Conclusion: an emergent alliance for 'critical doctrine'

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17. Conclusion: an emergent alliance for 'critical doctrine'

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1. THE DEFENCE OF DOCTRINE AS COUNTER-NARRATIVE

The pieces collected in this volume are quite diverse, touching on different axes of methodological struggle, and focusing on different areas of European legal scholarship. There is truly no 'lowest common denominator' among them. Indeed, readers will no doubt have noted strong disagreements and frictions running through and across the chapters in this book. However, we wanted to draw attention to one interesting alliance that emerged among a cross-section of the scholars contributing to this volume, with their diverse takes on the framing of questions about law, the best way to reach answers in legal research, the legitimate audiences of legal scholarship and education and the concept of law. That alliance seems to arise around the continued legitimacy and importance of doctrinal research.

This was a surprising outcome, at least to us. The inspiration for this project arose partially out of our sense that formal, doctrinal work was facing serious challenges from those who saw it as old-fashioned, unscientific, insufficiently critical or even just boring. In line with this, the majority of our contributors do seek to challenge or move beyond (or behind!) 'traditional' legal scholarship in one way or another. But when we found that a significant minority of chapters were to some degree defending the relevance of doctrinal work, we thought this counter-narrative deserved a second look.

The defence of doctrine does not seem to rest on the practice of doctrinal research itself. Rather, those contributors whose work supports the value of doctrinal approaches seem to see it as a necessary response to the growing

instrumentalization and technocratization of law and legal research in particular, and the technocratization of political reason more generally.[1]

The support for doctrinal research is also not unconditional. If formal, doctrinal research is to be worth saving, it will have to learn some of the lessons that the 'politics of method' has to teach us. Namely, it needs to recognize its academic, social and political impacts and responsibilities, and cease to hold itself accountable to legal practice alone. Doctrinal scholarship has to become more self-aware: about its theoretical assumptions; about its methodological soundness; about its social and distributive consequences; and about the public purposes it ought to serve.

2. UNDERLYING FOREBODINGS

The call to revive doctrinal scholarship seems somewhat surprising in the light of the methodological debates of the past century. The dominance of legal positivism and doctrinal methods in Europe is associated with many *not so innocent* institutional features. To begin with, as socio-legal studies, critical legal studies and feminist perspectives on the law have made clear, doctrinal scholarship has displayed a considerable bias toward the status quo, and as such has perpetuated inequalities rather than challenging the distribution of voice and resources.[2]

In addition, doctrinal scholarship is deeply embedded in professional legal practice and the legal community.[3] This is especially so in fields that deal with the 'economy', such as tax law,[4] financial law, competition law and private

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[1] See, e.g., Wojciech Sadurski, 'Solange, Chapter 3: Constitutional Courts in Central Europe—Democracy—European Union' (2007) 14 European Law Journal 1 (on how doctrine can be used to shield the law from over-politicisation).

[2] Jedediah Britton-Purdy et al., 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis' (2019) 129 Yale Law Journal 1784; Victoria Nourse and Gregory Shaffer, 'Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory' (2010) 95 Cornell Law Review 61. See in this volume the contributions by Jessica Lawrence, Lyn K.L. Tjon Soei Len, and Alessandra Arcuri.

[3] Arthur Dyevre, Wessel Wijtvliet and Nicolas Lampach, 'The Future of European Legal Scholarship: Empirical Jurisprudence' (2019) 26 Maastricht Journal of European and Comparative Law 348.

