1. The interaction of doctrine and theory in (international) legal scholarship

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1. INTRODUCTION

Theory is to doctrine in international legal scholarship exactly what it is to the scholarship of domestic law – at least in theory. Yet in practice it is not, because we tend to believe that the legal orders, the practice of doctrinal scholarship and (sometimes) even doing legal theory are fundamentally different in the domestic and international realms. Anyone who has tried to tell an audience of English lawyers what Rechtsdogmatik is can attest to the fact that practices certainly differ significantly between domestic legal cultures. However, the meta-theoretical question is whether international legal scholarship is a qualitatively different scholarly enterprise from German, English, French, and so on, domestic legal scholarship. The question could be answered, as it usually is, by a special plea – because international law is a special case, international legal scholarship is utterly different too. Yet I believe that international law, ‘its’ scholarship and ‘its’ theory are ideal case-studies for a broader claim about the nature of legal scholarship and legal theory – ideal because there is no strong, coherent and effective legal culture and ethos for international law. Both a shared legal culture and a uniform education are missing and so are pragmatic knock-down arguments and taboos which tend to blind us to theoretical issues, particularly what it means to conduct scholarship (Wissenschaft) of law.

1 See Kletzer, Christoph (2005), ‘Kelsen’s Development of the Fehlerkalkül-Theory’ 18 Ratio Juris 46, p. 62.
2 The different extensions of the terms ‘science’ and ‘Wissenschaft’ in English and German, respectively, are not merely a source of problems in the translation process. I believe that the absence of a truly universal term in the English language for all ‘proper’ academic enterprises, be they natural-scientific, social-scientific, part of the humanities or indeed legal studies is indicative of a different mind-set. I speculate that there is an (often subconscious) belief that there cannot or should not be a specific quality standard for scholarly enterprises (or one universal standard for all) which the
2. THE TWO FUNCTIONS OF LEGAL THEORY

Legal theory is the key to understanding what it means to engage in legal scholarship (as discussed in Sections 3 and 4). It partakes both of the realm of philosophy and of law and links them as well as the human activities, discourses and jargons centred around them. Legal theory is a communications interface and looks, Janus-faced, ‘above’ and ‘below’, but is also a mediator and controller. It aids mutual understanding and shows the boundaries of reflection – it manages the interface between and thus interlinks different realms of knowledge (‘Schnittstellenmanagement’).3 This median level of abstraction helps doctrinal scholars to avoid constructing theoretical foundations in a subconscious manner (which is almost certain to be incoherent due to the lack of structured thinking about the issue), because ‘doctrinal’ legal-scholarly and legal-theoretical arguments are mutually dependent. Legal scholars’ statements about their object – the law – are dependent on theoretical foundations in a number of ways, such as how normative orders are structured and how norms interact4 or what makes legal scholarship a scholarly endeavour. The reverse is also true: theory must respond to the law and the way we talk about the law.5

In international legal scholarship, this relationship takes on a particular importance because of a peculiarity which domestic colleagues have much less of and a lack which domestic colleagues are full of – international legal scholarship is particularly ‘orthodox’ when compared with the scholarship of domestic law. It is pervaded by ‘default’ legal positivism,6 that is: positivism’s non-theoretical and only quasi-positivist pathological mimic where the belief in the jurisprudence of international tribunals supplants a sustained scholarly critique of their authority or correctness, even regarding their adherence to the (general) positive law. While, as we shall see in Section 3, the desire to

5 Jestaedt, Matthias (2008), ‘Perspektiven der Rechtswissenschaftstheorie’ in Jestaedt, Matthias, Oliver Lepsius, (eds), Rechtswissenschaftstheorie, Tubingen: Mohr Siebeck, p. 199.
be relevant for legal practice is strong in domestic legal scholarship as well, international legal scholars’ subservience to tribunal statements is decidedly more pronounced – many arguments are based on nothing other than statements from case-law. On the other hand, international legal scholarship is not grounded in a common legal culture and cannot therefore use domestic legal culture’s conformity-inducing methods, such as a legal education shared by almost all scholars and practitioners of law which is effective even without having to engage too deeply with legal theory. In domestic legal scholarship, constitutional law scholarship also serves an important ancillary role, analysing structural-hierarchical relationships and critiquing doctrinal arguments, touching on many inherently theoretical topics in greater abstraction than administrative law scholars can.

