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The Classics' Corner

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Bringing theory back in

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1. There exists a widespread doubt over whether law in general not only Public International Law can be scientifically studied. This scepticism reached a high point during the development of *scientism* during the nineteenth century. Scientism viewed science as the way to resolve human and social problems in the world, which involved the development of sciences based on experimentation and rigorous laws. By delving ever deeper into the study of the natural world and understanding its laws, man would acquire control over his environment, thus allowing him to solve the problems of the time, thereby overcoming his ignorance. Science was the true path to progress and only those fields of study which followed its premises were deemed worthy of the name physics, chemistry, geology, mathematics etc. These disciplines deserved to be called sciences because, due to their accumulation of facts and investigations, and in line with the objectives and methods of scientism, they allowed society to achieve its fundamental goal of progress. The results of prior investigations would provide the basis for future investigations, which would allow for the discovery of new laws, which, through the development of increasingly abstract and general formulae, would lead to an understanding of a greater number of seemingly different phenomena.

   This approach left little room for forms of human knowledge which were not directly observable or measurable and, as a consequence, led to the development of new sciences which did not share the goal of dominating the natural world, but rather focused on using the methods used in natural sciences to explain social phenomena. This was developed by, amongst others, Émile Durkheim in the field of sociology.

2. In the field of law the influence of scientism created a double reaction. Firstly, there were scholars who argued that knowledge of law should be as objective and neutral as possible. This approach was adopted in France during the first half of the nineteenth century with the School of Exegesis, for whose followers scientific knowledge of law had to be based in objectivity. According to the School of Exegesis, the objective basis of law was legislation, and all positive law was identified with written law.

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This work was published as "La vuelta a la teoría", in *Hacia un nuevo orden internacional y europeo: Estudios en homenaje al profesor don Manuel Díez de Velasco,* Madrid, Tecnos, 1993, pp. 179-196.

The second reaction consisted of asserting the specific scientific nature of non-natural sciences based on their particular object of study and methods of gaining knowledge, onto which it would be inappropriate to apply the systems of the natural sciences. We thus see the distinction, as developed by Neo-Kantians, between sciences of nature and sciences of the spirit. In accordance with this approach, law would have objectives and methods which were distinct from those of the natural sciences, as it did not exist in the physical world nor was it based on experimentation, but it would have its own scientific nature, which it shared with other cultural sciences.

3. The denial of the scientific nature of knowledge of law was embodied by Kirschmann. In his famous conference of 1848, titled *On the Worthlessness of Jurisprudence as a Science,* he argued that legal scholars 'study the lacunae, the mistakes and the contradictions of positive laws; looking at what is false, antiquated or arbitrary within them. Their goal is ignorance, negligence, the passion of the legislator […] Due to positive law, legal scholars have become worms who live off rotten wood; avoiding what is healthy and setting up their nest in that which is sick. As science makes its object of study contingent, it defines its own contingency; Three lines from the Court of Justice and entire libraries become waste paper.'[2] Kirschmann's critique was aimed directly at the methodological approach adopted by the School of Exegesis, which focuses the work of the legal scholar on an analysis of written law. We thus need to ask if the legal scholar is limited to simply studying legal statutes.

   The critique of the School of Exegesis was developed in France, principally by François Gény, for whom there are two elements within law: that which is *given* and that which is *constructed*. On the one hand, legal scholars seek legal rules through an objective analysis of what can be deduced from 'social nature', where possible in its purest form, which forms what is the *given* element of law. On the other hand, legal scholars try to apply these natural, *given* elements, transforming them in such a way that they become modelled on the requirements of the legal order to which they are destined to form part of. The result of this 'artificial' work constitutes what is *constructed* within law. This duality allows Gény to develop a distinction between *science* and *technique*. *Science* consists of 'the development of the elements of law, carried out without artifices, observing facts of nature.' *Technique*, on the other hand, looks at the construction of law, consisting of 'the special and professional effort through which the surprising and unique contours, and considerable importance of a legal order are adopted.'[3]

4. Within Gény's analysis we see the elements necessary to put forward the idea of a science of law. The concepts of *given* and *constructed* elements, and of *science* and *technique*, can be taken as a starting point for this development, if we move away from scientism and other philosophical currents of the time.

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[2] H.J. von Kirschmann, *La Jurisprudencia no es Ciencia* (*On the Worthlessness of Jurisprudence as a Science*), translation and foreword by A. Truyol y Serra, 3rd edition Centro de Estudios Constitutionales, Madrid, p. 29

[3] F. Gény, *Science et technique en Droit Privé Positif*, Sirey, Paris, n.d., pp. 98-99

Kirschmann's critique had something of a basis in that the science of law cannot limit itself to the study of legislation. Whilst laws frequently change, sometimes too quickly, many laws have a long history. For many centuries legal scholars have developed a language, methods of reason, categories of interpretation and intellectual models to apply to laws and their application, and these often outlive the laws which they were designed to analyse. Angel Latorre highlights the importance of this doctrinal tradition for the possibility of creating scientific knowledge on law, positing, 'however radical legislative changes may be, the mental habits, terminology, and technical language of this doctrinal tradition are always applicable. It is in the preparation of this *forma mentis*, in the use of certain methods and the use of particular language that we see real legal training, rather than in the specific knowledge of particular laws.'[4]

This does not mean that the science of law consists exclusively of certain modes of reasoning and a specialized language, as its object of study also includes laws, specific legal norms and legal orders as a whole. In this sense it is worth making an often overlooked observation: law as such, that is, legal order, is not in itself a science; rather law is the object of study of a science, namely the science of law. As Luis Recasens Siches so graphically put it, law is not a science in the same way that an elephant is not a science; what are sciences are zoology and the science of law.[5] The distinction between law and the science of law is not always clearly understood. There are many reasons for this confusion, starting with the way the word *law* is used to refer both to legal orders and the work of legal scholars.