[4] In recent months, for example, major concerns have bubbled up in the Dutch media over the impact of tight links between universities and practitioners in financial and tax law. See for instance Arthle Schimmel, 'Lof voor Vleggeert: fiscale wetenschap moet dubbele petten verliezen' ('Kudos to Vleggeert: Fiscal Scholarship Must Lose its Double Hats') *Financieele Dagblad* (8 November 2020) <https://fd.nl/opinie/1363628/lof-voor-vleggeert-fiscale-wetenschap-moet-dubbele-petten-verliezen>; Folkert Jensma, 'De fiscal wetenschap heft zichzelf verkocht' ('Fiscal Scholarship Has

law; but the interweaving of the academy and legal practice is also evident in fields such as international law, investment law and administrative law. Much doctrinal scholarship in these fields understands its role as complementary to and in service of the legal profession, and the figure of the practising lawyer (advocate or solicitor[5]) looms large in the scholarly imagination.[6] If there was ever an effective boundary between legal scholarship and (commercial) legal practice, it imploded in the twentieth century.[7]

This blending of academia and practice has had a significant substantive impact on doctrinal legal scholarship in many fields. For example, doctrinal scholarship has often been guided by a narrow understanding of the problems that should be addressed, focusing foremost on the interpretative problems encountered in legal commercial practice, and displaying limited interest in probing the basic categories of the fields to be interpreted or expanding and critiquing forms of inquiry. This narrow 'normative imprisonment of legal scholarship'[8] has not only separated law from other social sciences, but has also had important political consequences. Through its deep institutional relation to legal practice, much of doctrinal legal scholarship has become subservient to the agenda of a particular class of private legal actors, leaving aside other important tasks that it may have assumed: producing knowledge to address collective problems; examining the distributional consequences of legal architectures; educating not only lawyers, but also judges, public servants, NGO workers and, ultimately, critical citizens. In this sense, at least some doctrinal legal scholarship has become a matter of private, rather than public, interest.[9]

This constellation has clearly not remained without challenge, and since the second half of the twentieth century we have seen several movements that aim to challenge the methodological dominance of doctrinal scholarship, and the powers that be, by opening up different theoretical and methodological spaces. Thus in Europe, we encounter various types of 'institutionalist thinking', espe-

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Sold Itself') *NRC Handelsblad* (Amsterdam, 7 November 2020) <https://www.nrc.nl/nieuws/2020/11/07/de-fiscale-wetenschap-heeft-zichzelf-verkocht-a4019103>.

5 More specifically, a straight, white, middle-class man.

6 See in this volume the contribution by Marija Bartl and Candida Leone.

7 Matthias Jestaedt, *Das mag in der Theorie richtig sein…: Vom Nutzen der Rechtstheorie für die Rechtspraxis* (Mohr Siebeck 2006).

8 Emilia Korkea-aho and Päivi Leino, 'Interviewing Lawyers: A Critical Self-Reflection on Expert Interviews as a Method of EU Legal Research' (2019) European Journal of Legal Studies 17.

9 Jennifer Hendry, Naomi Creutzfeldt and Christian Boulanger, 'Socio-Legal Studies in Germany and the UK: Theory and Methods' (2020) 21 German Law Journal 1309.

cially in the Latin legal systems;[10] 'law in context' in the UK;[11] and various critical approaches across the rest of Europe.[12] In the US, this trend took shape in the form of movements such as 'critical legal studies', 'law and society' and 'critical race studies', but also Chicago school 'law and economics'. All of these approaches had as their objective a disruption of the status quo: making use of new and different theoretical and methodological tools in order to challenge the 'powers that be'.

The success of these challenges has remained limited, however, at least in much of continental Europe. Considerable income differentials between commercial practice and academic employment, with academic rewards often being linked to success in legal practice, institutionally disadvantaged more 'theoretical' or unconventional legal scholarship in many fields of law. Those few who sought to engage in these 'other' forms of legal research often opted to join departments of legal theory or legal history, or to migrate to international relations or European studies departments, where there was perceived to be more tolerance for 'new' methods and approaches.

This compromise has been disturbed in Europe in recent years by a movement toward 'interdisciplinarity' in science in general, and law in particular,[13] supported and accelerated by the growing importance of competitive research grants for the distribution of academic recognition and prestige, on the one hand, and the internationalization of legal academia in several European countries on the other.[14] This institutional mix has unsettled the considerable prominence of doctrinal research in European law schools.

