1. Introduction

All through the process of developing this project, I had been shuffling between addressing two bundles of research questions. One concerns the academic status and epistemological credibility of legal doctrinal scholarship. The other revolves around the uses and benefits of conceptual reflection emanating from academic legal theory. It was not always clear which one was my more dominant preoccupation, and that had certainly been a hindrance while working on this volume. Ultimately, I weaved my two research questions together by committing to a project designed to set the conceptual parameters for a theory of legal doctrinal scholarship. This way, I seek to demonstrate the strengths of a specific model of conceptual reflection. I hope to show under what terms a version of academic legal theory ('doctrinally oriented legal theory') could provide active methodological support to legal doctrinal scholarship, and why it makes sense for academic legal theorists to pay more attention to the epistemological profile of legal doctrinal scholarship. There is a flourishing literature on where legal scholarship should or could go in the 21st century,¹ and I argue that academic legal theory could benefit from engaging more with the conceptual implications of that question. Legal theorists could be of some help by putting the controversies around the state of legal scholarship on a more stable conceptual footing.

As legal theoretical ambitions dictated the terms of my engagement with legal doctrinal scholarship, the project became more focused on the idea of a doctrinal discipline in the context of modern state law. It became less of an account of what 'legal scholars do all day'. It is not just that this volume is emphatically not an exercise in legal doctrinal scholarship. Nor do I offer a sociology or history of legal doctrinal scholarship. This is not an account of the historical development of Western legal scholarship – even though I am steeped in its traditions. I do not provide a sociological analysis of the current state of legal scholarship – even though I draw inspiration from sociological work on the practice of legal scholarship.² And I do not conduct a comparative analysis of the practices of legal doctrinal scholarship in different legal

¹ For a recent example, see Rob van Gestel, Hans-W. Micklitz and Edward L. Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (CUP 2017).

² See especially Fiona Cownie, *Legal Academics: Culture and Identities* (Hart 2004).

systems or legal cultures – even though I acknowledge that different versions of legal scholarship are adequate to different legal practices. Instead, I set out to articulate an abstract conception of legal doctrinal scholarship against the background of an account of modern state law. I hope that, in this way, we can provide more stable conceptual foundations for our understanding of the history of modern legal scholarship, as well as its sociological characteristics, and that we can facilitate comparative analysis of the practices of legal scholarship.

I conduct a predominantly conceptual analysis designed to set the epistemological and political philosophical parameters for legal doctrinal scholarship. I develop my conception of a specifically *legal* scholarship around an epistemological paradigm. I am particularly interested in how specific institutional conditions (like the modes of institutionalising legal education at universities) have epistemological implications for the practices of legal scholarship, and how the symbiosis of legal scholarship and the modern legal profession entangles an academic discipline in sorting out issues of political legitimacy for a professional group. I do not claim that everything legal scholars typically do can be explained in terms of a singular epistemological paradigm. Many legal scholars are likely to be surprised by my account of their discipline. However, the point is not to find an exact match between my account of doctrinal scholarship and the concrete practices of an academic discipline. The practices of legal scholarship are way too diverse for that. My ambition is to capture what gives legal scholarship a specific identity in academia. I hope to provide a point of orientation for a clarification of disciplinary identity and for further methodological development. I offer ideas that can be used to consolidate a very specific disciplinary identity and back it up with a comprehensive legal theoretical justification. My analysis is conceptual and normative, rather than descriptive.

Much of my work went into identifying a theoretical space academic legal theory could grow into. In this respect, the present volume represents an attempt to influence the agenda of contemporary ('mainstream') legal theoretical research. Unlike some others,³ I do not call into question the viability or relevance of the discourses of contemporary mainstream legal theory. Even though I no longer see the point of the characteristic conceptual controversies (like the one about the separability of law and morality) in academic legal

³ See, e.g., Ronald Dworkin, 'Hart's Postscript and the Character of Political Philosophy' [2004] *Oxford Journal of Legal Studies* 1. Andrew Halpin, 'The Methodology of Jurisprudence: Thirty Years Off the Point' [2006] *Canadian Journal of Law and Jurisprudence* 67.

theory, and I do think they display notable dysfunctions,⁴ I am sure they respond to genuine and interesting theoretical challenges. However, academic legal theory, in its current state, is not well positioned to account for the character of legal doctrinal scholarship without some reframing and a recalibration of its theoretical tools. I argue that academic legal theory would greatly benefit from a bit of capacity building to facilitate fruitful engagement with the theoretical problems around legal doctrinal scholarship. It would be a good use of the intellectual resources of conceptual legal theory. In particular, articulating a theory of legal doctrinal scholarship demonstrates a way in which conceptual legal theory may prove useful. This is certainly not its only viable use, but it is an appealing one.