The objective of the science of law is, firstly, to develop knowledge on laws, norms and legal orders, which we could refer to as the *given* elements of law, though in a slightly different way to that of Gény. And the second objective is to interpret and understand the techniques, intellectual habits, language, methods of reason, categories and intellectual models used by legal scholars, which we could refer to as the *constructed* elements of law. Just because specific laws and norms may be subjected to changes, this does not reduce their individualization and creation at any particular moment in time. Legal orders last over time and these *constructed* elements enjoy a high degree of permanence. Playing with the concepts of constancy and transience, Karl Larenz observes, 'the science of law is concerned with both that which is transient and that which is (to a lesser or greater degree) constant; it also delas with that which is constant within transience, that is, with the multitude of its constant manifestations. The object of study is both that which is special or individual, such as particular decisions in particular cases, as well as that which is general, namely a general idea of law and the way it is carried out.'[6]

5. From a different perspective, the scientific nature of law has been defended in terms of recent contributions to philosophy and the history of science. Kuhn has underlined the fact that scientists do not limit themselves to formulating empirical

4 A. Latorre (1968), *Introducción al Derecho*, Ariel, Barcelona, p. 122

5 L. Recasens Siches (1971), *Experiencia Jurídica, Naturaleza de la Cosa y Lógica 'Razonable'*, Fondo de Cultura Económica/ Universidad Autónoma de México, Mexico, p. 500

6 K. Larenz (1966), *Metodología de la Ciencia del Derecho*, (translation to Spanish by E. Gimbernat Ordeig), Ariel, Barcelona, pp. 20-21

laws based on the observation of natural phenomena as outmoded scientism postulated, but that they also accept certain premises that lack an empirical grounding, and that the scientific community uncritically accepts this.[7] Alberto Calsamiglia has argued that legal knowledge functions in the same way, as it has its own rules and it possesses objectives and social functions that are not arbitrary or subjective. The legal community, just like the scientific community, determines the acceptance of these features of legal knowledge and oversees their application. As Calsamiglia notes, 'it makes no sense to ask more of jurisprudence than of any other mature science.'[8]

6. The science of law thus deals with *given* and *constructed* elements, and expands the *given* elements beyond that which Gény outlined. Therefore, we need to ask what the role of *technique* is within law, and in this sense we need consider the two functions of technique. Firstly, law has a technical aspect in that it is an instrument which aims to achieve particular results. At a very general level, law is a technique or mechanism that aims to solve conflicts of interest (satisfactory function) and bring about peace, eliminating the individual use of violence (pacifying function).[9] Secondly, the language, modes of reasoning, habits of thought etc. are also *techniques*, or individual technical instruments. Therefore, the science of law cannot view either norms or modes of reasoning as absolutes, but rather as technical instruments which have a functional validity. This is what allows the science of law if it does not wish to cut itself off from its most important activities to be a science which is not only cognitive, but also *practical*.

7. From this perspective we see that Public International Law, which is not a science in itself, in the same way that domestic law is not a science either, can be the object of study of the science of law in that it is a form of legal order. Being a different form of legal order from that of domestic legal order, it can be a different object of study for the science of law. The role of *given* elements is far less important than that of *constructed* elements when compared with domestic legal order. We thus see that Hall's phrase, which was already inaccurate *there is no place for the refinement by courts of the coarse jurisprudence of nations* is even more inaccurate today.[10]

International Law, developed under the umbrella of the rich legal tradition of jurisprudence and supported from its origins by contributions from Roman Law, very quickly became a focus of the science of law. Its relatively modern origins, especially when compared with Civil Law, represent no problem in this sense, as it comes together with a much older scientific tradition. The claims of certain branches of law to be considered as an independent theoretical stream are, without doubt, overplayed. Whilst each branch of law has its own peculiarities, we can not seriously talk of a science of Civil Law or Procedural Law, for example. And neither can we talk of a science of International Law as such. However, we can talk of the Science of Law applied to international legal order.

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7 T. Kuhn (1962), *The Structure of Scientific Revolutions*, University of Chicago Press, Chicago
8 A. Calsamiglia (1986), *Introducción a la Ciencia Jurídica*, Ariel, Barcelona, p. 77
9 L. Díez-Picazo (1973), *Experiencias Jurídicas y Teoría de Derecho*, Ariel, Barcelona, pp. 18-20
10 W. E. Hall (1924), *A Treatise on International Law*, 8th ed., edited by A. Pearce Higgins, Oxford, p. 395, fn. 2

8. Methodology indicates the means through which knowledge can be acquired within sciences and how sciences can be taught. Within the field of law in a general sense, and within International Law in particular, it is understood that methodology can be broadly interpreted to include the means employed in the acquisition of scientific knowledge on the international legal order, and in a narrower sense, with reference to the means used to determine the existence of norms or rules within International Law.[11]

   The issue is more complicated than it appears as presented in this simple dualistic approach, however, as international legal scholars, just like other legal scholars and even other scientists, carry out their work on three distinct planes which are tightly interconnected: the plane of description, the plane of explanation and systemization, and the plane of operationality and application to reality. Elías Díaz, focusing this triple function on legal norms, posits that the work of a legal scholar can be differentiated along these three elements: a) the work of *locating* the valid norms which can be used for a specific case; b) the work of *interpreting* norms, of connecting norms in the *construction of institutions and fundamental legal concepts*, and of *systemizing* norms and institutions into a coherent whole; c) the work of *applying* norms for the resolution of particular cases in real life and for the implementation of a certain system of values within a particular society.[12]

   In a broad sense, the methodology of law should consist of the set of intellectual instruments which the legal scholar uses in order to carry out the aforementioned functions. Methodology should include both the methods used to determine the existence of international norms and to determine their interpretation and systemization, as well as to outline how they can be applied to a specific case. To a greater or lesser degree all legal scholars carry out these functions, but the importance given to each of these elements varies between scholars and practitioners of law.

