

EDITORIAL

International Law and its Methodology: Introducing a New *Leiden Journal of International Law* Series

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Questions about methodology are questions of disciplinary identity. It is thus not surprising that they provoke such heated debates. The state of methodological debates is indicative of the condition of a discipline. If those debates advance to the centre of attention within any specific field of scholarly practice, it typically indicates a moment of crisis or – less dramatically – a push for change. In other times of relative stability, questions of methodology tend to stay on the margins of the field. Scholarly practice goes about its routine business along well-established lines. It uses the tools of a discipline without further ado.

It seems safe to say that the practice of international legal research is under pressure to (re-)articulate its methods and its stance towards methodology. If not (yet) subject to change, it surely is under increased scrutiny. Pressure comes from within and from without the discipline. The pressure from within has done its work for a while now. The pressure from without (in particular from angles of political science, economics, and moral philosophy) has gained renewed momentum. The reasons are manifold and intriguing. They may connect to the histories of ideas just as well as to the demands of research funding agencies. What, more specifically, are those pressures?

From within the discipline, the disenchanted belief in the determinacy of legal rules has left the science of (international) law in a state of lost confidence. Yet, by and large, doctrinal legal scholarship has defended and retained its rightful place. It has largely reinvented itself as an argumentative practice whose quality of arguments carry forth its scientific ambition. It has mostly absorbed critiques of deconstruction and indeterminacy and may stand confidently next to them in partnership. But for sure, the disenchanted belief in the determinacy of legal rules has opened legal inquires up towards perspectives and insights from other disciplines. What explains and guides interpretations if the law runs out, so to speak?

At the same time, what has passed as an exposition of methods within the discipline of (international) law – i.e. a discussion of *judicial methods* – has more often

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than not been somewhat content with orthodoxy. Moreover, it seems fair to say that such an exposition of methods has above all aimed at instructing present and future lawyers about how to do their job. With law being a primarily practical discipline, judicial methods have been geared towards the professional task of interpreting and applying the law. Important exceptions aside, theoretical reflection has taken a backseat. Like professional practice, scholarship has gone about its routine business, using the tools of judicial methods without further ado. That, I would submit, is part of the reason for the present struggle to convincingly (re-)articulate a methodological stance.

Ironically, I would further submit, one of the more reflective and theoretically-informed stances on methodology within the discipline has come from the perspective of critical legal studies. That perspective has not only been critical of judicial methods. It has more generally been decidedly skeptical of any enterprise that tries to articulate any set of methods. Jacques Derrida introduced deconstruction as a *style* precisely because he thought that any methodological straightjacket would raise expectations and demands that turn out to be stiflingly restraining.¹ Methods arguably reproduce disciplinary blind spots. Indeed, I am not suggesting that the defence of judicial methods is a lost cause. Far from it. If anything, the pressure from without the discipline suggests that it is a cause worthy of the effort.

That pressure from without the discipline of international law appears to be more unsettling – for the better or worse. Here, lively debates about the promise and perils of interdisciplinarity are closely intertwined with questions about international law and its methodology. Those debates have pervaded many of the contributions in the *Leiden Journal of International Law* (LJIL) and have inspired our editorials. More specifically, the main pressure seems to come from a renewed push towards empiricism as well as normative theorizing. Other developments in the beliefs about what constitutes good scholarship play a role. As do developments in the (incentive) structures in which research unfolds shaped *inter alia* by research funding agencies, career prospects, and the audience of peers.

On the side of normative theorizing, for instance, debates on just war theory make suggestions with clear legal implications while arguing in quite some distance to the law.² Debates live up to argumentative standards of moral philosophy more than to standards of legal scholarship. On the other side of empiricism, international legal scholars are pushed towards questions of effectiveness and compliance. But not only that. In this issue, Gregory Shaffer defends the unequivocal claim that questions of ‘[h]ow international law obtains meaning, operates, and changes are empirical questions’.³ The practice of international legal research, in short, finds itself in a double squeeze between moral philosophy and sociology, next to other forces that push it towards (re)articulating its methodology.

What are viable methods for international legal research? Which theoretical positions do they embrace? How do views of methodology tie in with

1 J. Derrida, ‘Force of Law: The “Mystical Foundation” of Authority’, (1990) 11 *Cardozo Law Review* 920–1045.

2 See the Special Issue in (2013) 26 LJIL 253–349.

3 Shaffer, in this issue, at doi: 10.1017/S092215651500035

fact/value-distinctions and their critique? Which epistemology do they buy into? Which political agenda do they foster? What is the fate of methodological pluralism? What is the relationship between methods and disciplines? Are different methods commensurable? And so on.

Given the central place of debates about methodology, as questions of identity and as indicators of the state of a discipline, LJIL introduces a new series in its *International Legal Theory* section on precisely that theme: *International Law and its Methodology*. This issue starts the debate by setting out one specific challenge to received methods that comes with a renewed push towards empiricism. The next issue will contain two critiques of that push, as well as a rejoinder. Thereafter, we will continue the conversation in loose sequence with commissioned and unsolicited contributions. Please do lean in.

In this issue, Gregory Shaffer sets out the view from New Legal Realism on international law and its methodology. Building on his previous work, together with Tom Ginsburg, he contends that '[t]he major development in scholarly methods for the study of international law is the turn to empirical work.'⁴ We are truly grateful to him for having drawn together the other contributions on New Legal Realism, which focus on the fields of trade (by Andrew Lang), the environment (by Daniel Bodansky) human rights (by Alexandra Huneeus), and on a specifically European variation of New Legal Realism (by Jakob v. H. Holtermann and Mikael Rask Madsen). This set of contributions starts a debate that we wish to develop further. Lang, for instance, recalls the fate of empiricism in law and society scholarship, with particular attention to David M. Trubek and Esser's 'critical empiricism'.⁵ The twist that Holtermann and Rask Madsen introduce to legal realism with the help of Pierre Bourdieu supports the claim that empirical research must indeed take the mindsets of (legal) actors seriously. It thus questions the conventional distinction between internal and external perspectives. Those are just two of the many elements of the discussion. They will together shape assessments of what amounts to good practice in international legal research. The stakes are high.

In the next issue (28:3), Jan Klabbers and Ino Augsberg will respond – two very well-placed commentators renowned, among other things, for their critiques of (the politics of) empiricism in legal studies.⁶ Gregory Shaffer will add a rejoinder. This, we believe, offers a most promising start for a continuous conversation on international law and methodology that we are happy to host and cultivate.

4 Shaffer, in this issue, at doi: 10.1017/S092215651500035. With reference to G. Shaffer and T. Ginsburg, 'The Empirical Trend in International Law', (2012) 106 AJIL 1.

5 See D. M. Trubek and J. Esser, "'Critical Empiricism'" and American Critical Legal Studies: Paradox, Program, or Pandora's Box?', (2011) 12 *German Law Journal* 115–58.

6 See, e.g., J. Klabbers, 'Counter-Disciplinarity', (2010) 4 *International Political Sociology* 308–11; I. Augsberg, 'Von einem neuerdings erhobenen empiristischen Ton in der Rechtswissenschaft', (2012) 51 *Der Staat* 117–25.