I have already deployed some of the terms that will help me articulate my legal theoretical position accurately. To avoid needless confusion, I need to clarify the relationship between the most fundamental ones. In Chapter 2, a series of further terminological distinctions will be introduced. I use ‘legal theory’ as an umbrella term for all theoretical efforts targeted at legal practices. In the current study, it has no distinctive terminological significance. ‘Academic legal theory’ is a more specific term (and it determines the disciplinary affiliation of my work). The term covers academic practices that, in institutional terms, centre around law schools (in the sense that most academic legal theorists are employed in law schools and are involved in legal education), and which have the primary function of addressing theoretical challenges around legal practices. The latter qualification may seem a bit odd until we realise that it is not true of most of what we can broadly define as legal theory. Most ‘theorising about law’ is embedded in more broadly defined theoretical efforts and belongs to other disciplines. Plato has a theory of law,⁵ but it is just one aspect of his more complex philosophical undertaking, and it certainly does not make him an academic legal theorist. The same applies to many other philosophers (like Aristotle, Aquinas, Locke, Kant, Rawls) – even though their ideas keep inspiring and influencing academic legal theory. Similarly, most social theorists (like Niklas Luhmann or Jürgen Habermas⁶) and some anthropologists (like Pospisil⁷) have their accounts of law. But their legal theoretical contributions can only be made fully intelligible with reference to their broader

⁴ See Mátyás Bódig, ‘Comment on Simmonds – Legal Positivism and the Limits of the Contemporary Legal Theoretical Discourse’ [2011] *German Law Journal* 625.

⁵ See, e.g., Plato, *Laws* (CUP 2016) esp. books 4 and 9–12.

⁶ See, e.g., Niklas Luhmann, ‘Law as a Social System’ [1989] *Northwestern University Law Review* 136. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity 1996) esp. ch. 1.

⁷ See Leopold J. Pospisil, *Anthropology of Law: A Comparative Theory* (Harper and Row 1971).

theoretical agenda not specific to law. By contrast, I take academic legal theory to be an academic discipline of its own.⁸ In Chapter 4, where I characterise it as a ‘parasitic theoretical discipline’, I explain in more detail why that must be the case.

I sometimes also talk of ‘mainstream legal theory’ to pinpoint theoretical approaches or traditions that play a dominant role in contemporary academic legal theory. As I use it, ‘mainstream legal theory’ is essentially a sociological category. Its scope of application is determined by the influence certain schools of thought exercise over the institutional infrastructure of theoretical discourses (tenured positions in law schools, ability to attract postgraduate students, funded research, control over academic journals and venues of book publication, as well as the legal theory textbooks assigned in law schools). Of course, on this account, different kinds of legal theories can count as ‘mainstream’ in different countries or different legal cultures, as well as at different times. Currently in the English-speaking world, I take it that mainstream legal theory is characterised by adherence to the methods and style of ‘analytical philosophy’, as well as the agenda-setting role of ‘legal positivism’. In mainstream legal theory, legal positivists are the incumbents and anti-positivists are invariably the insurgents. The way mainstream legal theory shapes up today (especially in the UK) is largely due to the enduring influence (in terms of its methodological assumptions and agenda) of Herbert Hart’s ‘neo-analytical jurisprudence’.

I frequently use the term ‘conceptual legal theory’ as well. It refers to a specific field of theoretical engagement within academic legal theory that revolves around a central conceptual issue: the ‘what is law?’ question. It also deals with the theoretical clarification of basic juridical concepts (like ‘rule’, ‘obligation’, ‘adjudication’, etc.) that one needs to master to be able to answer the ‘what is law?’ question. Conceptual legal theory is distinguished from other thematic fields of legal theory like the theory of legal reasoning or the theory of legal interpretation. It is of particular significance for my analysis that (as I explain in Chapter 2) conceptual issues are different from issues of principle and issues of institutional design.

By relying on these three basic categories, I can state that I locate my efforts firmly inside the domain of academic legal theory, and that I seek to contribute primarily to conceptual legal theory. However, I deliberately distance myself from mainstream legal theory. I certainly do not work within the paradigm of analytical philosophy.

⁸ See Mátyás Bódig, ‘Legal Theory and Legal Doctrinal Scholarship’ [2010] *Canadian Journal of Law and Jurisprudence* 483, 503–505.