   The fundamental task of the legal scholar consists of the second of the aforementioned functions: the interpretation and systemisation of legal norms and institutions as a constructed and coherent whole. This task, however, also presupposes the function of determination and application of the norms of the legal order under study. The system of producing laws in a particular order conditions the perspective taken and the tools which should be used to examine the order. The way we study an order with high levels of written law and codification will be very different from that of an order where customary law or jurisprudence are more prevalent.[13]

   The function of application goes far beyond being a mechanical operation which is complementary to the location and interpretation of norms. In fact, it takes on creative features in cases where there is a gap within the law or it is necessary to

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11 C. Dominicé, 'Methodology of International Law', in *Encyclopedia of Public International Law*, vol. 7, p. 334

12 E. Díaz (1971), *Sociología y Filosofía del Derecho*, Taurus, Madrid, p. 70

13 Manuel Pérez González indicates that 'the meaning of law-making within international society is of crucial importance to methodology' and its importance to understanding 'law as an ordering system of characteristic intersocial relations.' M. Pérez González (1989), 'Observaciones Sobre la Metodología Jurídico-Internacional: Método, Evolución Social y *Law-Making* en Derecho Internacional Público', in *Liber Amicorum en Homenaje al Prof. Dr. Luis Tapia Salinas*, Madrid, p. 251

simultaneously apply various norms from different orders. In these cases we see problems in the way jurisprudence creates laws and the way in which analogies are used to solve particular legal cases.

The contributions made by the science of law in terms of generating a better understanding of law have been varied and highly valuable, and they are closely linked to the development of thought and social sciences in recent times. Taking the international legal order as a reference point, we need to ask to what extent the methods of the science of law are applicable to International Law and whether other methods from social science can contribute to the development of the science of International Law.

9. Within the modern science of law there has been a wide-ranging debate around the method which has contributed to its development and enrichment. The main methodological currents within this debate have also been seen more specifically in International Law. In fact, the science of law and the science of International Law have followed parallel paths. Any analysis of methodological issues in International Law that were limited purely to the sphere of the science of International Law, and not the science of law more generally, would only provide a partial picture of this theme. Debates have raged within various interconnected doctrinal streams. The aim here is to analyse the general theme of these debates, incorporating contributions from various fields, not only International Law, though there will obviously be more of a focus on International Law.[14]

10. For many years the science of law has been identified with the dogmatic method. Developed by great German legal scholars at the end of the nineteenth century, the dogmatic method sought to construct legal *concepts*. Basing itself on the study of positive laws, it aimed to establish general legal concepts such as those relating to property, contracts, inheritance etc. that were valid in a general sense regardless of any particular legal system. These concepts would acquire a supralegal nature and, in certain way, a metaphysical and abstract status. Legal dogma grew up from the positivist premise of 'isolation' from a specific aspect of reality, which in this case meant isolation from law. This meant that a 'scientific' analysis would be possible without interference from other aspects of the reality within which law was embedded. For the dogmatic method, this exclusion of sectors of reality is as important as its concept-construction technique of reasoning. As Gallego Anabitarte notes, '*dogmatic reasoning* is that whose aim is to think through to the logical end of an *authoritative* opinion in order to understand its meaning; this opinion should be thoroughly analysed so as to understand all its possible meanings, but it is forbidden to go beyond the opinion, which is what characterizes this intellectual activity. Dogmatic thought means staying within the realm of the particular aspect being analysed, and developing a series of distinctions, relations,

[14] For a more detailed analysis of the distinct methodological currents within the contemporary science of International Law, see A. Truyol y Serra (1977), *Fundamentos de Derecho Internacional Público*, 4th edition, Tecnos, Madrid, pp. 53-83. See also, A. Ortiz-Arce de la Fuente (1980), 'Consideraciones Metodológicas en Derecho Internacional Público', *Revista de la Facultad de Derecho de la Universidad Complutense de Madrid*, nº 60, pp. 7-45, and nº 61, pp. 67-94

classifications etc. This process is full of difficulties and can infuriate those who are not instructed in its method.'[15]

The dogmatic method proposes *deductive* reasoning. The basic scheme of this has been well captured by Castberg, who observes, 'legal reasoning is characterized by its use of norms, from which conclusions are deduced through the introduction of a specific case under the general law, the norm.'[16]

In short, we can say that the dogmatic method is characterized by: 1) its methodological *premise* of the 'isolation' of law from other sectors of reality; 2) its scientific programme, that is, the construction of *concepts*, and; 3) its reasoning technique, namely, deduction.

Critiques of the dogmatic method have come from three different fronts. Legal sociologism and functionalism have questioned the premise of isolation; historicism and sociologism have criticized its programme; and the school of argumentation has criticized the validity of deductive reasoning.

Focusing on the critique of the dogmatic method's programme, historicists argue that abstraction of something as fluid and contingent as the historic reality of legal systems is pointless. This is captured by Francesco Calasso, who observes, '*Dogmatic* is the most unfortunate term within the vocabulary of legal scholars, and it does not even belong to them. It has been borrowed from the only science which can proclaim dogma, or unmovable truth, theology, *scientia Dei*, knowledge of a *substantia omnino immutabilis*, and therefore, *scientia uniformis et invariabilis*. As this concept has infiltrated law, which is human field that is governed by the law of movement, this is an enormous problem.'[17]

Luis Díez-Picazo notes, 'institutional concepts and categories are not dogmas, but rather responses that are historically conditioned to groups of typical social problems. They do not make sense in themselves but are worthy in terms of the results which they functionally produce or aim to produce.'[18]

Within the field of International Law the dogmatic method has some well known exponents in Tomaso Perassi and a large sector of the Italian doctrine.[19] However, it should be noted that Perassi did not take dogma to the extremes that other branches of law have done. Perassi was not ahistorical. In his *Introduzione alle Scienze Giuridiche* he clearly marks out the complexity and complementarity of the diverse scientific approaches to law, of which dogmatic method is nothing more than one particular approach or technique.[20]

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15 A. Gallego Anabitarte (1965), 'Constitución y Política', appendix to the Spanish translation of the work by K. Loewenstein, *Teoría de la Constitución*, Ariel, Barcelona, p. 475

