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Dogmatik and International Criminal Law: Approximations in the Realm of 'Language' and 'Grammar'

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Abstract

Starting from the assertion of George Fletcher that there could never be an effective International Criminal Law (ICL) without a corresponding ICL Dogmatik – understood as a supporting culture of ideas and general principles – the article attempts to retrace and critically assess the connection made between the domestic concept and the international realm; to give a first approximation of what 'ICL Dogmatik' is supposed to mean.

While not being definable in a conclusive way, Dogmatik – as understood in the German legal system – represents a specific habitus and mindset when approaching law, providing for an autonomous legal discourse fueled by the aspiration of a coherent normative system based on argumentative rationality and close cooperation of legal scholarship and legal practice. The article argues that, while the term Dogmatik is a specific cultural expression, the substance of the concept more generally refers to and echoes universal challenges of law and legal scholarship.

The urge for an ICL Dogmatik should therefore not be (mis-)understood to argue for an authoritative rule of scholars or the adoption of German legal theories on the international level. Instead, the statement enunciates the necessity to establish ICL as an autonomous normative framework of concepts and terms. Dogmatik merely stands for an abstract vision, which may help to organize legal thinking in ICL, to structure and systemize the field, and most importantly to raise awareness for the necessity to develop a shared and coherent (legal) language, which enables productive discourse between all legal families.

A. Setting the Scene

> "*It turned out, of course, that although we had in mind a tower that would reach the heavens, the supply of materials sufficed only for a dwelling that was just roomy enough for our business on the plane of experience and high enough to survey it; however, that bold undertaking had to fail from lack of material, not to mention the confusion of languages that unavoidably divided the workers over the plan and dispersed them throughout the world, leaving each to build on his own according to his own design."*[1]
>
> *Immanuel Kant, Critique of Pure Reason, A707 [B735].*

International Criminal Law (ICL) might be caught in a tale as old as time. Its narrative begins with the 'creation' of individual criminal responsibility under the former 'International Law of States'.[2] Ending impunity by assigning individual responsibility for mass atrocities under International Law (IL) was and is the *tower that would reach the heavens* to engage with *Kant's* illustrative metaphor. However, ICL as a discipline is said to suffer from an ongoing identity crisis, in that the undeniable pluralism in the International Criminal Justice system creates fundamental normative and methodological uncertainties:[3] a *confusion of languages*. For example, the hard-fought debate[4] over the "modes of liability" – essential *pillars* in determining a defendant's responsibility – is sometimes seen as a 'clash of legal cultures'; as evidence for the inability of the legal traditions to

1 P. Guyer & A. W. Wood, *Critique of Pure Reason* (1998), 627.

2 Comp. H. Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals', 31 *California Law Review* (1943) 5, 530, 567.

3 D. Robinson, 'The Identity Crisis of ICL', 21 *Leiden Journal of International Law*, (2008) 4, 925, 925 [Robsinson, 'The Identity Crisis of International Criminal Law']; Cf. S. Vasiliev, 'The Crisis and Critiques of International Criminal Justice', in K. Heller *et al*. (eds), *Oxford Handbook on ICL* (2020), 626.

4 See e.g. *Prosecutor v. Tadić*, Judgement, IT-94-1-A, 15 July 1999, para. 185. (JCE as a discrete mode of participation under customary IL); *Prosecutor v. Jean-Pierre Bemba Gombo,* Judgement, ICC-01/05-01/08A, 8 June 2018, para. 166. (interpretation of the knowledge requirement of command responsibility). Cf. S. Nouwen, 'ICL – Theory All Over the Place', in A. Orford & F. Hoffman (eds), *Oxford Handbook on the Theory of International Law* (2016), 738, 739 [Nouwen, 'ICL – Theory All Over the Place']; cf. M. Drumble, 'Collective Violence and Individual Punishment', 99 *Northwestern University Law Review* (2005) 2, 539, 549, 566; cf. J. de Hemptinne, R. Roth & E. van Sliedregt (eds), *Modes of Liability in ICL* (2019).

effectively work together in finding and fabricating *sufficient materials* for justice in the international realm.[5] After initial years of enthusiasm, the field of ICL became increasingly aware of its inherent limitations, inconsistencies, and overly optimistic expectations.[6] One could now fear that the whole project of ICL is in danger: *leaving each to build on his own according to his own design*. However, with the establishment of the International Criminal Tribunals (ICTs), the ICC as a permanent court, as well as multiple hybrid courts, there is some structure – *dwelling* – already built, although its stability and ultimate purpose remains uncertain. In this situation the need for *plans* and the critical re-assessment of the whole purpose of *building* the tower becomes apparent.[7] It might well be that a 'fragmented' system of regional ICTs, of multiple *towers*, serves the idea of justice better,[8] and *that we have to aim at an edifice in relation to the supplies given to us that is at the same time suited to our needs*.[9]

5 K. Campbell, 'The Making of Global Legal Culture and ICL', 26 *Leiden Journal of International Law* (2013) 1, 155, 158 [Campbell, 'The Making of Global Legal Culture and ICL'].

