ESIL Reflections
Editorial board: Anne van Aaken, Jutta Brunnée, Jan Klabbers, André Nollkaemper (editor-in-chief)

December 16, 2013 Volume 2, Issue 11


Image by Dr Case

The Activist Academic in International Legal Scholarship

Gleider I Hernández
Durham University

A. The notion of 'Committed Argument' in Scholarship

According to classical legal positivism, the role of legal scholarship is to identify, cognise and provide structure to the positive law. The emphasis is primarily, if not solely, on the validity of a legal rule or norm; its moral correctness, efficacy or consonance with a theory of justice are generally to be avoided. This is perhaps a gross over-simplification of 'legal positivism', but the essence of legal positivism as I understand it is that it dismisses the value-laden character of subjective observation, instead maintaining that there is the possibility of objectivity in the law itself.[1] What I would argue is distinctive about the positivist approach to law is its overriding commitment to evaluative objectivity.

Yet there is another view to scholarship, one in which scholarship takes on an activist colour, and seeks actively to prescribe what the law ought to be—sometimes with no regard to what the law may be at a given moment in time. A useful, and non-pejorative term for this, would be what Owen Fiss has called 'committed argument':[2] to engage with law and legal rules from a prescriptive perspective, measuring its correctness not purely through validity but also conformity with a standard of justice. The law is apprehended and evaluated in conformity with that standard of justice; if found wanting,

---

* D.Phil (Wadham College, Oxford), LL.M (Leiden), BCL, LL.B (McGill). Lecturer in Law, University of Durham. This paper is a shortened version of a conference presentation delivered at the 5th Research Forum of the European Society of International Law, held in Amsterdam on 23rd-25th May 2013. I am grateful for feedback and discussion given in Amsterdam.

[1] For an interesting critique of specifically Hartian legal positivism, see J. Beckett, 'The Hartian Tradition in International Law', (2008) 1 *The Journal of Jurisprudence* 51.

[2] O Fiss, 'The Varieties of Positivism' (1981) 90 *Yale Law Journal* 1007, 1009.

the law is to be moulded so as better to conform with that standard.[3] A more radical approach would even dispense with the law entirely in such circumstances. Interestingly, to class 'committed argument' as a form of scholarship transforms the nature of scholarship from the positivist vision of detached objectivity into an endeavour to evaluate and a claim to improve the law. It is this question that I wish to address in this brief *Reflection*: I think it useful to distil and understand the phenomenon of 'activism', which I equate with Fiss' concept of 'committed argument', in scholarship.

By 'activism', what I mean is the activity of campaigning to bring about social and/or political change. On its own, it is a political act: to advocate purely in favour of one's political or social values remains legally incoherent. But activist legal scholarship is different: because he employs the methods of international legal scholarship to promote his political and social agenda, the 'activist academic' in international law is fully engaged with the method and form of law, and aims at becoming intelligible—and persuading—the wider community of international lawyers. Although a strictly positivist perspective would suggest that any activist strand in scholarship is either inappropriate or irrelevant, I take the view that, given the normative potential of scholarship, it is a phenomenon to be understood rather than to be extinguished.

B. DEFINING THE 'ACADEMIC' AND THE 'ACTIVIST'

Definitions matter: and there is a challenge in defending any definition of 'scholarship'. Some have defined it vocationally: 'those engaged, through the higher education system, in research or teaching'.[4] Yet even there, one has a value-laden agenda: 'legal scholarship ... purports to examine controversial legal issues from a neutral, value free perspective ... Scholarship is the capacity to add new knowledge in a publicly transmittable and acceptable form.'[5] Kelsen's view is more empirical: the role of scholarship is about 'finding the law', and only inasmuch as it is considered to be *valid*.[6]

It is my view that theoretical conceptions of international law are necessary preconditions to scholars' ability to engage with it. With these theoretical positions taken come also assumptions as to the nature of law and legal scholarship. The classical, 'orthodox generalist' view would insist that international legal scholars should focus on the sum total of the positive law, ignoring the temptation to engage with factors beyond this: anyone with a different approach to legal scholarships would be termed a 'political

[3] The most obvious, and also most ambitious, attempts so to engage with law from an overt political position come from the New Haven School, whose canonical text remains M.S. McDougal, H.D. Laswell, and J.C. Miller, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure* (YUP, 1967).

[4] A O'Donoghue, 'Agents of Change: Academics and the Spirit of Debate at International Conferences' (2012) 1(3) *Cambridge Journal of International and Comparative Law* 275, 279.

[5] RL Bard, 'Advocacy Masquerading as Scholarship; or, Why Legal Scholars Cannot be Trusted' 55 *Brooklyn Law Review* (1989) 853–862.

[6] H Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre* (Tübingen: Mohr 1920), iv.

activist'.[7] Methodology is in search of objective outcomes, of 'truths', much like a physicist would seek to prove a theorem. Any evolution in the law is only conditioned by the validity through which new rules come into play.

To my mind, the saving grace of orthodox positivism remains its commitment to neutrality and its rejection of political goals: this idealism, and aspiration towards rigour, technique and clarity all play a valuable role in international legal scholarship. Yet precisely due to this commitment to neutrality, further questions arise: how do orthodox 'legal scientists' address ambiguities and interstices? In such scenarios, the assessment and balancing of competing legal principles necessarily requires a subjectivisation of the law in its application, and the question arises as to the complex processes through which indeterminacies are resolved, and the role that extra-legal considerations play within such processes. International law, given its multifaceted and diffuse law-creating methods and its relative lack of normative hierarchy, is the archetype of a relatively indeterminate system leaving much room for contestation. In such a system, the very act of cognition has 'constitutive character and "creates" its object insofar as it comprehends the meaningful whole'.[8] A pragmatic approach thus naturally moves away from the claim that international legal scholars are epistemological communities dedicated purely to the description of the system *as it is*. Anne Peters has dealt cogently with this argument in her recent EJIL article, recognising both the political implications of international legal scholarship: 'the issue is no longer whether the scholar should pronounce a value judgement but, on the contrary, whether she *can* actually *abstain* from doing so'.[9] Although it remains true that legal scholarship is not in itself formally jurisgenerative, the normative analysis that Peters advocates is both welcome and necessary.

