Legal philosophy and the foundations of *ius commune*

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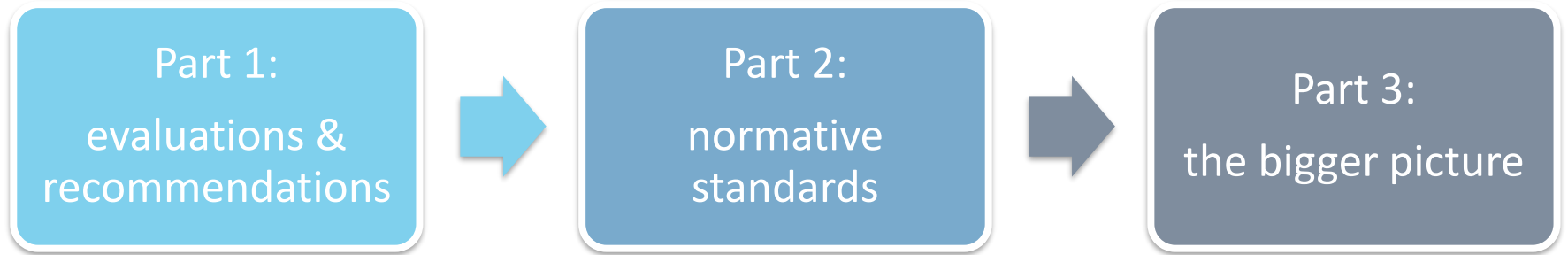
Who, what, and why?

Legal theory & philosophy	Legal theory: analysis of legal tools, legal reasoning, concepts	Legal philosophy: normative evaluations of the law

Overview

Part 1:
evaluations & recommendations

→

Part 2:
normative standards

→

Part 3:
the bigger picture

Evaluations & Recommendation

"Is there enough harmonisation in this area?"

"Should there be more harmonisation in this area?"

"There should be more harmonisation in this area!"

"Harmonisation in this area should look like …"

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Evaluations & Recommendations

Evaluation

Tests whether something is good/bad/(in)sufficient/effective

Diagnostic, not treatment

Recommendation

Suggests what should be done

Treatment, not diagnostic

Some possible distinctions

Empirical

Empirical evaluation

Has the law realised its explicit purpose?

Evaluates causal/contributory relationship legal instrument > realisation of explicit goal

Assesses negative side effects

Normative

Normative or value-based evaluation

Goes beyond explicitly stated purpose of legal instrument

Weighs values against one another

Pro Tanto

Partial evaluation

Takes into account one (or a limited number of) dimension(s) only

Generally does not require interdisciplinary training

Limited applicability

All things considered

Complete evaluation

Takes into account "all things": all relevant dimensions

Requires interdisciplinary orientation (beware: incorporation problem)
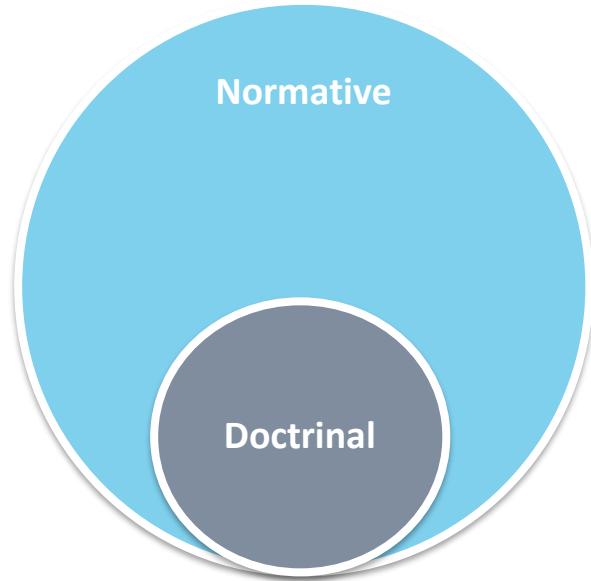
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Evaluations in *Ius Commune* research

Most often: normative & pro tanto

Normative – but what standard of 'measurement'?

Pro tanto – but then recommendations?

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Legal evaluations

Normative
- Standard consists of values and/or norms
- Values/norms can be moral/philosophical, legal, or other

Doctrinal
- Standard consists of values and/or norms *specifically* derived from law itself

Normative

Doctrinal

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Standards for doctrinal evaluation

Higher norm(s)

Coherence/fit

Value

Is X in compliance with norm Y?

Is C discriminatory in the sense of norm X?

Does A fit in the existing system of EU consumer protection?

Does K violate the value of public health?

Justifying normative & evaluative conclusions (1)

Normative: 'xyz should be done'
Evaluative: 'xyz is good/bad/(in)sufficient/other
evaluative term

You can always ask 'why?', i.e. ask for further
justification

Why is it justified to say that x should be done or y is
sufficient?

Why do we even need a standard?

Alternative: gut feeling?

Replicability

Justification

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Justifying normative & evaluative conclusions (2)

Justifying normative & evaluative conclusions (3)

Legal justification 'bottoms out':

↓

"That's the law."

↓

No further justification needed (?)