The move to 'interdisciplinarity' in legal research has taken several forms. The focus has been in particular on interdisciplinary approaches integrating law with other social sciences. Three of those interdisciplinary approaches are particularly relevant to represent the dynamics of European legal scholarship. First, 'law and economics' scholarship has now gained some ground in Europe, decades after its US debut.[15] Second, so-called empirical legal studies, which aims to bring more quantitative methods into legal study, has recently

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[10] Léon Duguit, 'The Law and the State' (1917) 31 Harvard Law Review 1.

[11] William Twining, *Law in Context: Enlarging a Discipline* (OUP 1997).

[12] Thomas Raiser, 'Rechtssoziologie in Deutschland' (2010) 1 RW Rechtswissenschaft 204.

[13] See in this volume the contribution by Irina Domurath.

[14] Christophe Jamin and William Van Caenegem (eds), *The Internationalisation of Legal Education* (Springer 2016).

[15] Francesco Parisi, *The Oxford Handbook of Law and Economics: Volume 3: Public Law and Legal Institutions* (OUP 2017).

experienced a bloom in interest.[16] Finally, the latest newcomer, 'law and political economy', seems to also be gaining ground.[17]

Law and economics, quite similarly to doctrinal scholarship, represents an exercise in 'logical deductions', and aims to increase the efficiency of legal rules. In its more sophisticated versions, law and economics requires up-to-date economic theory and serious mathematical modelling. In its less sophisticated versions, it relies mainly on the 'common sense' of the researcher in assessing efficiency trade-offs. While critiques of the latter (unfortunately more common) approach abound, its appeal has not waned.[18]

The 'empirical turn' in legal scholarship has aimed to heighten its methodological rigour, foremost by relying on data-driven scholarship. Empirical work aims to test scientific claims against external sources of evidence,[19] and hopes thereby to gain important insights into the social and economic impacts *of* law and the impact of society and economy *on* law. However, this approach is also not without downsides and blind spots. In its more sophisticated version, the focus of empirical work is on building scientific knowledge through the collection, analysis and quantification of verifiable data.[20] At their best, these mechanisms import into law the same reliance on positivist epistemologies that has been traditionally dominant in political science.[21] In its less sophisticated (and more common) variant, the empirical turn has additionally meant the neglect of both the social theory behind the methods and the theory behind the law, leading to an unreflective empiricism and the evisceration of the complexity of social structures.[22]

Most importantly, perhaps, the shift to 'interdisciplinarity' as embodied in law and economics and empirical legal studies has led to neglect of an aspect that was well known to any doctrinal lawyer: the constitutive and performative dimensions of law and legal research. Thus, rather than leading to more vivid and transparent academic exchanges and discussions in legal scholarship, law and economics and empirical legal studies tended to naturalize both legal institutions and the reality to which they were applied.

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[16] See in this volume the contribution by Juan Mayoral and Tommaso Pavone.

[17] Poul F Kjaer, *The Law of Political Economy: Transformation in the Function of Law* (CUP 2020).

[18] Rob van Gestel and Hans-Wolfgang Micklitz, 'Why Methods Matter in European Legal Scholarship' (2014) 20 European Law Journal 292.

[19] Mark A. Pollack, 'Political Science and International Adjudication' in Cesare Romano, Karen Alter, Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014); Lee Eppstein and Andrew D. Martin, *An Introduction to Empirical Legal Research* (OUP 2014).

[20] See in this volume the contribution by Or Brook.

[21] Pollack (n 19).

[22] See in this volume the contribution by Juan Mayoral and Tommaso Pavone.

While political economic perspectives have certainly not been missing in European legal scholarship, the rise of the 'law and political economy' movement is of a more recent, and primarily US, origin. Harking back in various degrees to the concerns of Marxist and post-Marxist scholars, law and political economy aims to rally legal scholars around concerns regarding the distribution of economic, political and other forms of power and to the role of law in the making and remaking of political economy. More an *approach* than a 'method' in the formal sense, it relies on history; economic, social, political and legal theory; and contextualized empirical knowledge as means to understand law as co-constitutive, and co-constituted, of and in political economy. How successful the law and political economy movement is going to be in Europe, both in rallying support and in delivering legal scholarship, remains to be seen.