SPECIFIC AMBITIONS

Once we have some idea about my approach to accounting for legal doctrinal scholarship, as well as my legal theoretical agenda, it becomes easier to specify my substantive aspirations for this volume and the way the chapters will try to deliver on them. Clearly, the primary ambition is to provide a theory of legal scholarship. I will characterise legal doctrinal scholarship as a hermeneutic discipline that addresses the normative aspects of legal practices from an ‘embedded’ internal point of view, and which takes responsibility for their integrity and rationality. Its specific epistemic concern is how the normative aspects of legal practices are reflected in practice-specific doctrinal knowledge. Legal scholars register, structure and generate doctrinal knowledge.

Importantly, legal doctrinal scholarship does not cultivate just any kind of doctrinal knowledge about law. It is tuned on the doctrinal aspects of what professional lawyers (and judges in particular) know and expect each other to know. That is, it cultivates a ‘professionalised’ variety of doctrinal knowledge. This point is the key to understanding the internalism characteristic of legal doctrinal scholarship. It is not just that legal scholars internalise the constitutive values of law (and thereby construe ‘legality’ as a value of major social significance). They also get involved in legitimising the social and institutional influence of the legal profession. This is the side of internalism that determines the political profile of legal doctrinal scholarship. And it is responsible for the value commitments that are ideologically fixed for the discipline – like the commitment to the value of legality.

It is in this context that we will explore whether legal doctrinal scholarship can preserve its epistemological credibility – despite its ideological commitments. I will answer this question of epistemological credibility in the affirmative. It is true that the epistemological profile of legal scholarship is aligned with the political philosophical parameters of legal practices and the professional culture of lawyers, but the kind of normative knowledge manifested in the works of legal scholars has a legitimate claim to objectivity. It may be a challenge to find the appropriate sense of academic disciplinarity that can accommodate the distinctive epistemological profile of legal doctrinal scholarship, but we can find an epistemological core around which a viable discipline has been built. I will argue that, as long as modern state law remains the dominant construct of legality, that epistemological core remains indestructible – regardless of the structural and technological changes to concrete legal practices.

Apart from the primary substantive ambition of clarifying the epistemological and political philosophical profile of legal scholarship, a secondary ambition also shapes the agenda for this volume: I look at the conditions of

interdisciplinary engagement for legal scholarship. Interdisciplinary research becomes ever more popular and influential in legal academia. Understandably, many academics see it as an effective protection against the tendency of insularity in a discipline with unique epistemological concerns. However, interdisciplinary research raises searching questions about the methodological reach and methodological autonomy of legal doctrinal scholarship. That is why interdisciplinary engagement is a crucial testing ground for my theoretical efforts. If legal doctrinal scholarship remains poorly understood, it is much more likely that interdisciplinary engagement becomes a source of systematic methodological confusion.

This overview of the thematic focal points makes it clear that my ambitions for influencing the practices of legal doctrinal scholarship remain limited. I do not promise a methodological canon to legal scholars or even a detailed account of the sprawling practices of legal scholarship. Primarily, this work is meant to be a demonstration of the capacity of legal theory to find a fitting methodological vision for legal scholarship. Working out a methodological canon, if it is possible at all on the basis of my research, is further down the line.

One of the key reasons why the ambitions to shape the practices of legal scholarship must remain limited is that, as indicated above, my account of what legal scholars characteristically do is not complete. A lot of legal scholars engage in work (and brilliant work at that) that does not fit the framework I outline. I stay focused on the kind of knowledge that gives legal doctrinal scholarship its identity as an academic discipline. That is, I try to capture the epistemological core of legal doctrinal scholarship. A lot is built around that core that my investigation cannot cover. Many of my claims are placeholders for more detailed research.

The ambitions for this volume are also tempered by the fact that this investigation is built on a narrow information basis. It is rooted in my experiences in Hungarian and then British academia. My teaching and research straddles legal theory and legal doctrinal scholarship, and this book project grew out of my efforts to come to terms with the conflicting demands of the different strands of my work. That explains why the concrete examples of doctrinal constructs come primarily from the law of delicts and international human rights law. It also explains why I pay special attention to the academic debates around British legal scholarship. I am aware that the way I account for legal doctrinal scholarship and relate it to academic legal theory may not align with the experiences and perceptions of others. I have trust in the plausibility of my theoretical claims, but I do not hope to dictate the terms of the practices of legal doctrinal scholarship.