For these reasons, I would suggest that the act of intellectual construction is the mode through which scholarship is constitutive: it is not that material is assembled but the *method* and *justification* through which this is done that that is determinative. The better view is to perceive the academic-activist distinction as a dialectic rather than a dichotomy, both 'categories' existing rather in nested opposition, with individuals embodying different aspects of each category rather than being classified rigidly into one.[10] Viewed in this way, perhaps there is a way to reconcile the aspiration towards doctrinal, value-free scholarship with the unfettered chaos of subjective instrumentalism.

C. THE 'ACTIVIST ACADEMIC' AS SCHOLAR

It is fair to argue that legal scholarship ought not to be a tool to fulfil one's personal agenda. But I would suggest that, precisely because legal scholarship has the potential

[7] J Kammerhofer, 'Orthodox generalists and political activists in international legal scholarship' in M Happold (ed), *International Law in a Multipolar World* (Routledge, Abingdon, 2010) 13.
[8] H. Kelsen, *Pure Theory of Law* (2nd ed. Vienna: Deuticke 1960), at 239.
[9] A. Peters, 'Realizing Utopia as a Scholarly Endeavour', (2013) 24 European Journal of International Law 533, 542.
[10] Peters calls it a productive tension, 552.

to constitute or to change the law, awareness and responsibility for the activism latent in legal scholarship would be an important step forward. Sometimes it is easy to sense moral or political instrumentalism in legal method: it is fairly evident when using teleological arguments such as 'it is obvious that' or 'justice demands it' in order to arrive at an outcome that strains—or outright discards—plausible interpretations of the applicable law.

Regarding more overt forms of activist scholarship, the methodological criticism is fair, although one could equally point out that explicitly advancing a political or moral agenda is at least transparent. But more interesting are the more subtle forms of activism, which deploys the accepted canons of validity and legitimation (for example of the sources of the applicable law or the rules of interpretation) to arrive at a certain outcome. Methodologically indistinguishable from classical legal positivism, the activist who deploys such strategies of justification can enjoy great success in promoting his agenda. A strikingly effective example of this could be how Christian Tomuschat argued that State consent had led to the creation of an overarching international legal order of co-ordination, where certain hierarchical elements are no longer subordinated to State consent, but instead embodied the common interests of all States.[11] Tomuschat's method, in this respect, seems to suggest that what distinguishes an activism from a 'non-activist' legal scholar has nothing to do with method.

What is more, even the act of detached observation upheld by classical legal positivism is not itself necessarily objective. To insist on a scientific fidelity to that system is also a choice: it is a theoretical commitment to the very structure of the law as it stands, and to the ideological commitments and choices immanent within the legal framework that critical scholarship has so robustly criticised.[12] Activism can also be conservative, preserving the system in stasis, even if it aims to focus exclusively on the positive international law already in force, without regard for its effects and consequences. These a priori theoretical commitments condition legal methodology as a whole; and in some respects, one could even argue that we are *all* activists, just of different stripes.

D. Final Reflections

I have suggested that activism, or 'committed engagement', is a largely prescriptive form of legal scholarship, concerned with the content of the law, concerned with the law's furthering of the ends of justice. This form of scholarship seeks to close the gap between 'ought' and 'is', even whilst recognising the distinction. In this respect, although its *aim* is different, there is no real inconsistency between this method and that of orthodox positivism: both share a belief in the *form* and *method* of the law. It is that

[11] C. Tomuschat, 'Obligations Arising for States Without or Against Their Will' (1993) 241 *Recueil des Cours* 195, 303. Indirectly, he concedes that the common interest of States is also that of all of mankind.

[12] See eg D. Kennedy, 'A Rotation in Contemporary Legal Scholarship', (2011) 12 *German Law Journal* 338; A. Rasulov, 'International Law and the Poststructuralist Challenge', (2006) 19 *Leiden Journal of International Law* 799.

commitment to rationality in legal scholarship that transforms mere activism, or the instrumentalisation of law, into something else. Although when it is cloaked it takes on an insidious form, when it is open and transparent, normative analysis in international law allows for engagement not only with method, but also with the very aims and goals of committed engagement.[13] Such scholarship avoids the reductionism of the realist challenge and those who would seek to use the law purely as a tool to advance their political commitments. It is to open up the notion of law itself to careful scrutiny from legal scholarship.

Certainly, we *must* take the notion of law seriously and with great responsibility; to point to the political or moral choices embedded in the law is sometimes seen as risky. But if international law is to have any purchase, it cannot be viewed as a beautiful system in complete isolation from its actual normative force. Instead, returning to the critical challenge for a moment, by questioning the foundations of the law also opens the possibility to envisage possibilities that more accurately reflect reality, or to reflect seriously on what a substantive notion of justice might contain rather than that embodied in today's international law. Although I robustly defend the importance of the critical challenge in this endeavour, I do not yet concede that it leaves legal scholarship in tatters. Instead, the important lesson to be drawn from outside the law is that a heightened self-awareness allows us to cognise our limitations; in turn, these allow us to challenge constantly the theoretical commitments that we have towards the law.

[13] Peters, 551-2, although from a slightly different angle, makes much the same point.