16 F. Castberg (1933), 'La Méthodologie du Droit International Public', *Rec. Des Cours*, vol. 43-I, pp. 320-321

17 F. Calasso (1966), *Storicità del Diritto*, Giuffrè, Milan, p. 180. Se also B. Paradisi (1956), *Il Problema Storico del Dirittto Internazionale*, 2nd edition, Naples, p. 24

18 L. Díez-Picazo (1970), *Fundamentos de Derecho Civil Patrimonial*, vol. I, Tecnos, Madrid, p. 36

19 E. Pecourt García (1965), *Tendencias Actuales de la Doctrina Italiana de Derecho Internacional Público*, Institución Alfonso El Magnánimo/ Caja de Ahorros y Monte de Piedad de Valencia, Valencia

20 T. Perassi (1938), *Introduzione alle Scienze Giuridiche,* Rome, pp. 25-31

11. Professor Georg Schwarzenberger proposes what he terms the *inductive approach*. If we focus exclusively on its theoretical formulation, this approach displays certain features which link it to a revised version of the dogmatic method. But if we examine Schwarzenberger's use of the inductive approach, then we see that it is in fact a more complex method. It is in this contradiction that we can locate the ambiguity of Schwarzenberg's position and the difficulty of knowing whether to situate him within the fold of modified positivists or amongst *realist* sociologists.

Given the emphasis that Schwarzenberger places on the distinction between *lex lata* and *lex ferenda*, and taking into account his critique of authors who combine deductive and inductive approaches and look at social and functional elements of the legal order, whom he defines as eclectic, we could classify the *inductive approach* at least in its theoretical formulation, which is what interests us at this moment as an approach which is closer to positivism and the dogmatic school.

According to Schwarzenberger, the inductive approach is characterized by the following four features:

1) Its emphasis on the exclusive existence of three law-creating processes in International Law: consensual commitments in the broadest sense of the term, customary International Law and the general principles of law as recognized by civilized nations.

2) The establishment of means to determine legal rules (law-determining agencies) in accordance with rationally verifiable criteria.

3) Its awareness that only the norms of International Law are compulsory, unless there is evidence that a principle, derived from these norms, has acquired a superior status so as to prevail over others (overriding rule).

4) The recognition of the differences that exist between International Law applied to the inorganic society, to the partially organized society and to the fully organized society. Whilst in the first case International Law is generally *ius strictum*, in the second case and, above all, in the third case International Law tends to become *ius aequum*, as in the case of the United Nations. [21]

When Schwarzenberger looks at methodological assumptions whose links to positivism are fairly clear in that they set out the tasks for the doctrine the *functional* analysis takes on a key role. Schwarzenberger proposes that the inductive approach take in the possibilities of interdisciplinary study, bringing in historical, sociological and axiological perspectives so as to complete the results of the inductive approach from the basis of jurisprudence and international practice.[22]

The approach put forward by Schwarzenberger was radically opposed by Wilfred C. Jenks. Jenks' critique attacked the conservativism of Schwarzenberger which makes it difficult to change the direction of international jurisprudence the limited role afforded to deduction and intuition in legal reasoning, and the 'sealed

[21] G. Schwarzenberger (1965), *The Inductive Approach to International Law*, Stevens, London, pp. 5-6

[22] Ibid., pp. 43-71. Also, by the same author (1957), 'El Derecho Internacional en el Sistema de las Ciencias Políticas', *Revista de Estudios Políticos*, nº 91, pp. 3-14

compartments' which are established as tasks for international legal scholars as analysts of law.[23] This critique is fully justified in Jenks' eyes, as he advocated methodological eclecticism and believed that the doctrine had an important role in the development of International Law.[24]

12. Due to the attention which International Law pays to the historical, social and economic contexts in which it plays out, one part of the doctrine insists on the relevance of these contexts in producing knowledge of International Law.[25] A pioneer in this line was the Swiss legal scholar Max Huber. His starting point was that the state was a fundamental element of international relations. The state is a territorially defined form of social organization and its power is projected over its entire territory, not over social, tribal or family groups. States have a tendency to expand, but at the same time they maintain legal relations of cooperation with each other. The reasons why states develop relations are, firstly, due to complementary interests (as in reciprocal trade) and, secondly, due to common interests or coinciding aims. The primary reason why states enter into treaties is their own self-interest. Consequently, International Law should not move too far away from its social and political foundations, or from the interests of states (understood in terms of this broad formula) and, in general, from the configuration of power in international life. These concepts were heavily influential on Max Huber as both a judge and arbitrator, and on subsequent authors.[26]

    This focus on the social foundations of law is also found in the more intellectually developed thought of the French solidarist school, represented in the field of International Law by Georges Scelle. International Law springs from the social solidarity that occurs when different groups of humans come into contact with each other. From this empirical observation, Georges Scelle develops a very personal concept of International Law which has attracted many followers, doubtlessly due to its evolutive and totalizing discourse which allows for the adoption of postures towards the future which are essentially open.[27] In this line we could cite many other authors of the time and subsequently, such as the influential Italian Santi Romano[28] and the perspective adopted by the Belgian legal scholar Charles de Visscher, whose most well-known work, *Theory and Reality in International Law*,[29] is a brilliant and nuanced study of the relations between the international legal order and the social context in which it operates.

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23 C. W. Jenks (1964), *The Prospects of International Adjudication*, Stevens, London, pp. 623 and ff.

24 See the chapter, 'La Pericia en Derecho Internacional', in C. W. Jenks (1968), *El Derecho Común de la Humanidad*, (tranlsation into Spanish by M. T. Rodríguez de Arellano), Tecnos, Madrid, pp. 375-405

25 R. Yakemtchouk (1974), 'L'Approche Sociologique du Droit International', *Revue Générale de Droit International Public*, pp. 5-39

26 J. Klabbers (1992), 'The Scoiological Jurisprudence of Max Huber: An Introduction', *Austrian Journal of Public and International Law*, vol. 43, pp. 197-213

27 G. Scelle (1932 and 1934), *Principes de Droit de Gens*, 2 volumes, Sirey, Paris. On the influence of his work, see various pieces published in *La Technique et les Principes du Droit Public. Études en l'Honneur de Georges Scelle*, 2 tomes, LGDJ, Paris (1950), and A. Cassese (1990), 'Remarks on Scelle's Theory of "Role Splitting" in International Law', *European Journal of International Law*, nº 1-2, pp. 210 and ff.