It is only in one respect that I seek to exercise some corrective influence. It seems to me that legal scholars tend to settle for a rather depoliticised image

of their disciplinary practices. My own analysis suggests that this image is not borne out by deeper legal theoretical reflection. A better understanding of legal doctrinal scholarship demands deeper engagement with the political philosophical foundations of legal practices.

The investigation I embark on will be delivered in the next five chapters. Chapter 2 sets the more precise theoretical parameters for the volume. Chapter 3 articulates my account of ‘doctrinal knowledge’ and embeds it in modern legal practices. The chapter provides the epistemological grounding for the whole investigation, but it also serves as a demonstration of why balancing between epistemological and political philosophical considerations is an inevitable feature of my theoretical initiative. Chapter 4 provides the theory of legal doctrinal scholarship I have promised in the Introduction. In Chapter 5, I test the viability of that theory by addressing the challenges of interdisciplinary engagement in legal doctrinal scholarship. Chapter 6 returns to problems of legal theoretical framing. It specifies the legal theoretical implications of the previous three chapters and provides a more definite shape for ‘doctrinally oriented legal theory’ as I envisage it. This is also where I draw my final conclusions.

LEGAL DOCTRINAL SCHOLARSHIP

As already indicated, the term I use to capture the main object of my analysis is ‘legal doctrinal scholarship’.⁹ The terminological choice was inspired by Nigel Simmonds,¹⁰ and I stick with it because it signals that the discipline I focus on does not fall under categories such as natural sciences, social sciences, or humanities. I argue that it represents a separate mode of academic disciplinarity: ‘doctrinal scholarship’. I also use the qualification ‘doctrinal’ to keep in mind that the scope of the analysis is narrower than ‘scholarship on law’. The ‘law’ refers to a cluster of complex and interconnected social practices that are of interest to a range of disciplines (sociology, political science, economics, etc.). The ‘study of law’ or ‘scholarship on law’ is a vibrant, multidisciplinary field of study. This is where ‘legal doctrinal scholarship’ operates. Arguably, it does not dominate the field, and it does not even cover the full scope of scholarship cultivated in law schools. Contemporary law schools (at least the ones I have first-hand experience with) house a broad variety of academic engagement with legal practices.

⁹ An obvious implication of this choice is that the key actor in my analysis is the ‘legal scholar’.

¹⁰ See Nigel Simmonds, *Law as a Moral Idea* (OUP 2007) 164.

It needs to be added that I work with a broad construal of ‘scholarship’ based on two basic considerations. The first is that scholarship generates knowledge about set epistemic objects and assigns objective validity to claims backed by that knowledge. The assessment of the claims made by scholars revolves around truth value – as opposed to sincerity or firmness of conviction. The second consideration is that ‘being a scholar’ means professional involvement in academic practices of teaching and research. Scholars are committed participants in an institutionalised critical discourse in which truth claims are put forward and systematically tested according to institutionally fixed academic standards.¹¹ Scholarship itself is a form of professionalised social practice.

The ‘doctrinal’ element of my concept of legal doctrinal scholarship will be articulated with reference to the idea of ‘doctrinal knowledge’. Doctrinal knowledge, as I construe it, is not specific to law: participants generate it in and around all normative social practices. In my account, the disciplinary identity of legal doctrinal scholarship revolves around the cultivation of doctrinal knowledge about law. The idea of ‘doctrinal knowledge’ is articulated in Chapter 3, and it forms the epistemological core of my project. The idea of ‘cultivating doctrinal knowledge’ will serve as the shorthand for the epistemological paradigm I settle on in my theory of legal doctrinal scholarship.

It would be awkward and ineffective to introduce the idea of ‘legal doctrinal scholarship’ simply by way of a stipulative definition. At this early stage, it makes better sense to give a clearer indication of what kind of discipline I have in mind by pointing to the character-defining activities of legal scholars. Even though I do not undertake to ‘track and trace’ all the subject-specific activities of legal scholars, I believe certain preoccupations are central to the disciplinary identity of legal scholars. They will be prominent objects of theoretical reflection in this volume. I have three such activities in mind. First, legal scholars set out to provide accounts of the legal materials in particular fields of law and make explicit their systematic character. Secondly, they subject pieces of legislation and major judicial decisions to critical scrutiny. They exercise some ‘quality control’ over the (judicial and legislative) decisions that serve as the primary drivers of normative development in concrete legal practices. Thirdly, legal scholars ask about the desirability and plausibility of institutional reforms in respect of existing legal mechanisms. That is, they engage with issues of institutional design.