Trivially and inevitably, what legal theory is depends on how ‘the law’ is defined; what law is depends on the legal-theoretical approach chosen. The choice of theoretical approach in this chapter is therefore profound, but also arbitrary. It is arbitrary in the word’s original sense: based on an arbitrium, a decision of human will. I believe strongly that, on the one hand, we have to proceed on the basis of one (of some) approach without, on the other hand, being able to deliver a final justification for that choice. I have chosen the normativist positivism of the Pure Theory of Law, because it is the best description of law ‘if we continue to insist [as we tend to do] on speaking of it as prescription of behaviour; that is, as “Ought”, as norms.” On this approach, then, legal theory (Rechtstheorie sensu largo) performs at least two connected but fundamentally different functions:

- It is a theory of legal scholarship, a theory of legal knowledge or ‘philosophy of science’ for the field of legal studies (Rechtswissenschaftstheorie) – its object is the process of the academic study of law.

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10 Jestaedt (2008) note 5; see also Klüver, Jürgen et al. (1971), ‘Einleitung: Rechtstheorie – Wissenschaftstheorie des Rechts’ in Jahr, Günther, Werner Maihofer
• It is also a theory of norms and law, a study of the concept, kinds and interaction of legal rules reasonably abstracted from specific legal orders (Rechtstheorie sensu stricto) – its object is the law as normative order.

2.1 Legal Theory as a Theory of Legal Scholarship

Because law is the object of legal scholarship and scholarship is a specific (strict and formal) form of knowledge-creation, Ewald Zacher argues that it is possible to envisage a role for legal theory as a methodology of legal scholarship. It would discuss whether practices fulfil the criteria for scholarship (Wissenschaftlichkeit) and would be linked to the general debates within the philosophy of science (Wissenschaftstheorie)\(^{11}\) – a theory of legal ‘science’ (in the non-technical sense),\(^{12}\) a Rechtswissenschaftstheorie. Karl-Ludwig Kunz highlights the function of legal theory as finding the conditions for the possibility of juridical cognition; the conditions under which legal scholarship (foremost doctrinal scholarship) are possible (legal epistemology)\(^{13}\) or ‘legal doctrine’s meta-theory’.\(^{14}\)

All of this is broadly in line with Hans Kelsen’s theory of scholarship, which argues that the cognition of law as norms without the non-cognitivist reductivism of analytical legal philosophy or of Scandinavian legal realism and without turning to the normative absolutism of natural law approaches is possible: a war on two fronts.\(^ {15}\) Yet just as the Pure Theory should not be misunderstood as an explanation of the totality of ‘the law’, legal scholarship is not the only scholarship concerned with ‘the law’. ‘Rather, it emphatically stresses that every juridical discipline [such as legal doctrine or legal sociology] is founded on a separate concept of law which means that there cannot be one overarching, universal and identical concept of law and corresponding

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object of cognition."\(^{16}\) The Pure Theory is an attempt at constructing a theory of scholarship for law as norms which combines a critical with a constructive element.

