SPECIAL SECTION: LEGAL EPISTEMOLOGIES, EDITORIAL.

OVERCOMING TEMPTATION?

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This timely and stimulating symposium issue is the final result of what started as a few days of intense debate over the question, "How do we know what is true in the field of law?", which took place at a workshop in June 2022 at the European University Institute in Florence. In addressing this question, the different interventions, three of which have ended up in this issue, situated themselves within a broader context of increasing theoretical and methodological turmoil in legal scholarship over the last couple of decades.

Some describe this turmoil as a *Methodenstreit*,[1] referring particularly to the perceived clash between traditional doctrinal and empirical methods in legal scholarship. At the heart of this *Streit* we find sometimes heated disagreement about the increasing use of empirical methods, and particularly about the relationship of such studies to traditional doctrinal legal scholarship. This debate has led some to speak, either with appreciation or with regret, about the advent of an empirical turn in legal scholarship.[2] Much is at stake in this

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[1] Claasen this issue; Jakob v. H. Holtermann and Astrid Kjeldgaard-Pedersen, 'International Law from a Nordic Perspective' in Peter Hilpold (ed.), *European International Law Traditions* (Springer Cham 2020).

[2] Cf. e.g. Gregory Shaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) 106 American Journal of International Law 1, 1; Jakob v. H. Holtermann and Mikael Rask Madsen, 'Toleration, Synthesis or Replacement? The "Empirical Turn" and its Consequences for the Science of International Law' (2016), 29 Leiden Journal of International Law, 1001.

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debate. Not least clashing perceptions of truth in the field of law. While this may seem rather abstract, it has real life implications: an empirical turn will, if consistently implemented, significantly change the contours of legal education, which in turn will impact the role of the legal profession in society and the workings of the rule of law.

Although doing so in quite different ways, all three contributions to this symposium can be said to engage with this *Methodenstreit* and with the discussion about the empirical turn. Their different approaches range across a spectrum from Claasen's relatively empirically minded assessment that doctrinal law and empirical approaches need each other; to Steensig's more eclecticist "live and let live" approach; and Dijkman's more conservative suggestion that legal scholarship should be conducted roughly "as our mother used to cook it" – or at least in accordance with suggestions made by the American legal realists of the first half of the 20th century.

TOLERATION, SYNTHESIS, REPLACEMENT

In a broader perspective, however, one could make the case that in reality all three papers are quite close to each other in the sense that they all provide relatively conservative answers to the question about the role of empirics in legal science. This assessment can be explained drawing on a paper in which Mikael Rask Madsen and I developed a taxonomy designed to exhaust the logical space of possible stances to the question of the relationship between doctrinal and empirical approaches in legal scholarship.[3] The aim of this exercise was to provide a framework to better situate arguments about the role of empirical studies in international law, and I believe that it is useful in the present context.

In that paper, we distinguished between three basic ideal type approaches differentiated by their epistemological understandings of the hierarchy and interface between law and empirical studies: toleration, synthesis, and

[3] Holtermann and Madsen (n 2).

replacement. By *toleration* we referred to the notion of peaceful but asymmetric co-existence between doctrinal law and empirical approaches, but where doctrinal law had the upper hand.

This is the most conservative or traditional approach founded on the premise of a

> relative supremacy of doctrinal law over empirical studies of law and a corresponding inside/outside dichotomy where doctrinal law is the unavoidable and essential insider.[4]

In the literature, this position is classically represented by the likes of Hans Kelsen and H.L.A. Hart.

At the opposite end of the spectrum, we identified the *replacement* approach which constitutes the most revolutionary approach to empirical methods in legal scholarship. Replacement is based on a foundational critique, which essentially denies the possibility of doctrinal law as a sound science and suggests that the only way to save legal science as a science is to go empirical.

In between these two, we identified a third approach which we dubbed the *synthesis* approach. This approach is characterized by the ideal of peaceful coexistence between doctrinal law and empirical approaches based on mutual recognition of the respective disciplines and of their importance for understanding law in its totality. From the synthesis position, doctrinal studies can and should be enlightened by empirical studies and vice versa.

Looking to the three contributions, it appears that none of them represent the replacement approach. None of the three papers are based on the premise that the doctrinal study of law is fundamentally flawed. Claasen's paper comes closest with its criticism of pure doctrinal legal research for not taking sufficiently seriously and engaging with empirical legal scholarship.

[4] Holtermann and Madsen (n 2) 1002–1003.

However, while admittedly emphasizing this, Claasen also emphasizes that empirical legal scholarship requires a sound doctrinal legal basis. In this sense, this contribution is a paradigmatic example of the synthesis approach.