I argue that the combination of these character-defining activities makes legal doctrinal scholarship unique among academic disciplines. It will be a key

¹¹ Cf. András Jakab and Attila Menyhárd, ‘A magyar jogtudomány helyzete és kilátásai’ in András Jakab and Attila Menyhárd (eds), *A jog tudománya* (HVG-ORAC 2015) 25.

challenge to find out how these activities can be construed as aspects of one epistemological paradigm. In the end, I will argue that it is the commitment to the ‘rational reconstruction of law’ that defines the basic epistemological aspirations of legal doctrinal scholarship. This is a point directly inspired by Neil MacCormick’s incisive comments on legal scholarship.¹² The rationale of cultivating doctrinal knowledge lies in building the capacity for the rational reconstruction of law, and the rational reconstruction of law makes it possible to set academic standards for explicating the systemic character of law, for the critical assessment of normative developments, and for engaging with issues of institutional design.

I have mentioned above that legal doctrinal scholarship lives in a sort of symbiosis with the legal profession. We deal with a discipline that has character-defining connections with both academia and the legal profession. It is a constant challenge to balance between two sets of (often conflicting) expectations. Legal doctrinal scholarship may end up looking deficient as an academic discipline, or it may look like failing the legal profession.

Legal doctrinal scholarship would not even exist as an academic discipline without its functional ties with the legal profession. It is an academic discipline openly committed to improving the quality of lawyering, as well as influencing the trends of normative development in concrete legal practices. The character of doctrinal scholarship is determined by the fact that the legal profession happens to treat the mastery of doctrinal knowledge as the primary test of competence for its members (i.e. professional lawyers). The primary manifestation of this connection is the involvement of legal scholars in professional legal education. If mastery of doctrinal knowledge is the test of professional competence for lawyers, legal education must take the form of doctrinal training, and the gates of the profession must be patrolled by experts in that kind of knowledge.¹³ And if legal education is to centre around the law schools in universities, those gatekeepers must be predominantly academic experts. In a sense, the rise of legal doctrinal scholarship (as we know it today) is the consequence of the way doctrinal competence came to determine the character of specifically legal expertise, as well as the specific mode of institutionalising professional legal education.

The ties to academia are straightforward: legal doctrinal scholarship is an academic discipline. But accommodating legal scholars in academia is a challenging and precarious process. The functional ties with a professional

¹² Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (OUP 2007) 290.

¹³ See Alex M. Johnson, ‘Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice’ [1991] *Southern California Law Review* 1231, 1246.

group are certainly not unique to legal scholarship. But they come with specific epistemological implications that may make it harder to earn and retain the credibility and prestige of a discipline. They have certainly been troublesome for legal doctrinal scholarship. The emergence of the social sciences in the 19th century has been a game changer in terms of the position of legal scholars in academia. Disciplines built on an empirical (and thus non-doctrinal) knowledge base about social relations have gained unprecedented (and much deserved) influence over academic discourses. In comparison, legal scholarship seemed to get stuck with an outdated model of generating academic knowledge: drawing formalistic conclusions from normative materials and learning very little about the social context in which the law is practised. For some, legal scholarship had to settle for the precarious status of a ‘soft applied science’.¹⁴ And the challenge is made trickier by the fact that involvement in legitimising the influence of the legal profession over legal practices implies certain ideological commitments for legal doctrinal scholarship.

All this implies that maintaining legal doctrinal scholarship as a viable academic discipline is fraught with difficulties. The ideological aspects of the association with the legal profession have the capacity to compromise the epistemological credibility of the discipline. But severing or even weakening those ties could strip legal doctrinal scholarship of its very reason for existence and its unique disciplinary identity. In this volume, I set out to provide a theoretical framing for the epistemological and political philosophical issues around legal doctrinal scholarship. I hope to demonstrate that a precarious balance can indeed be found and maintained between commitment to the legal profession on the one hand and commitment to academia on the other. Legal doctrinal scholarship is not just viable – it is indispensable. It is in this respect that I would like to highlight the strengths of doctrinally oriented legal theory.

It is an interesting question how this diagnosis aligns with the self-perception of legal scholars. I have presented the main themes of this book over the years on many occasions. I have had ample opportunities because this project has been slowly developing for a decade or so. I have seen strikingly different responses to my ideas from practising legal scholars. Some did not quite understand what the problem was supposed to be. They were perfectly content with the research they were doing, and the prestige it earns them in the academic world. Others not only recognised that there was a problem, but talked about it in quite dramatic terms. A colleague has argued that, considering the way we set up academic research in law schools, we are badly letting down our research students. Most legal scholars I have encountered have been some-

¹⁴ Tony Becher and Paul Trowler, *Academic Tribes and Territories: Intellectual Enquiry and the Cultures of Disciplines* (2nd edn, OUP 2001) 36.

where in the middle. There are some issues around legal scholarship, and there is something to talk about. In particular, legal scholars often feel that they do not get much respect from other disciplines, and that puts them at a disadvantage when competing for research funds against economists, sociologists or political scientists.