The critical element is expressed by the word ‘pure’. As mentioned above, Kelsen believes strongly that there is not a single scholarly method to cognise the world, but a multiplicity of scholarly methods on an equal footing. In a very specific epistemological sense, the differences in the scholarly method ‘produce’ different objects: ‘law’ seen from the perspective of a structural analysis of a normative order is not ‘law’ as societal practice.\(^{17}\) The culture of misreading Kelsen in the Anglosphere is, I believe, to a large extent based on an unrevealed divergence on this point: the linguistic and realistic turns combined with the Anglosphere’s empiricist and utilitarian history have meant that this equality, autonomy and separability of scholarly methods, which is so basic to Kelsen and his heirs, is utterly alien there. For Kelsen, and for many other Germanophone lawyers as well, there is an instinctual and perhaps unreflected plausibility to the argument that an admixture of methods by scholars will lead to a falsifying of the result of the exercise in cognition. Hence, the rallying cry for the purity of scholarly method.\(^{18}\)

The constructive element is the belief in the possibility of the cognition of law as norms as a separate scholarly enterprise – the idea of legal scholarship as a ‘normativist’ enterprise. Normativist scholarship is to be distinguished from normative scholarship:\(^{19}\) the former is norm-descriptive or norm-cognising, the latter norm-prescriptive, norm-setting or norm-creative. Even some who do not hold with Kelsen’s positivism, like Karl Larenz, are adamant that ‘norm scholarship’ (‘Normwissenschaft’) ‘does not mean that it is norm-giving, that it creates a legal norm itself. Rather, it is a system of statements about valid law.’\(^{20}\) The necessity to cognise the law as norms, as ‘ought’\(^{21}\) is the true reason why Kelsen placed such heavy emphasis on the Is–Ought dichotomy. If we

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\(^{19}\) See also Jestaedt, Matthias (2014), ‘Wissenschaft im Recht: Rechtsdogmatik im Wissenschaftsvergleich’ 69 \textit{JuristenZeitung} 1, p. 8.


\(^{21}\) Kelsen (1960) note 4, p. iii (Foreword).
are able to understand the realm of norms as categorically different from what exists – from a world of brute facts – then we must first have a method to do so; second, this method should be different from, say, sociology or psychology (which as scholarly enterprises are not concerned with norms as such), and third, this also means that all ought-entities, whether or not they belong to a legal order, can be cognised using this normativist method.

2.2 Legal Theory as a Theory of Law and Norms

This second function of legal theory is probably what Kelsen meant when he set out ‘a general theory of positive law’:

This theory, resulting from a comparative analysis of the different positive legal orders, furnishes the fundamental concepts by which the positive law of a … legal community can be described. The subject matter of a general theory of law is the legal norms, their elements, their interrelation, the legal order as a whole, its structure, the relationship between different legal orders and, finally, the unity of law in the plurality of positive legal orders.

Despite critics who believe that legal theory should focus only on the concepts and arguments of scholarship (as theory of legal scholarship), it is central to the Pure Theory that legal theory also analyses the law as normative order. There is a practical and a philosophical reason for this. Practically speaking, this function cannot be left to doctrinal scholarship, because it tends towards an instrumentalist view; it tends to use those theoretical arguments which support its current doctrinal argument. Doctrinal scholarship itself is not required to develop theoretical arguments in accordance with consistent foundational reflections; however, where a theory-averse doctrine does take an (implicit, ad hoc) theoretical stance, these are likely to be inconsistent. One example is the current assumption that the rules of interpretation enshrined in Articles 31–33 Vienna Convention on the Law of Treaties (VCLT) and parallel customary law are to be ‘interpreted’ by reference to these self-same rules, and the attendant

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22 Ibid., p. 111 (ch. 26).
assumption that ‘interpretation’ is a purely doctrinal topic. Answers to the question what interpretation of the law means, the argument goes, are to be found exclusively in the law as expressed in tribunal pronouncements, rather than the reflection on ‘meaning’ and the hermeneutic process.26