6 P. Akhavan, 'The Rise, and Fall, and Rise, of International Criminal Justice', 11 *Journal of International Criminal Justice* (2013) 3, 527; E. van Sliedregt, 'ICL: Over-studied and underachieving?', 29 *Leiden Journal of International Law* (2016) 1, 1 [Sliedregt, 'ICL: Over-studied and underachieving?']; R. Keydar, 'Lessons in Humanity: Re-evaluating ICL's Narrative of Progress in the Post 9/11 Era', 17 *Journal of International Criminal Justice* (2019) 2, 229; D. Guilfoyle, 'Lacking Conviction: Is the ICC broken? An Organisational Faliure Analysis', 20 *Melbourne Journal of IL* (2019) 2, 401.

7 Comp. Guyer & Wood, *supra* note 1, 627.

8 Comp. e.g. W. Burke-White, 'Regionalization of International Criminal Law Enforcement: A Preliminary Exploration', 38 *Texas International Law Journal* (2003) 4, 729, 760, 761; V. Nerlich, 'Daring Diversity – Why There is nothing wrong with 'Fragmentation' in International Criminal Procedure', 26 *Leiden Journal of International Law* (2013) 4, 777, 779; as well as the chapters in L. van den Henrik & C. Stahn, *The Diversification and Fragmentation of International Criminal Law* (2012).

9 Guyer & Wood, *supra* note 1, 627.

Still, calls for a 'general theory'[10], 'universal concept'[11] or 'sui generis system'[12] for ICL are on the rise in recent years.[13] The possibly most significant assertion in this context has been made by *George Fletcher*. He cites German scholar *Günther Jakobs* to have argued, that there could never be an effective ICL without a supporting culture of ideas and principles, an ICL *Dogmatik*.[14] *Fletcher* argues that "[t]here can be no effective ICL because it would presuppose an international or universal *Dogmatik*. Since there is no universal *Dogmatik* – only local culturally-specific forms of *Dogmatik* – any system [of ICL] with universal pretensions must fail".[15] Recently, *Neha Jain* has adopted *Fletcher's* argument and portrayed the ICC's jurisprudence on 'modes of liability' and especially its reliance on teaching of publicists as an attempt to develop a *Dogmatik* of ICL.[16] While being critical of the effects this approach might have on the general understanding of sources and interpretation in ICL, she envisages, that the ICC could rely on the 'systematizing function of doctrine to lend structure and coherence' to ICL in the future.[17] In this case, she argues, the ICC 'would need to address far more

10 T. Einarsen & J. Rikhof, *A Theory of Punishable Participation in Universal Crimes* (2018), 26.

11 J. Stewart, 'Ten Reasons for Adopting a Universal Concept of Participation in Atrocity', in E. van Sliedregt & S. Vasiliev (eds), *Pluralism in International Criminal Law* (2014), 320, 321.

12 R. Haveman & O. Kavran, *Supranational Criminal Law: A System Sui Generis* (2003); cf. K. Ambos, 'Individual Liability for Macrocriminality', 12 *Journal of International Criminal Justice* (2014) 2, 219.

13 Cf. G. Sluiter, 'Trends in the Development of a Unified Law of International Criminal Procedure', in C. Stahn & L. van den Henrik, *Future Perspectives on International Criminal Justice* (2010), 585, 586; J. Steward & A. Kiyani, 'The Ahistorism of Legal Pluralism in ICL', 65 *American Journal for Comparative Law* (2017) 2, 393 [Steward & Kiyani, 'The Ahistorism of Legal Pluralism in ICL']; E. van Sliedregt & S. Vasiliev, 'Pluralism: A New Framework for International Criminal Justice', in E. van Sliedregt & S. Vasiliev (eds), *Pluralism in International Criminal Law* (2014), 3, 7.

14 G. Jakobs, *Norm, Person, Gesellschaft*, 3rd ed. (2008), 127; as cited by, G. Fletcher, 'New Court, Old Dogmatik', 9 *Journal of International Criminal Justice* (2011) 1, 179, 179. It should be noted that the author was not able to retrace this specific statement in the cited chapter. *Jakobs* speaks about the possibility of universalizing a normative system in general; ICL is not mentioned *verbatim*.