It is not my ambition to convince my audience that there is a crisis around legal scholarship. And I would find it inappropriate to raise alarm among legal scholars. I argue that there is uncertainty around the epistemological profile of legal scholarship, but not necessarily a crisis – or more of a crisis than ten, 50, or even 100 years ago. In the end, legal doctrinal scholarship has remarkable resilience to it. And once we have a modern legal system and an institutionally embedded legal profession in place in any country, legal doctrinal scholarship becomes indispensable and pretty much indestructible. The discipline has a stable position in academia: nothing can take its place, and the combination of factors that keep academic legal education at universities pretty much guarantees that the institutional infrastructure for legal scholarship (the law school) will remain in place. In fact, legal scholarship has grown steadily over the past few decades.

If my claims about legal doctrinal scholarship have a critical edge, they cut in a different direction. It is quite common to point to the methodological challenges facing legal scholarship and argue that the discipline is in need of a very substantial adjustment in the 21st century. Legal scholars need to change their practices and methodological orientations in fundamental ways. Of course, in an important sense, all forms of scholarship need to adjust (again and again) to an ever-changing disciplinary environment. And legal scholars need to keep pace with the evolution of legal practices. However, it is important not to exaggerate the practical implications of this obvious point. I argue that legal scholarship does not need to be reinvented or reconstituted. Instead, legal scholars need to be more self-aware of the character of their discipline. They must be alert to the dangers of epistemological uncertainty: it may breed misunderstanding and methodological dysfunctions. It is a drag on the development of any academic discipline. It is tempting to think that the current disciplinary environment is unfavourable for legal scholarship, and that there is limited appreciation in academia for the kind of work legal scholars do.¹⁵ However, instead of pointing to external factors hindering the discipline, we may be better off staying focused on the internal dynamics of legal scholarship. It is quite possible that legal scholars keep selling their discipline short. They should be more assertive about their contribution to understanding an important category of social practices. It may be true that legal scholarship got stuck

¹⁵ See Cownie, *Legal Academics*.

in a rather low-prestige position in academia (and I do not deny that there are some data to back that up), but there is nothing preordained about this.

FINDING A LEGAL THEORETICAL PERSPECTIVE

I have suggested above that legal doctrinal scholarship could use some support from academic legal theory. However, legal theoretical contributions capable of providing that support are hard to come by. For a variety of reasons (chief among them the tendency of mainstream legal theorists to pursue the favour of analytical philosophers), the contemporary agenda of mainstream legal theory is far removed from the epistemological challenges facing legal scholarship. Legal scholars might feel that the ongoing legal theoretical controversies are largely irrelevant to their work. It does not mean that legal theory does not exert influence on how contemporary legal scholarship takes shape today. There is always some exchange of ideas between abstract legal theory and academic engagement with the doctrinal aspects of the law.¹⁶ Some scholars will always shuffle between legal theory and doctrinal scholarship.¹⁷ However, that is not the same as bringing the epistemological challenges facing legal doctrinal scholarship into focus and making a commitment to providing active methodological support to a cognate discipline.

Moreover, one can argue that, in certain respects, the influence of contemporary academic legal theory has been positively unhelpful. The dominance of legal positivism in mainstream legal theory (which is, to an extent, the by-product of the rise of analytical legal theory), lends credibility to the idea that doctrinal reflection does not need to worry about its justificatory background.¹⁸ It has no bearing on the outcome of interpreting the law in pure doctrinal terms. In fact, it is not unusual among scholars to profess that doctrinal reflection assumes legal positivism as its theoretical background.¹⁹ It is one of my ambitions to challenge this view. Divorcing doctrinal analysis (and problems of justifying *by* the law) from issues of background justification for the law (problems of justification *of* the law) can turn into a dangerous

¹⁶ E.g., Hart's work is influential on causation and responsibility. See H.L.A. Hart, *Punishment and Responsibility* (Clarendon 1968). H.L.A. Hart and Tony Honore, *Causation in the Law* (2nd edn, Clarendon 1985). However, in his case, doctrinal issues more typically serve as inspirations for conceptual reflection rather than the other way round. See, e.g., H.L.A. Hart, 'Definition and Theory in Jurisprudence' [1954] *Law Quarterly Review* 37.