Philosophically speaking, it can be argued that a legal theory which sees its exclusive role in analysing (the concepts and arguments of) legal scholarship – and disavows looking at the law and legal orders, at norms and normative orders themselves – either encourages or is already subconsciously committed to reductivism and non-cognitivism. If theory is merely an analysis of the ‘legal discourses around fundamental [legal] doctrines’, 27 then legal theory is reduced to discourse analysis. It would then not study the law, but something only marginally and, more importantly, only contingently connected to the law: the way we talk about the law, ‘law-talk’. It is a small step from there to the denial of the law as anything more than ‘talk’ and from there to the trivial but weighty conclusion that if we cannot conceive of law as an ideal, if we cannot imagine the ought, then murder is not prohibited in any meaningful sense.28

If legal theory as a theory of law and norms is accepted, it would look at a wide variety of questions of central importance to the daily operations of legal orders. It contains a morphology (systems analysis) and functional theory (concerning legal operations) of norms and law (Struktur-, Geltungs- und Funktionstheorie des Rechts), for example:

- a theory of normativity and validity;
- the relationship to other normative orders;
- norm-functions/deontology;


• legal operations (creation and derogation, norm-conflict);
• norm-cognition and interpretation.

Interpretation is problematic – is it part of the theory of legal scholarship or of the theory of law? In *Reine Rechtslehre* (1960), Kelsen distinguishes between the interpretation of the law by legal scholarship and ‘interpretation’ by legal organs. The latter is not interpretation in the sense of a hermeneutic process of knowledge-generation, but application as authentic decision-making. Organs cannot interpret, only human beings can, even if their actions are attributed to an organ: ‘[I]nterpretation is either meaning-ascertainment, but neither a legal process nor does it necessarily happen when the law is applied, or a legal process that may sometimes be required by law before an application, but has little to do with cognition.’

On this reading, then, discussing ‘interpretation’ is firmly part of the first function of legal theory. In contrast, orthodox legal doctrine insists on making interpretation part of the law; it is imagined as ‘the construction of treaties by tribunals … a regulation of the process of judicial reasoning … seek[ing] to narrow the freedom implicit in empowering an organ to decide,’ which I have elsewhere called ‘interpretationB’. Much of legal doctrine eagerly restricts its task to that of a re-creation of past or a hypothetical creation of future tribunal decisions. This is based on the correct assumption that legal scholarship itself is not an organ of international law and on the incorrect assumption that interpretation can be a legal process and a hermeneutic exercise in equal parts. However, scholarly interpretation in a narrow sense ‘has to stop at the point where several interpretative results are possible and may not … construct a definite meaning which the positive law does not allow.’ Therefore, the theory of interpretation is properly part of the theory of doctrinal legal scholarship, to which we now turn.

29 Kelsen (1960) note 4, p. 352 (ch. 47).
31 Kammerhofer (2021) note 26, p. 87.
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3. DOCTRINAL SCHOLARSHIP: LEARNING FROM RECHTSDOGMATIK

*Rechtsdogmatik* is a German obsession – nowhere has more been written on the proper role and limits of doctrinal legal scholarship than there.\(^{33}\) The term is untranslatable German, and the debate is culturally specific\(^ {34}\) and cannot be transposed to the level of international legal scholarship without more. Yet, we can nonetheless learn from that debate, because the ‘core’ task of legal scholarship is traditionally seen in similar terms by international and domestic lawyers and because the features, problems and arguments are similar for both realms. Why not benefit from the depth of arguments which the intense German debate has created? We can learn from *Rechtsdogmatik*, both by adoption and by distinction. Space permits only a glance at this extensive debate, a highlighting of some elements and problems which are pertinent both to international legal scholarship and to the Pure Theory’s critique.