15 *Ibid*., 181, 182.

16 N. Jain, 'Teachings of Publicists and the Reinvention of the Sources Doctrine in International Criminal Law', in K. Heller *et al.* (eds), *Oxford Handbook on ICL* (2020), 106, 120 [Jain, 'Teachings']; cf. J. d'Aspremont, 'The Two Cultures of International Criminal Law', in K. Heller *et al.* (eds), Oxford Handbook on ICL (2020), 400, describing a shift from 'source-based to interpretation-based expansionism'.

17 Jain, 'Teachings', *supra* note 16, 125.

explicitly the scope and nature of the *Dogmatik* and its interpretive function within the framework of the Rome Statute'.[18] The statements of both scholars combined thus merit a closer analysis of the concept of *Dogmatik* in relation to ICL. In a first step, this article aims to assess the meaning of the term *Dogmatik* and its normative content in the context of the German Legal System.[19] (2.) In a second step, the initial assumption that the concept is something specific to the German legal tradition shall be critically questioned by undertaking an illustrative comparative analysis in respect of national jurisdictions and the realm of IL.[20] (3.) The idea is to gain a first understanding of whether the concept may well be universal or at least universalizable. Lastly, the status and prospect of *Dogmatik* in ICL will be discussed. (4.) Considering this agenda, the sub-title deliberately concedes that the attempt to discuss a highly abstract concept like *Dogmatik* in relation to multiple normative frameworks in a journal article can constitute nothing more than an initial 'approximation'.

B. Dogmatik – A Tale of Law, Theory and System

One important note to begin with: the choice to use the German term *Dogmatik* is deliberate. *Fletcher* rightly argued that none of the potential English translations fully captures the conceptual idea, but instead all convey some type of negative connotation.[21] Thus, one reason for skepticism may already be found at the semantical level, in the pejorative understanding of 'dogma' as an unquestioned, authoritatively enforced belief.[22] Legal *Dogmatik*, however, (also) derives from the older understanding of the term δόγμα in the context of philosophy, namely as a set of principles established by reason and experience, which seem right to all people.[23] In Germany, the use of the term is further inextricably linked to the historical development of an autonomous legal scholarship in the 18th century.[24] As a reaction to a confusingly complex state

18 *Ibid*., 125.

19 Because of insufficient English sources on the German legal system, this part of the article must rely on German sources.

20 The selection of jurisdictions has no substantive meaning and is grounded in the availability of sources and language accessibility.

21 Fletcher, 'New Court, Old Dogmatik', *supra* note 14, 180; Cf. O. Lepsius, 'The Quest for Middle-Range Theories in German Public Law', 12 I*nternational Journal of Constitutional Law* (2014) 3, 692, 694.

22 Merriam-Webster.com Dictionary, "*dogma*", available at https://www.merriam-webster.com/dictionary/dogma (last visited17 July 2023).

23 H. Lidell & R. Scott, *An Intermediate Greek-English Lexicon* (1889), "δόγμα".

24 Cf. Fletcher, 'New Court, Old Dogmatik', *supra* note 14, 180.

of the law in a fragmented multitude of German states, the 'scholar-made' law became a stabilizing source of normativity.[25] A 'symbiotic relationship' between scholarship and legal practice developed, remnants of which remain until today:[26] building on the common conception of being a 'jurist'[27], *Dogmatik* is traditionally understood to be the common platform for practical and theoretical legal thought.[28]

But what exactly is *Dogmatik*? Most often, the understanding of the term is tacitly assumed with the result of a conceptual 'black box', about which only implicit knowledge exists.[29] Nonetheless, an initial definition could sound as follows: Legal *Dogmatik* is a collection of normative, interconnected, and interdependent propositions, which refer to and are derived from enacted law, while not merely describing it; and which are compiled, arranged, and discussed by a class of legal professionals.[30] This vague definition, however, remains inconclusive. Consensus is that a generally accepted definition is yet to be found.[31] The nature of the concept – substance, form, or method – ,[32] as well as its relationship to legal theory, legal methodology, and legal practice is not yet

25 S. Vogenauer, 'An Empire of Light – Learning and Lawmaking in the History of German Law', 64 *Cambridge Law Journal* (2005) 2, 481, 486.

26 W. Goette, 'Dialog zwischen Rechtswissenschaft und Rechtsprechung in Deutschland am Beispiel des Gesellschaftsrechts', 77 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (2013) 2, 309.