28 R. Monaco (1932), 'Solidarismo e Teoria dell'Istituzione nella Dottrina di Diritto Internazionale', *Archivio Giuridico Filippo Serafini*, vol. CVIII, fasc. 2, October, pp. 221-243

29 C. de Visscher (1970), *Théories et Realités en Droit International Public*, 4th edition, Pedone, Paris

The functional approach proposed by Philip C. Jessup which is, as the author himself admits, difficult to define also represents an attempt to join legal norms to human activity, as 'norms are born in human activity and their aim is to provide order to this activity.'[30] His work is vast, as he aspired to study international norms in relation to their background in international society, taking into account information from disciplines such as political science, history, economics, sociology. Jessup himself admitted that it was such an ambitious venture that it could strike fear into even the most industrious and hardworking of scholars, but he also recognized that 'we can consider the functional method without having to aspire to perfection.'[31]

The sociological theory of Talcott Parsons influenced the school led by Myres S. McDougal, also known as the New Haven approach owing to its links to the University of Yale.[32] This school perceives Public International Law as 'a system of global public order', expressed through political conduct (policy) which gives rise to a series of behavioural standards (patterns), which provides regularity to the process of decision-making, creates expectations amongst actors in the international system and provides stability to this system.[33]

The current known as 'jurisprudence of interests' also focuses on the social realities in which norms are developed and has had a certain impact within the doctrine of International Law. This is seen in works by Kraus, Wengler and Maarten Bos,[34] who look at interests in international life, though none of these are true followers of the focus developed by Heck and his school of thought.

13. Numerous scholars within the doctrine believe that international law scholars must go beyond studying legal norms and the social and political factors which influence these. They contend that the need to understand the role of values within legal phenomena forces them to broaden their field of vision, though at the same time ensuring that they remain within the limits of scientific objectivity as promoted by those who defend objectivisation within the methodology of the science of law.[35] Law is more than a technique and it must go beyond the function assigned to it by the highest exponent of the exclusion of values from the field of science, namely Max Weber. From Weber's perspective, 'law should limit itself to defining what is valid according to the rules of legal thought, which is partly strictly logical and partly linked to some conventionally constructed frameworks. Its function is to determine

30 P. C. Jessup (1938), 'Application de la Methode Fonctionnelle au Droit International', in *Introduction à l'Étude du Droit Comparé. Recueil d'Études en l'Honneur d'Edouard Lambert*, vol. II, Paris, p. 172

31 Ibid., p. 175

32 M. Medina Ortega (1961), 'Una Nueva Concepción del Derecho Internacional: El Sociologismo de Myres S. McDougal', *REDI,* pp. 517-533, and B. Rosenthal (1970), *Étude de l'Oeuvre de Myres Smith McDougal en Matière de Droit International*, LGDJ, Paris

33 M. S. McDougal et al. (1960), *Studies in World Public Order*, Yale University Press, New York/ London, p. 871

34 H. Kraus (1934), 'Interesse und Zwischenstaatliche Ordnung', in *Niemeyers Zeitschrift für Internationales*, Recht, pp. 22-65, and *Staatsinteressen im Internationalen Leben*, Munich (1951); W. Wengler (1950), 'Prolegomene zu einer Lehre von den Interessen im Völkerrecht', in *Die Friedens-Warte*, pp. 180 and ff.; M. Bos (1968),'Dominant Interests in International Law', in *Estudios de Derecho Internacional. Homenaje a D. Antonio de Luna*, CSIC, Madrid, pp. 79-96

35 I. Von Munch (1961), 'Zur Objektivität in del Völkerrechtswissenschaft', Archiv des Völkerrechts, pp. 1-26

when certain legal norms and methods of interpretation are compulsory. It does not correspond to law, however, to decide whether law should exist or whether certain laws should be established and not others. Law can only indicate that if a certain aim is to be achieved that the most suitable means to achieve it, in accordance with our framework of legal thought, is one or another norm.'[36] This notwithstanding, the problem does not lie in whether the legal scholar should consider values or not within their scientific endeavours, which they undoubtedly must, as they form part of the objective of the scholar's analysis; rather the question is whether the legal scholar should carry out their work from a basis of a certain system of values.

The critical analysis of law from the basis of a certain system of values is what is known as *legal axiology*. The rebirth of *iusnaturalism* in part follows this line of critical evaluation of law.

Within the field of International Law, Ernst Sauer, amongst others, has defended the importance of values and drawn links between the legal and moral spheres.[37] There is a very strong argument in favour of this approach as, in the words of Carrillo Salcedo, 'the supposedly untainted positions, contrary to appearances, are heavily committed to a particular order or disorder that has been established within International Law, and are not sustainable today.'[38]

14. Later studies on legal thought, of which the work by Viehweg[39] is a brilliant example, have rejected dogmatic positions from a perspective of legal thought as *topical* thought. Viehweg argues that 'the most important point in the examination of a topic is the claim that it is a thought technique which is focused towards a problem.'[40] This reasoning technique was developed by Aristotle and Cicero and it is found within *ius civile*, in *mos italicum* and in current legal thought. The reason for which it has not been appreciated until recently is due to the influence of Cartesians in the domain of legal enquiry. For many years topical thought remained hidden behind the deductivism and axiomatic thinking of dogmatism. From the topical perspective, legal thought is not deductive thought from certain basic principles, neither is it thought based on the construction of abstract concepts; rather it is thought based in problems, an aporetic or topical thought. This is summarised by Luis Recasens Siches, who states that ' [legal thought] does not spring from first principles, such as premises, in order to draw conclusions, but rather it comes from practical problems that arise in social life, which it analyses in terms of all their factors and dimensions. It then ponders these problems through an analysis of the contrasting arguments that interested parties adduce; it evaluates these in terms of justice and prudence; and it strives to find a solution which is fair inevitably in

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36 M. Weber (1967), *El Político y el Científico*, (translated into Spanish by F. Rubio Llorente), Alianza, Madrid, p. 210

37 E. Sauer (1954), 'Zur Völkerrechtliche Methode', in *Mensch und Staat in Recht und Geschichte. Festchrift für Herbert Kraus*, pp. 163 and ff. Also E. Sauer (1963), 'Zur Grundlegung der Völkerrechtliche Methodologie', *Acta Scandinavica*, pp. 121 and ff.