The idea that *Rechtsdogmatik* as currently practised is the only proper (or at least the primary) form of legal scholarship is widely shared in Germany. Take Christian Waldhoff’s ‘legal scholarship using doctrinal methods, ie legal scholarship *sensu stricto*: ‘[l]egal doctrinal work on valid law, with its focus on the process of application, is the proper [Proprium] legal scholarship as practised in Germany … only [it] … uses a specifically juridical method.’\(^ {35}\) This is usually followed by a commitment to two other, but highly problematic, beliefs: guiding the application of law (what I have elsewhere called ‘interpretation’) is seen as the central element; connected to this is the belief that doctrine is performed not just by professional academics, but also by ‘practice’. This can even lead to veritable category mistakes, for example in the following passage: ‘Even “erroneous” … decisions, because they are enforceable, shape

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\(^{33}\) For cultural and linguistic reasons, the debates in Austria and Switzerland have tended to track the German debate, even if they tend to be a bit less overstrung (‘hochgezüchtet’, Jestaedt (2014) note 19, p. 2) than in the Federal Republic.


\(^{35}\) ‘Das rechtsdogmatische Arbeiten mit dem geltenden Rechtsstoff bildet die Anwendungsorientierung als Proprium von Rechtswissenschaft, wie sie in Deutschland betrieben wird, ab. … Nur die dogmatisch arbeitende Rechtswissenschaft, d.h. die Rechtswissenschaft i.e.S., nähert sich dem Recht mit einer spezifisch juristischen Methode.’ Waldhoff (2012) note 34, p. 31.
legal life and thus societal or statal reality. Even judicial errors by courts of final instance are part of *Dogmatik*.36 This looks like a nonsensical statement, but it can be explained by the orthodox drive to explain and guide the process of application: doctrine as ‘Rechtsanwendungslehre’.37

As mentioned above and as detailed (for international law) in other writings,38 if the act of application by a legal organ, foremost the courts, is necessarily preceded by ‘interpretation’, if that process can and should be guided39 and if the law to be applied by that organ can be given greater specificity through interpretation – if, in short, ‘solutions’ to legal problems are possible through reflective work rather than through authoritative decisions – then legal doctrine could potentially be involved in this work. This is certainly the mainstream view, both in Germany and among specialists of international law, for example Uwe Volkmann who defines *Dogmatik* as an ‘aid to application for competent deciders in legal practice’;40 it is seen as the processing of general norms in advance of individual decisions.41

This gives the enterprise a strongly instrumentalist perspective: the work done by *Rechtsdogmatik* is directed towards a specific goal: to guide the decisions of legal organs in a specific direction before they decide – and to justify them after they have done so42 – despite the theorists of *Dogmatik* agreeing that the ‘one right answer’ model is incorrect.43 It is thus also geared towards the solution of problems which legal practice may provide,44 such as

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38 Kammerhofer (2021) note 26, pp. 68–143.


Bernd Rüthers’ emphatic statement: ‘We expect of courts and therefore of Rechtsdogmatik that it decides every case and finds a solution to every legal problem. … This distinguishes legal scholarship from all other forms of scholarship. It must not acknowledge the existence of “unsolvable” questions and problems – at least for the courts.’ This again shows the category mistake: authoritative decisions by the courts – law-making in the hierarchy of norms – are conflated with the cognition of law by humans, probably because judges are professional jurists just as legal scholars tend to be (and in Germany always are). The third attribute of Dogmatik is that it is sometimes subconsciously, sometimes (self-)consciously normative, that is, norm-creative: a source of law cognition (Rechterkenntnisquelle) is turned into a source of law-creation (Rechts(erzeugungs)quelle). Jestaedt describes this process as *duplex transmutatio dogmatica*: ‘Doctrine first turns law into scholarship, into the heart of legal scholarship, in order to be able, in a second step, to turn that scholarship back into law by way of the process of applying the law.’

