the methods that are advocated by OL. Chapter 8 will investigate whether OL is reconcilable with the notion of the Rule of Law or whether it calls for a redefinition of that notion. Chapter 9 concludes by comparing Foucault’s style of discipline with OL and will explore the relation of these notions to law.