The case can be made that Steensig's contribution also belongs in the synthesis category. She clearly argues for an inclusive approach to empirical approaches in addition to traditional doctrinal studies of law. However, one could also claim that Steensig in fact represents the toleration position insofar as she is clearly defending the soundness of the traditional doctrinal study of law and its viability in its own right, independently of joining forces with empirical approaches. Empirical approaches are welcomed but not out of any acknowledgement of principled flaws in doctrinal legal research. They are precisely *tolerated* as independently valuable studies, but they are not considered necessary as such. On the contrary, and Steensig's defense of eclecticism notwithstanding, she generally seems rather underwhelmed by the performance of various modern empirical approaches to date.

This is further emphasized by the fact that she argues that the *Methodenstreit*, or what she describes as the 'struggle for the *is*-position',[5] is in fact based on a misunderstanding and, on closer inspection, reduces to a sort of empty posturing. More specifically, Steensig submits that this struggle is based on a category error insofar as, disregarding a few outliers (among whom she includes Dworkin), the mainstream legal doctrinal position among both natural lawyers and legal positivists has always been empirical: aiming to determine what the law *is* (*de lege lata*), not what the law *ought to be* (*de lege ferenda*).

For this reason, the claim originally put forward by legal realists and today repeated from many corners of the legal academy that we should go empirical is fundamentally misguided according to Steensig. The doctrinal study of law was always already empirical and the only real methodological

[5] Helga Molbæk-Steensig, 'Battling for the IS-Position in the Field of Law: The Problem with Case Law Sampling' (2024) 15 European Journal of Legal Studies 37.

problem in this traditional scholarship has been its characteristic reluctance to be transparent about its sampling methods.

While the piece has many merits, I could not help thinking that Steensig was not convincing on this specific point. To be sure, she is basically right that doctrinal studies are *also* empirical. They do indeed include sampling. The notion of the pure theory of law deriving from Kelsen is in that sense a misnomer, inviting the misunderstanding that the doctrinal study of law *qua* normative is *not* empirical – it is. However, unlike realist and (some) other empirical studies, the doctrinal study of law is at least *also* normative. I believe that Steensig misunderstands Kelsen's notoriously enigmatic notion of *ought-statements* in a descriptive sense. In one place, Kelsen describes these statements in the following way:

> The ought-statements in which the theorist of law represents the norms have a merely descriptive import; that, as it were, descriptively reproduce the 'ought' of the norms.[6]

Joseph Raz later helpfully clarified this notion also to Hart's satisfaction by introducing the distinction between *committed* and *detached normative statements*:

> [A] detached normative statement does not carry the full normative force of an ordinary normative statement. Its utterance does not commit the speaker to the normative view it expresses.[7]

The distinction between the two is not semantic but pragmatic. Semantically, a detached normative statement is exactly as normative as a committed normative statement. This also means that *ought-propositions in a descriptive sense* have different truth conditions from ordinary descriptive statements. These propositions cannot – on pain of committing the

[6] Hans Kelsen, *General Theory of Law and State* (Lawbook Exchange 2009), 163.

[7] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979), 153. For discussion, see Jakob v. H. Holtermann, 'Introduction' in A. Ross and others (eds.), *On Law and Justice* (Oxford University Press 2019) xxxix-xl.

naturalistic fallacy – be derived from empirical observation alone but necessarily require the help of a normative premise. And for this reason, legal realists like Alf Ross are correct at least insofar as they criticize traditional legal doctrinal scholars for not being *consistently* empirical.

The third piece of the symposium – on persuasive legal writing – is presumably the one that falls most squarely within the category of toleration. Drawing on American legal realism and Karl Llewellyn's work in particular, Dijkman argues in favor of a turn away from science and towards a kind of craft or art of persuasion by combining what he describes as legal, empirical, and normative considerations. By empirical, however, he primarily refers to 'the application of the law to some real-world problem',[8] such as in the context of court proceedings, which can but need not include genuine empirical problems.

If this account of the three articles in light of the toleration, synthesis, replacement-taxonomy is anything to go by, it is tempting to think that the rumors of an empirical turn – and not least of the death of doctrinal legal scholarship – are greatly exaggerated. Instead, the combined picture emerging from these three pieces is one of a rather measured enthusiasm for the promise of empirical methods in legal scholarship. This is interesting not least in light of the excitement sometimes encountered at legal academic conferences and seminars. On many such occasions, one can get the impression of participating in a virtual competition where the winner is the one who first pronounces his or her research to be empirical.

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It is obviously too early to assess whether these three articles may be the early signs of a new trend or a burgeoning counter-offensive in the *Methodenstreit*. Be that as it may, they are well worth the read in their own right. Read together, the three pieces contain plenty of food for thought and leave an impression of much needed nuance and moderation in the ongoing reflection on legal method – a shared concern for not throwing out the baby with the bathwater. By exploring ways of overcoming or dealing with the empirical temptation, they provide a highly valuable contribution to the ongoing and increasingly sophisticated conversation on legal method, which is the *sine qua non* of legal scholarship.