By defending it and by segregating Rechtswissenschaft from other scholarly endeavours, the apologists for Rechtsdogmatik cast grave doubt on whether much of what is currently practised as Dogmatik can rightly be called ‘scholarship’. This applies to a large degree to doctrinal international legal scholarship as well. Its instrumentalist aims, seeking primarily to influence the legal organ at the point of application, might strengthen its connection to the law, but by its very practicableness alienates it from the process of cognition and knowledge-creation which is by definition central to Wissenschaft. This

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50 *Wissenschaft ist, was Wissen schafft* – as long as knowledge-creation is combined with methodical stringency: Jansen (2018) note 42, p. 635; Zacher (1971) note 7, p. 228.
holds true even for interpretative-hermeneutic disciplines and irrespective of the fact that the natural sciences are not the only relevant standard for scholarly enterprises.51

*Dogmatik* is largely based on peer-acceptance, rather than truth-dependence; it is standard-setting, guiding, norm-creating. As I have argued elsewhere, orthodox views of interpretation are a set of tools to give, rather than cognise, meaning in order to (partially) pre-determine decisions by legal organs. Treaty interpretation is based on the ‘interpreter’s perspective’: ‘interpreters use a variety of sources which are acceptable to peers in order to “justify” the interpreter’s insertion of meaning into a treaty norm’; it is a framework of practices acceptable to peers.52 At least that practice-oriented, decision-guiding instrumentalist exercise is *technē*, rather than *epistēmē*, practical craft rather than scholarly epistemic endeavour, ‘an unscholarly legal scholarship’53 as Franz Wieacker calls it. If we can openly admit that this is not part of scholarship, partaking of its nimbus and prestige, that would be fine, but we tend not to. However, even if we did, the question of ‘poisoning the well’ would remain.54 By that I mean the problem engendered by the same people engaging in both legal scholarship proper55 and the non-scholarly parts of *Dogmatik*, often doing so in the same text. Admixing the unscholarly with the scholarly without clear separation thus ‘poisons’ the results of scholarly cognition, because the methodical stringency of the process is not maintained throughout. Nils Jansen draws the inevitable consequences: ‘[If] what [legal] scholarship does is no different from what the courts and legal practitioners do, it will no longer be recognised as scholarship vis-à-vis the other fields of knowledge.’56

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55  Lepsius (2012) note 34, p. 60.
4. THE PROPER ROLES OF DOCTRINAL LEGAL SCHOLARSHIP

However, if this form of doctrine is not scholarship properly so called, which practices are? In a nutshell: legal scholarship proper is the analysis of legal orders and interpretation as frame-determination, two intimately connected research procedures. The first task has been called ‘structural analysis’. The analysis of the structure of a legal order is central to doctrinal legal scholarship, because normative orders are of necessity structured. Norms of one normative order are in a relationship if they are to be more than an unconnected assemblage of mini-normative orders. The Pure Theory proposes that this can be described as a hierarchy, a Stufenbau (step-pyramid). The hierarchy is established by the validity relationship (Geltungsbeziehung) between norms, the only ‘systemic connections which are … a necessary corollary of the concept of law’, because the source norm (empowerment norm) establishes the validity of the norms created by it. Since validity is the form of ‘existence’ that norms take, they would not ‘exist’ if they had not been created, at least not as member of the source norm’s normative order. The analysis of the structure of legal orders – analysing how the norms of a legal order interrelate – is, I would argue, the most important task of any doctrinal legal scholarship sensu stricto – and neither banal nor a trivial accountancy of rules. It is a rational scholarly enterprise, yes, but it ‘need not obfuscate when the statutes or jurisprudence seem inconsistent or dysfunctional, but will endeavour to describe possible points of rupture in a precise manner’.

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57 This section draws on Kammerhofer (2021) note 26, pp. 146–151.
64 ‘braucht also nicht zu lavieren, wo Gesetz oder Rechtsprechung inkonsistent oder dysfunktional erscheinen, sondern wird sich vielmehr darum bemühen, etwaige Bruchstellen präzise zu benennen.’ Ibid., p. 654.
The second task is interpretation, understood as frame-determination.65 This equally important (and virtually indistinguishable) task is a form of micro-level structural analysis: the determination of the frame of possible meanings of the law. The process of establishing the ‘meaning-content’66 of written norms is one of great freedom because of the use of natural language which produces relatively indeterminate norms:

[T]he law to be applied merely provides a frame, within which there is more than one possibility of application. Any act that stays within this margin and gives the frame a possible sense is legal. … If ‘interpretation’ is to be understood as epistemic ascertainment of the meaning of the object to be interpreted, the result of a legal interpretation can only be the ascertainment of a frame (which is the law to be interpreted) and thus the cognisance of multiple possibilities [of meaning], which are possible within the frame.67

Because legal scholarship does not make the law it interprets – because its task is knowledge-generation, not law-making – it can cognise/identify, but does not itself create, the frame of possible meanings.68 Yet, the frame is not non-existent; the limits of the norm are the limits of frame-determination. As a scholarly exercise it can in principle describe the immanent limits of the interpreted norm – those immanent in its validity. It is scholarship’s task and responsibility to cognise them; it has no legal authority, only its reputation as methodologically stringent knowledge-generation enterprise (Wissenschaft).

For the Pure Theory, doctrinal scholarship cannot ‘present one interpretation (desirable as it may be from a subjective political point of view) as the only possible one from an objective scholarly vantage-point, where another interpretation is logically equally possible’.69 Thus, if doctrine can restrict itself to an effort at cognising the law in force, it will be able to say something

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67 ‘Das anzuwendende Recht bildet … nur einen Rahmen, innerhalb dessen mehrere Möglichkeiten der Anwendung gegeben sind, wobei jeder Akt rechtmäßig ist, der sich innerhalb dieses Rahmens hält, den Rahmen in irgendeinem möglichen Sinn ausfüllt. … Versteht man unter “Interpretation” die erkenntnismäßige Feststellung des Sinnes des zu interpretierenden Objektes, so kann das Ergebnis einer Rechtsinterpretation nur die Feststellung eines Rahmens sein, den das zu interpretierende Recht darstellt, und damit die Erkenntnis mehrerer Möglichkeiten, die innerhalb dieses Rahmens gegeben sind.’ Kelsen (1960) note 4, pp. 348–349 (ch. 45(d)).
68 For example, Thaler, Michel (1982), Mehrdeutigkeit und juristische Auslegung, Vienna: Springer, p. 17 (fn. 35).
69 ‘indem eine Interpretation, die von einem subjektiv-politischen Standpunkt aus erwünschter ist als eine andere, logisch ebenso mögliche Interpretation, als die von
meaningful about the law beyond an uncritical apology of what states do or what tribunals say – and beyond merely reflecting the scholar’s personal values.

5. ASCERTAINING OR CREATING CUSTOMARY INTERNATIONAL LAW?

The (meta-)theoretical discussions above have shown the function and limits of legal theory and doctrinal scholarship. Both its function as theory of legal scholarship and as theory of legal norms can help to structure and channel (and thus restrict) arguments about international law, particularly its sources. One example is the current debate on how customary international law functions, which is notorious for the arbitrariness of the foundational arguments bandied about. For example, it has recently become commonplace to discuss the ‘identification’ or ‘ascertainment’ of customary international law more than its creation.70

The International Law Commission’s 2013–2018 project on customary international law was originally concerned with custom’s ‘formation and evidence’, but the title was soon changed to ‘identification’.71 The 2018 ILC Conclusions argue that its work was about ‘the way in which the existence and content of rules of customary international law are to be determined’72 – ‘the methodology for identifying rules of customary international law … a structured and careful process … to ensure that a rule of customary international law is properly identified’.73 State practice and opinio iuris, usually styled as requirements for the creation of customary law, are downgraded to a tool to aid cognition: ‘together [they] supply the information necessary for the identification of customary international law.’74

The Pure Theory’s requirement for an empowerment norm discussed in Section 4 applies to all normative orders and forms of law, including customary norms and customary international law. In order to be positive rather than fictional norms, they must be the product of human volition – customary

70 This section draws on Kammerhofer (2022) note 28, pp. 17–20.
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norms are not a special case which simply ‘arise’. For the Pure Theory, the ‘belief’ in *opinio iuris* is best explained as a collective will:

Only when [practice has] occurred for a certain amount of time, the idea develops in individuals that they ought to behave as the members of the society usually behave, and the will that other members of society ought to behave in this manner. … In this manner custom becomes a collective will, whose subjective sense is an Ought.75

The ILC project, however, explicitly excludes law-making processes, not to mention international law’s empowerment norms for the creation of customary international law – the law telling us how customary international law ought to be made:76 ‘the draft conclusions do not address, directly, the processes by which customary international law develops over time.’77 By the phrase ‘formation of rules’,78 the ILC seems to have meant the social and political forces which in fact cause law-creation, not the legal process of law-making proper. On that understanding, the making of (international) law is not itself part of the law – a crude form of etatist natural law thinking typical for late 19th-century dualist thinkers.79

If all that project does is to provide the means for the identification of law, then why is it couched in normative language (‘as in any legal system, there must in public international law be rules for identifying the sources of the law’)?80 Why do we require rules for identification; are these rules part of international law? The ILC, however, does not seem to attempt to prove that. If, on the other hand, the usus plus opinio formula is merely a method for identifying customary international law, is it not odd that this process is as rigid and formal as an empowerment norm for law-creation? If it is no more than a methodology (or set of proofs), we would expect a flexible process – which may have little to do with state practice and opinio iuris – to be more apt in finding out which customary international law norms are valid and what their content is. To the contrary, state practice and opinio iuris with all their formal-
ity is probably no more and no less than the conditions the law on international customary law-creation prescribes for the making of customary norms, rather than a set of proofs.

On the ILC’s view, state practice and opinio iuris are the microscope which we use to observe the process of cell division, rather than the physical process of cell division itself, but how would customary international law be created if not by way of the two elements? If practice and opinio are not the legal basis for the claim that a proposed norm is part of the sum-totality of customary international law, where is the legal foundation for law-making? I do not believe that doctrinal legal international legal scholarship should only, or even primarily, be concerned with finding out how to identify customary law, rather than with its formal source (in the Pure Theory’s parlance: the law on customary law-making). This latter task is a prime example of the structural analysis described in Section 4. However, even when we are concerned with identification processes, would not any such enterprise, as long as it is part of legal scholarship, quite naturally have to proceed from ‘a re-creation of [customary law’s] genesis’ – a counting and analysis of the various emanations of state practice and opinio iuris which contributed to the customary norm’s creation?

In domestic legal scholarship, we would not describe the approval of a bill by parliament or its sanction by the head of state as a means of law-identification.

6. CONCLUSION

A combination of three factors was most likely causal for the shift from the creation to the identification of customary international law. First, the subconscious anti-positivist impetus of international legal scholars – present also in many of those calling themselves ‘positivists’ – is loath to construct the higher reaches of the international legal order exclusively on the basis of norms. As mentioned above, we can imagine them saying that the sources of international law are not themselves made up out of law, but are based in efficacy or power or in absolute or universally agreed values. Second, their subconscious anti-intellectual impetus regards the construction of complex and ultimately ‘unhelpful’ hierarchies of higher law as unnecessary, because customary international law can be made to ‘work’ by relying on ‘practical guidance’ for the identification process only. Third, the many evidentiary difficulties involved in customary international law may lead international lawyers to consciously

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abandon the search for legal requirements and to succumb to ‘the eternal temptation to escape to the real world … and to explain empirical reality’.84

And that explanation turns out not to be unique to this problem and to international legal scholarship after all, but one that plagues much of legal scholarship. We would rather re-imagine the world and our place in it than live with the limits we – as academics in the faculties of law – are faced with: a lack of authority to shape the law and significant theoretical, evidentiary and conceptual problems. Acknowledging and learning to live with these limits is sometimes depressing, yet I would prefer despair at being unable to solve the world’s problems over hubris in believing that we can – or should.