38 J. A. Carrillo Salcedo (1976), *Soberanía del Estado y Derecho Internacional*, 2nd edition, Tecnos, Madrid, p. 278

39 T. Viehweg (1964), *Tópica y Jurisprudencia*, (translated into Spanish by Luis Díez-Picazo y Ponce de León), Tecnos, Madrid

40 Ibid. p. 49

relative terms prudent and viable, taking into account all the circumstances of the problem, which are highly diverse and changeable.'[41]

It cannot be argued that scholars of International Law have been unresponsive to this way of focusing law. The interpretation of international treaties as a 'topical' activity was proposed by Grotius himself, when he posits that 'the measure of good interpretation is the deduction of thought through the most probable indices,'[42] linking the activity of interpretation to dialectic and problematic deduction, just as Aristotle did. More recently within the doctrine, Ilmar Tammelo has argued that Public International Law, perhaps more than other legal orders, has an essentially 'topical' nature.[43] Firstly, Public International Law is not based on a series of clearly defined basic principles from which conclusions can be drawn; on the contrary, it contains a high number of principles with a reduced central core and many grey areas which, when applied to specific, complicated cases, lead to contradictory results. Secondly, the absence of the 'rule of 'precedent', that is, the binding nature of judicial decisions when applied to similar posterior cases, increases the lack of determination in the application of norms. International Law continues to be an order based on customary law. The establishment of customary laws requires an analysis of highly complex international practice (*diuturnitas*), which in certain cases leads to courts resorting to rhetorical arguments in sentencing. Customary norms become 'sites' of argumentation. Neither do international treaties offer much of a basis for deduction, becoming references for 'dialectic' argumentation. The inclusion of customary norms within multilateral international treaties, especially in cases which affect the vital interest of states, is effectuated in terms of very highly general formulations which, owing to their breadth and vagueness, give rise to multiple positions in terms of their application to specific cases. Finally, taking 'the basic principles of law' as a reference which allows us to resolve cases in which there is no applicable customary or conventional law is a move that could be considered a *topoi par excellence*.[44]

15. In recent years legal thought has been enriched by authors representing what is known as the *Critical Legal Studies Movement*. This movement's object of study focuses on legal argumentation, and from this perspective they can be considered as the successors to the debate opened by authors who adopted a topical focus towards law; however, it should be noted that their positions and methods are radically different. The origins of this movement can be found within the universities of North America at the end of the 1970s, and it spread rapidly through France, Germany and other European countries in the following decade. Amongst its proponents there is a diversity of positions, though they all share a focus on legal issues from a broad perspective of social theory in accordance with the most recent contributions to structuralism, the critical theory of the Frankfurt School and post-

41 L. Recasens Siches, *op. cit*., p. 104

42 Hugo Grotius (1925), *Del Derecho de la Guerra y de la Paz*, book II, chapter XVI, section I, (translated into Spanish by Jaime Torrubiao Ripoll, tome II, Reus, Madrid, p. 293

43 I. Tammelo (1964), 'The Law of Nations and Rhetorical Tradition of Legal Reasoning', *The Indian Yearbook of International Affairs*, pp. 227-258

44 Ibid. p. 253

structuralism. Their epistemological approach is highly radical and their aims are ambitious: a deep critique of traditional legal thought, even in its most *updated* forms.[45]

In the ambit of Public International Law, the most renowned members of the Critical Legal Studies Movement are the Harvard professor David Kennedy[46] and the member of Finland's foreign service bureau, Martii Koskenniemi.[47] In this line we also see Anthony Carty,[48] Friedrich V. Kratochwill[49] and Ulrich Fastenrath.[50] It is maybe to soon to meaningfully analyse the contribution of Critical Legal Studies in the field of Public International Law, as the movement is still evolving and it is highly possible that new insights will be produced in the coming years.[51]

16. The aforementioned authors share a common critique of the recent doctrine of International Law that is characterised, in their opinion, by a general abandonment of reflection on the theoretical bases of International Law. Indeed, the producers of Public International Law during the 1960s and 1970s seem to have renounced any reflections on the general problems of the international legal order, focusing instead on specific questions, especially regarding international organisations. Within North America the doctrine has referred to this trend as the *move to institutions*. In the Spanish doctrine we also see this phenomenon, fostered by polarisation around European Union Law. This discreditation of theoretical reflection was heightened by the fact that even authors who did employ general positions, informed by doctrinal considerations of previous generations (normative scholars, sociologists, *iusnaturalists*, etc.) failed to bring their doctrinal influences into their work on the specific cases of International Law, and they were able to debate and reach common points of understanding with authors who held completely contrary doctrinal positions. There was a widespread sensation that theory was 'not necessary'. The dominant doctrine had found a comfortable terrain in a pragmatism that dispersed theory and which, in certain cases, was sugarcoated with a progressive ethos that projected unconvincing references to general values such as peace and material justice.