¹⁷ See, e.g., Jules Coleman, *Risks and Wrongs* (OUP 2002).

¹⁸ I will frame those problems as issues of 'external justification' in subsequent chapters.

¹⁹ See, e.g., Mark van Hoecke and Francois Ost, 'Legal Doctrine in Crisis: Towards a European Legal Science' [1998] *Legal Studies* 197.

simplification that contributes to the methodological uncertainty around legal doctrinal scholarship. Doctrinally oriented legal theory needs to explore the depth and complexity of justificatory issues around the law, and the methodological profile of legal doctrinal scholarship needs to reflect that complexity. This is a vital prerequisite to one of my key substantive theoretical ambitions: anchoring the epistemological paradigm for legal doctrinal scholarship in the rational reconstruction of the law.

This consideration is connected to a point I have already touched on: the work done in this volume belongs predominantly to conceptual legal theory. But why would a renewed focus on conceptual issues be helpful in this context? And why should we do some work on how we understand conceptual legal theory? I have claimed that mainstream legal theory (at least in the English-speaking world) decisively moved towards adjusting itself to the style and methods of analytical philosophy. The trend became particularly prominent with the growing influence of Herbert Hart from the 1950s. Undoubtedly, analytical legal theory philosophy has its attractions, and it has raised legal theoretical reflection to a higher level – especially in terms of intellectual rigour. And it has had a particularly strong impact on conceptual legal theory. It has been marvellously inventive in expanding or renewing the terminological framework of theorising about law (producing terms like ‘secondary rules’,²⁰ ‘pre-emptive reasons’,²¹ or the ‘practical difference thesis’²²). Due to the efforts of legal theorists over the past few decades, we have at our disposal the most sophisticated arsenal of conceptual constructs for analysing legal practices ever devised by humans. The success and staying power of analytical legal theory are living proof of its ability to engage with genuine epistemic needs: it has a lot to say that some people genuinely want to know.

What is the trouble, then? Why would it be difficult simply to build on the achievements of analytical legal theory over the past half a century when it comes to conceptual framing? Admittedly, finding the right legal theoretical perspective for my project has been the most difficult challenge. And I have ended up distancing myself from the analytical tradition for three fundamental reasons.

First, analytical legal theory represents a distinctive approach to conceptual issues. It promises to set the conceptual parameters for all theoretical efforts directed at the law. This should be clear to anyone who takes a look at the introductory chapter to Hart’s *The Concept of Law*²³ – in many ways the

²⁰ H.L.A. Hart, *The Concept of Law* (3rd edn, OUP 2012) 81.

²¹ Joseph Raz, ‘Authority, Law and Morality’ [1985] *The Monist* 295.

²² Jules L. Coleman, ‘Incorporationism, Conventionality, and the Practical Difference Thesis’ [1998] *Legal Theory* 381.

²³ Hart, *The Concept of Law* 17.

founding document of contemporary conceptual legal theory. He identifies three characteristic sources of endemic misunderstanding around the law (the complicated relationship between coercion and legal obligations, the overlaps between the languages of law and morality, and the tricky questions around the mode of existence for rules) and offers conceptual analysis to sort them out. Crucially for us, Hart's analysis has no built-in limitations of scope. It lays claim to explaining the conceptual basics of all legal practices – contemporary, as well as historical; real, as well as fictional. In time, this aspiration for a 'general theory of law'²⁴ has become controversial, but analytical legal theory remained steadfastly committed to it. The problem for me is that the claim to universal applicability is at odds with the legal theoretical pluralism that I advocate. It is not just that I believe that, depending on the concrete theoretical challenges, adequate conceptual framing may be achieved by relying on a range of different epistemological models. More importantly, when it comes to dealing with conceptual challenges, a 'general theory of law' can hardly prove adequate. In this volume, I indeed argue that developing a theory of legal scholarship requires us to operate on a lower level of abstraction. We need to make our conceptual arsenal adequate to specific 'constructs of legality' – as opposed to an abstract and general idea of 'law'.