Moral justification does not obviously 'bottom out' anywhere

↓

Different answers: foundationalism, coherentism, &c.

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Justifying normative & evaluative conclusions (4)

Justification within a practice

Justification of a practice

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Checklist

1. What is the precise subject of evaluation

2. What are the most important values to be used in the evaluation of this specific subject?

3. Which conceptions of these values are chosen?

4. How can/are these conceptions be operationalised into evaluation criteria? What methods will be used to assess them?

5. How should the subject be evaluated in view of each of the criteria? Are the criteria met?

6. (How do we balance conflicting pro tanto evaluations?)

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Standards for evaluating evaluations

Explicitness

- Of standard
- Of criteria
- Of arguments
- Of counter-arguments

Soundness of argument

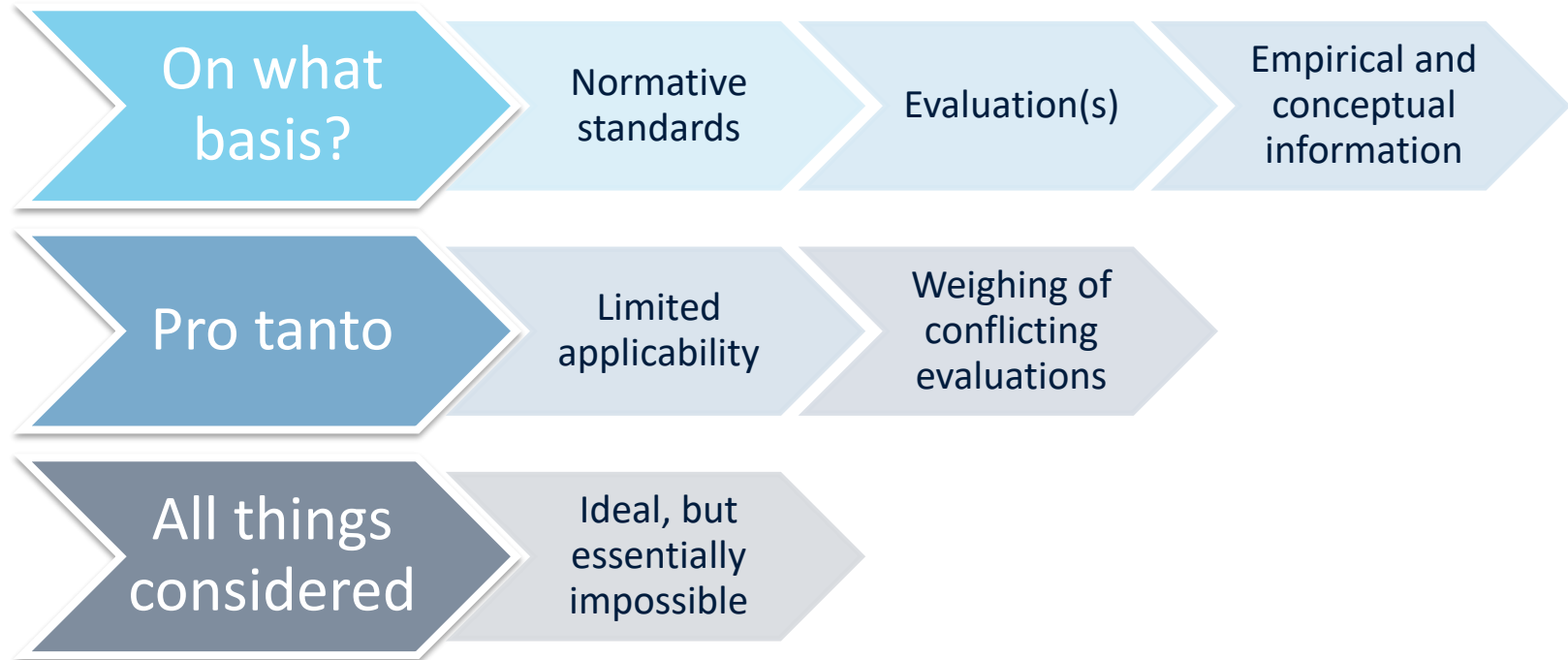Logical structure

Avoid fallacies

Justification

And what about recommendations?

| On what basis? | Normative standards | Evaluation(s) | Empirical and conceptual information |

| Pro tanto | Limited applicability | Weighing of conflicting evaluations |

| All things considered | Ideal, but essentially impossible |

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Law as a gateway drug to other disciplines

Where do we want (should we) go?

What legal paths are available to get there?

Which legal paths will actually get us there?

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Recommendations & assumptions (1)

Recommended path to take

Rests on conceptual & empirical assumptions/information

Which? Are these tested? By whom, how, &c.

Recommendations & assumptions (2)

Conceptual or logical

- X makes Y more concrete; X is part of Y

Causal

- X leads to Y

Contributory

- X contributes to Y

Conclusion

For both evaluations & recommendations, clear normative framework/standard is necessary

Standard can be doctrinal or extra-legal

Recommendations are often pro tanto: limited applicability

Evaluation & recommendation rely on – and open law up to – insights from other disciplines