3. A STRANGE COALITION

The calls for doctrinal scholarship in this volume[23] emerge in this context of the rise of 'interdisciplinary' legal scholarship, as a way both to contest the narrowness and reductionism that came with the rise of law and economics and empirical legal studies,[24] and at the same time to re-position law as an important instrument of public (as opposed to private) authority.[25] Normative thinking and doctrinal scholarship, these contributors argue, can be the counterpoints to the dominance of economic rationality and instrumental thinking. People and their law are more than just cogs in a machine that aims to deliver more efficiency, more growth and more effective management of the market. There has to be a place for the right and the just, without excuses.[26]

Clearly, this is not to say that the contributors endorse doctrinal research as it stands now: the support is conditional. Doctrinal scholarship must overcome the narrowness of its questions, which lead it to take as unproblematic the background assumptions and distributional consequences of law and legal scholarship.[27] It must become more accountable in how it answers these questions[28] and break free from the limited, outwardly conservative and instrumentally defined audiences to whom it has declared allegiance thus far.[29]

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23 See in this volume the contributions by Gareth Davies and Irina Domurath.
24 Ibid.
25 See in this volume the contribution by Christina Eckes.
26 See in this volume the contribution by Hans-W. Micklitz, Poul F Kjaer, and Ruth Dukes.
27 See in this volume Part I: The Politics of Questions.
28 See in this volume Part II: The Politics of Answers.
29 See in this volume Part III: The Politics of Audiences.

If these pre-conditions are met, then reaffirming the relevance of law and legal expertise, under the flagship of doctrinal scholarship, becomes justifiable. Law's collective nature, open normativity and at least partial non-instrumentality make it an important scholarly project that differs from other types of knowledge and expertise that have dominated the academy and the social imagination in recent years (and that have led to some grim outcomes, if judged according to the growth of inequality, rising authoritarianism and increased environmental degradation).

This conditional support for doctrinal scholarship is not, however, only a response to the limitations of some of the more prominent interdisciplinary responses. Rather, we believe that some broader political and ideological shifts influence the growing readiness to support doctrinal research, or at least the normative thinking that underpins it.

First, we can see this support as a reflection of the (perceived or actual) decline of Thatcherite neoliberalism: a reaction against the overwhelming instrumentalism of technocratic governance. This reading is supported not only by those contributions critiquing the reductionism of efficiency-focused thinking in legal scholarship, but also by those that critique 'empirical legal studies'[30] as reductive and difficult to justify in light of contemporary social-scientific discussion on methods.[31] These two moves are often associated with neoliberalism as ideology.

Second, an alternative explanation for the renewed support for doctrinal and normative work could be that it is a response to contemporary threats to the European project. European integration faces many challenges today: from Brexit, to stalled Treaty reforms, to democratic backsliding in some EU member states. European doctrinal scholarship may help to counter some of the challenges facing the EU legal order by virtue of some stabilizing effect, reaffirming the reality and solidity of what has been achieved by articulating it in the traditional discourse of the law. While quantitative studies tend to turn the political attention to numbers, risk assessments and rankings, doctrinal method puts laws and norms centre stage.[32]

Ultimately, whether the reflexive, critical vision of doctrinal research prevails; or we stick with traditional doctrinal methods (entrenched as they may be in private interests and commercial practice); or instead legal doctrine vanishes altogether as 'newer' methods come to dominate legal scholarship, is yet to be seen. What is clear is that ours is a moment in which struggles

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[30] See in this volume the contributions by Gareth Davies, Juan Mayoral and Tommaso Pavone, and Or Brook.

[31] See in this volume the contribution by Juan Mayoral and Tommaso Pavone.

[32] Hans Krause Hanse and Tony Porter, 'What Do Numbers Do in Transnational Governance?' (2012) 6 International Political Sociology 409, at 410.

over method – and the politics of method – have returned to European legal scholarship, and in which discussions such as the ones in this volume are vital for engaging in this scholarship reflexively and responsibly.