Secondly, advocates of analytical legal theory have been remarkably reluctant to accommodate dialectical relations between the conceptual features of law. This may be attributed to the preference for working with clear and distinct conceptual constructs. But the aversion to dialectical relations may have more to do with a methodological commitment to keeping issues of conceptual legal theory (like 'what is law?') distinct from issues of justifying the law.²⁵ In other words, it is the by-product of the close association between analytical legal theory and descriptive (or methodological) legal positivism – another aspect of Hart's legacy. Whatever the reason, my investigation certainly calls for a dialectical framing of conceptual relations. Most importantly, I claim a dialectical relationship between doctrinal knowledge and legal practices. And, by implication, there is also a dialectical relationship between legal doctrinal scholarship and legal practices. It is equally important that, in the process of figuring out these relationships, we will indeed intertwine issues of clarifying concepts and articulating values. As many legal theorists have insisted, law

²⁴ See *ibid* 239. Joseph Raz, 'Can There Be a Theory of Law?' in Martin P. Golding and William A. Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell 2005).

²⁵ This is the problem that Nigel Simmonds characterises as 'fragmentation of inquiry' with reference to contemporary legal positivism. See Simmonds, *Law as a Moral Idea* 21–25 and 170–171.

is a social phenomenon (which can be described in terms of social facts), but legality is also a value, and that value keeps shaping legal practices.²⁶

Thirdly, the exact epistemological model my investigation relies on falls outside the domain of analytical philosophy. In the next chapter, I argue for adopting a version of interpretivism as our epistemological model. That is, I settle theoretical issues around social practices by way of analysing interpretive data gained from participant communication. Of course, analytical legal theory can accommodate an interpretive methodology. Hart himself was an interpretivist in the sense I use the term. However, I opt for a more robust variety of interpretivism that is rooted in philosophical hermeneutics (and Gadamer's work in particular²⁷). That is a good fit for a doctrinally oriented legal theory because, as we will see, legal doctrinal scholarship is best understood as a hermeneutic discipline. Analytical legal theory, however, is at odds with 'post-Heideggerian' philosophical hermeneutics – for reasons connected to my point about dialectical relations. Philosophical hermeneutics operates with a dialectical model of understanding. It is a good template for a close association between conceptual claims and value commitments. As will become clearer in the next chapter, I cannot settle my problems with the analytical tradition by simply adopting one of the alternative versions of interpretivism already available – like Ronald Dworkin's. Even though I pull closely together legal theory and political philosophy as much as Dworkin did, I still need to develop a specific version of interpretivism here.

It needs to be noted that there is a deeper layer to my specific objections to analytical legal theory. By operating on a high level of abstraction and by circumventing the dialectical relationship between basic juridical concepts and the constitutive values of legal practices, it projects a fundamentally depoliticised image of academic engagement with the law. I do not deny that apolitical engagement with the law (or more like the idea of law) is indeed possible and often methodologically feasible. However, it would certainly be inadequate for the purposes of doctrinally oriented legal theory. I argue that legal doctrinal scholarship has a distinctive political profile and that legal theory must work with a conceptual frame that reflects this aspect of the discipline. Legal theory must explore how the constitutive values of legal practices underlie the legitimacy of legal authorities and the professional culture of lawyers. Doctrinally

²⁶ This is a familiar point from academic legal theory formulated in different ways over the decades. Roscoe Pound has already articulated this point, see Roscoe Pound, 'Is There an Ideal Element in Law?' [1948] in Roscoe Pound, *The Ideal Element in Law* (Liberty Fund 2002). Lon L. Fuller, *The Morality of Law* (Yale University Press 1964) 162. Simmonds, *Law as a Moral Idea*, 191. Brian Z. Tamanaha, *A Realistic Theory of Law* (CUP 2017) 194–198.

²⁷ Hans-Georg Gadamer, *Truth and Method* (2nd edn, Continuum 1989).

oriented legal theory must be closely associated with political philosophy – even in a fundamentally epistemological investigation like the present one.

This makes clear that, even though I keep a distance from analytical legal theory, I do not seek a clean break with the dominant paradigm of mainstream legal theory. I focus on establishing and testing the viability of a legal theoretical perspective within academic legal theory. I suggest certain adjustments that may make theoretical work more adequate in a specific context. Admittedly, this legal theoretical perspective is parasitic on the development of mainstream legal theory over the past few decades. By reflecting on the character of law as an institutionalised normative social practice, mainstream legal theory has supplied conceptual points that are vital for the clarification of doctrinal knowledge and legal doctrinal scholarship. In particular, I owe a lot to efforts that went to developing a concept of authority for legal theoretical use. Most characteristically, I tie the idea of legal doctrinal scholarship to the concept of doctrinal knowledge, and I take doctrinal knowledge to revolve around the epistemic relevance of authoritative materials in legal practices. The practices of legal authorities are the most fundamental point of orientation for ‘getting to know’ the law.