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45 See the work of Roberto M. Unger (1986), *The Critical Legal Studies Movement*, Harvard University Press, Cambridge, MA; Peter Fitzpatrick and Alan Hunt (eds.) (1987), *Critical Legal Studies*, Basil Blackwell Oxford-Cambridge, MA; and Andrew Altman (1990), *Critical Legal Studies: A Liberal Critique*, Princeton University Press, Princeton, NJ

46 Author of numerous articles published in academic legal journals in North America. His most well-known work is *International Legal Structures*, Nomos Verlagsgesellschaft, Baden-Baden (1987)

47 Martii Koskenniemi (1989), *From Apology to Utopia: The Structure of International Legal Argument*, Lakimieslüton Kustannus, Helsinki

48 Anthony Carty (1986), *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs*, Manchester University Press, Manchester/ Dover NH

49 Friedrich V. Kratochwill (1989), *Rules, Norms and Decisions; On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, Cambridge University Press, Cambridge

50 Ulrich Fastenrath (1991), *Lücken im Völkerrecht,* Duncker & Humbolt, Berlin

51 See the attempts to analyse the impact of the movement by Anthony Carty (1991), 'Critical International Law: Recent Trends in the Theory of International Law', *European Journal of International Law*, vol. 2, pp. 66 and ff., and Nigel Purvis (1991), 'Critical Legal Studies in Public International Law', *Harvard International Law Journal*, vol. 32, pp. 81-127

As a consequence of this intellectual stagnation, the study of the field of International Law has become progressively marginalised within the sphere of legal studies. Within universities claims are made the Public International Law has an importance that cannot be questioned, but there is little commitment towards its teaching within law faculties, and it is typically taught only as an introductory course during the first year of degree courses. This also seen in the way that Public International Law is perceived in more scientific terms. Scholars of International Law who turn their back on theoretical reflection when looking at specific problems are condemned to reproduce those problems, without moving forwards in the production of knowledge on International Law. Even much of the work which manages to go beyond being descriptive is still scientifically 'insignificant' in philosophical terms. Faced with this situation, members of the Critical Legal Studies Movement adopt a common position that pushes for a truly scientific approach to the study of International Law, which can only be carried out from positions based in social theory and political philosophy.

17. Faced with this panorama, authors from the Critical Legal Studies Movement contend that the scientific reflection within Public International Law should focus on the discussion of premises (which are generally not set out explicitly) that make up the underlying foundations of argumentation in International Law. The contemporary doctrine of International Law has taken on board a certain vision which is not exactly liberalism but rather a 'liberal conception'. This conception does not involve making declarations in favour of democracy and social progress through moderate change, but rather argues that it is desirable and natural that there be a social framework which facilitates political debate and decision-making between actors representing different positions (liberalism, socialism, nationalism etc.). The problem with this 'liberal conception' is that it claims to be neutral and independent from the ideologies whose presence within the doctrine it fights to defend.

This 'liberal conception' constitutes the fundamental theoretical premise of the contemporary doctrine of International Law scholarship, and the uncritical acceptance of this leads the doctrine into deep contradictions. The Critical Legal Studies Movement argues that the roots of these contradictions lie in the *objectivism* that underlies the doctrine. Objectivism has been defined as 'the belief that legal texts which are granted with authority legislation, jurisprudence and accepted legal ideas embody and structure a project based on human association.'[52] Legal texts develop, albeit imperfectly, an intelligible moral order. In other cases these are the result of the practical needs of social life, such as the functioning of the economy, which, together with the constant desires of human nature, represent a normative force. Therefore, law is not just the outcome of particular power struggles or practical needs that lack authority, but rather it has an existence beyond the scope of lawmakers, judges and legal scholars. It is, as such, an objective social phenomenon. If we move from these abstract positions to a terrain which is more familiar to scholars of International Law, we are reminded that this objectivist

[52] Roberto M. Unger, *op. cit.*, p. 2

position is in line with the theoretical reflections of Robert Ago, who, from my perspective, rounded off the cycle of important contributions made by International Law scholarship between the end of the nineteenth century and the mid-twentieth century. The illustrious Italian legal scholar concludes one of his most important works with the following words: 'A legal order is an objective reality whose existence is seen through history,' arguing that the international legal order 'can only be demonstrated as the result of objective, scientific analysis of empirical reality.'[53]

The prevailing 'liberal conception', with its relativism towards ideological concepts and its objectivist theoretical premise, leads the doctrine of International Law towards an incoherent logic. The doctrine cannot base itself on the rejection of objective values, which is a feature of the 'liberal conception', and at the same time claim to be able to resolve international conflicts through the application of objectively neutral norms. The legal argumentation of scholars within the doctrine of International Law is based on a series of dichotomies which are assumed to be natural and objective: sovereignty of states Vs international order; the domestic Vs the international sphere; public Vs private etc. In adopting these contradictions as elements of legal argumentation, the doctrine sets up a contradiction with its own epistemological premises, which are supposedly relativist. As Martii Koskenniemi observes, the dilemma of the 'liberal conception' is that 'if liberalism is to maintain its radical scepticism towards values, it cannot function as a basis for the coherent resolution of problems; if it refers to the objective nature of certain values, it enters into conflict with itself.'[54]

18. Authors from the Critical Legal Studies Movement adopt a methodological approach from structuralist philosophy, aiming to draw out the 'deep structure' of argumentation within International Law. Following in the footsteps of Jacques Derrida, the method which allows them to capture this deep structure is 'deconstruction'. The argumentation of international law, in this respect, is a 'discourse' which, in addition to its immediate meaning, has an implicit internal structure which needs to be highlighted in order to understand its scope and meaning. In this sense international legal texts have certain codes which must be deciphered. The most common methodological features seen in the Critical Legal Studies Movement are represented by a holistic, formalist and critical approach.

The approach is *holistic* in that it aims to move away from the debate on the content of International Law in terms of specific issues, concentrating rather on the broader doctrine of International Law in its entirety and social theory. Methodologically the focus is on the whole as the primary category of analysis. In this sense, the whole is more than the sum of its parts, as the whole is affected by the position of the parts within it the *totum* is not the *compositum*. We thus observe that the whole is made up of a series of relations which are established between its parts, this representing its 'structure'. This overarching view aims to highlight the common points that

53 Roberto Ago (1956), 'Science Juridique et Droit International', *Recueil des Cours*, vol. 90, II, p. 954. See also the extensive review of the original piece of work by Ago (1950), *Scienza Giuridica e Diritto Internazionale*, Guiffrè, Milan, carried out by Manuel Díez de Velasco (1951), and published in *REDI*, vol IV, pp. 655-664 (see especially the critical nuances in pp. 662-664)

54 Martii Koskenniemi, *op. cit.*, p. 68

exist between arguments that are apparently opposed yet which form part of the same whole and whose implicit premises must be recognised in order to justify positions. The breadth of this focus means we can overcome traditional distinctions between the doctrine of International Law, reserved for theoretical scholars, and the practice of International Law, which is the domain of politicians, diplomats and lawyers. These distinctions between theory and practice are, however, a pure illusion stemming from the widely accepted objectivism of the doctrine. For authors from the Critical Legal Studies Movement, truth is essentially subjective and relative. As Anthony Carty puts it, 'We cannot observe the world of International Law as it is in reality, as this world and the way we observe it are one and the same.'[55]

The Critical Legal Studies Movement is *formalist* in that aims to highlight the deep structure of argumentation within International Law. This deep structure is not explicit and is produced within a closed circle of interactions between sources, substantive norms and dispute-resolution mechanisms. None of these three ambits of argumentation allows for the resolution of the problems that arise from the need for a foundation with sufficient authority, which needs to be sought from *outside*, or to resolve the dichotomy between state sovereignty and international order. Despite the common elements which structuralist analysis of the discourse of International Law highlights, David Kennedy notes that 'discourses on sources, procedures or content seem to be distinguished from each other and relate with each other through a series of differential references and projections. So that, paradoxically, each discourse seems to support itself through reference to the others so as to complete and continue their own project.'[56] This conclusion fully aligns with the formalist positions of linguistic structuralism, initiated by Ferdinand de Saussure, who analyses the meaning of words (*paroles*) through a socially established code of language (*langue*). Each word must be understood as the transformation of a code which must be known, that is, meaning does not come from specific contents, but rather from a set of relations. Each of the legal schools can be understood as a series of *paroles* whose meaning depends on a set of relations which make up the *langue* of legal argumentation, which, in our case, is that of Public International Law.

The Critical Legal Studies Movement is also *critical*. By uncovering the hidden code of the discourse of Public International Law, authors from this school of thought present themselves as promoters of a strong critique which questions the predominant doctrine of International Law. As, according to structuralist postulates, language precedes thought, the contemporary doctrine of International Law (including even the most 'progressive' authors) puts forward a certain view of social reality as *objective* or *natural*. The critical approach is not based on defining the problems which the Critical Legal Studies Movement believes should receive priority treatment within the doctrine (poverty, racism, economic inequality, sexism etc.) but rather focuses on providing a theoretical framework for an alternative to the predominant discourse within the study of international law, whose theoretical

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55 Anthony Carty, *op. cit.*, p. 129

56 David Kennedy, *op. cit.*, p. 292

incoherence prevents these problems from being solved. According to one of the most distinguished scholars of the Critical Legal Studies Movement, Martii Koskenniemi, International Law, in its current form, is useless as a mechanism through which to justify or critique the behaviour of states. Koskenniemi posits that 'In basing itself on contradictory premises, it is both a legitimating mechanism by excess or default. In terms of excess, it can be invoked to justify any behaviour (justificationism), and by default in that it fails to provide any convincing argument regarding the legitimacy of any practice (utopism).'[57] In this we see the deep *radicalism* of the position adopted by these scholars.

19. It has been argued that, in putting forward such a radical critique of the current doctrine of International Law and its epistemological premises founded in the 'liberal conception', the Critical Legal Studies Movement paradoxically falls into an approach similar to *iusnaturalism* or legal nihilism. Its members' critique of the relativism and internal incoherence of the 'liberal conception' could push them towards positions similar to those of *iusnaturalism;* the radicalism of their analysis and their lack of alternative solutions could be considered as nihilism. To avoid these accusations of being a *iusnaturalist* in disguise, Martii Koshenniemi argues that 'the critical legal scholar has to accept the reality of this conflict.'[58] Legal discourse does not consist of the application of universal principles to specific cases but rather is a process within which the adoption of normative decisions is carried out through an 'open (non-coercive) discussion of the various alternative material justifications.'[59] The accusations of nihilism can be countered through stressing the epistemological value of critical knowledge. As one member of the critical current puts it, 'Knowledge in itself can be a force for progress, moral autonomy and *good*.'[60]

The approaches and analyses of scholars from the Critical Legal Studies Movement may appear to be excessively abstract to legal scholars who are unfamiliar with contemporary philosophical thought. The importance of the members of this current may owe less due to positions and conclusions, which need many critical nuances, and more to their objectivist methodology. This chapter began with some simple reflections on the scientific nature of law in general, and Public International Law more specifically. In response to those who accuse the Critical Legal Studies Movement of adopting a focus which is distant from that adopted by mainstream legal scholars, one of the key figures within the movement argues that the 'deconstruction' that the movement advocates 'only aims to achieve what traditional science has always strived for: to provide a theory which with the least possible number of variables is able to explain a wide variety of seemingly distinct phenomena through regularities which can be explained.'[61] It is difficult to disagree with this scientific objective.

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57 Martii Koskenniemi, *op. cit.*, p. 48
58 Ibid., p. 486
59 Ibid., p. 487
60 James Boyle (1985), 'Ideals and Things: International Legal Scholarship and the Prison-House of Language', *Harvard International Law Journal*, vol. 26, p. 350
61 Martii Koskenniemi, *op. cit.*, p. XXIV

20. Even if it is only due to their critique of the doctrine of International Law, which is often disconnected from its theoretical underpinnings, the contribution of scholars from the Critical Legal Studies Movement deserves to be considered. The most astute sector of the European doctrine is aware of the need to recover the theoretical debate. Bruno Simma, writing in the *European Journal of International Law*, states that 'the time is certainly ripe for a new analysis of international legal theory,' and the journal which he himself edits is an excellent venue from which to launch a new debate and build new foundations.[62] The members of the Critical Legal Studies Movement, with their method of 'deconstruction' have shaken up the generally accepted doctrine of international legal studies. Now what needs to happen is for the doctrine of international legal studies to shake up its theoretical base.

[62] Bruno Simma, 'Editorial', *European Journal of International Law*, vol. 3, p. 215