27 Comp. N. Walker, 'The Jurist in a Global Age', in R. van Gestel, H.-W. Micklitz & E. Rubin (eds), *Rethinking Legal Scholarship* (2017), 84; M. Jesteadt, 'Wissenschaftliches Recht', in G. Kirchof, S. Magen & K. Schneider (eds), *Was weiß Dogmatik?* (2012), 117, 119.

28 J. Harenburg, *Die Rechtsdogmatik zwischen Wissenschaft und Praxis* (1986), 184.

29 C. Buhmke, *Rechtsdogmatik – Eine Disziplin und ihre Arbeitsweise* (2017), 2, 7; B. Rüthers, 'Rechtsdogmatik und Rechtspolitik unter dem Einfluss des Richterrechts', 15 *Rechtspolitisches Forum* (2003) 3, 5 [Rüthers, 'Rechtsdogmatik'].

30 A. Voßkuhle, 'Was leistet Rechtsdogmatik?', in G. Kirchof, S. Magen & K. Schneider (eds), *Was weiß Dogmatik?* (2012), 111, 111; cf. R. Alexy, *Theorie der juristischen Argumentation* (1983), 314 [Robsinson, 'Argumentation']; E. Bulygin, 'Legal Dogmatics and the Systematization of the Law', in E. Bulygin *et al.* (eds), *Essays in Legal Philosophy* (2015), 220, 221.

31 Cf. Alexy, 'Argumentation', *supra* note 30, 314; J. Esser, 'Dogmatik zwischen Theorie und Praxis', in F. Bauer *et al.* (eds), *Festschrift Ludwig Raiser* (1974), 517, 533–534; D. de Lazzer, 'Rechtsdogmatik als Kompromissformular', in R. Dubitschar (ed.), *Dogmatik und Methode – Josef Esser zum 65. Geburtstag* (1975), 85, 90.

32 Cf. de Lazzer, *supra* note 31, 89.

conclusively determined.[33] Thus, *Dogmatik* presents itself *ab initio* as a multi-faceted concept, which in its open-ended nature and partial vagueness might not be definable in a conclusive way.[34] To gain an approximate understanding of the substance of the concept, therefore, means to approach the multiple dimensions and aspects of *Dogmatik* individually.

I. Substance

1. Centrality of Sources and Form

To begin with, *Dogmatik* focuses on the matter of applicable law and is concerned with the interpretation, application, and systematization of these – concrete – norms.[35] The idea of having normative sources as the starting point of legal practice is historically connected to the codification movement in the 19th century and its agenda that law may only be developed within the limits of the codified legal system.[36] Codification offered the prospect to leave the arbitrary administration of justice behind for a system of rules and order by creating a measure against which legal practice could be judged.[37] To determine the object of observation, however, does not establish the normative relationship between legislated norms and *Dogmatik*. While it has been argued that the legislated law with its binding force is the 'holy scripture of jurists',[38] the majority view in German legal scholarship may be characterized to follow a type of refined positivism, in which ethics can negate the authority of positive law, where "the

33 M. Auer, *Zum Erkenntnisziel der Rechtstheorie* (2018), 14; C. Waldhoff, 'Kritik und Lob der Dogmatik', in G. Kirchof, S. Magen & K. Schneider (eds), *Was weiß Dogmatik?* (2012), 17, 21; P. Sahm, 'Unbehagen an der Rechtsdogmatik', 26 *Legal History* (2018), 358, 358, 359; A. Peczenik, 'A Theory of Legal Doctrine', 14 *Ratio Juris* (2001) 1, 75, 103.

34 V. Rieble, 'Methodische Rechtserkenntnis', *rescriptum* (2013) 2, 163, 164.

35 T. Kuntz, 'Auf der Suche nach einem Proprium der Rechtswissenschaft', 219 *Archiv für die civilistische Praxis* (2019) 2, 254, 260; W. Paul, 'Kritische Rechtsdogmatik und Dogmatikkritik', in A. Kaufman (ed.), *Rechtstheorie: Ansätze zu einem kritischen Rechtsverständnis* (1971), 53, 60; T. Schlapp, *Theorienstrukturen und Rechtsdogmatik* (2019), 199.

36 R. Lesaffer, *European Legal History* (2019), 453, 467 [Lesaffer, 'European Legal History']; N. Jansen, *The Making of Legal Authority* (2010), 3; L. Farmer, 'Codification', in M. Dubber & T. Hörnle (eds), *Oxford Handbook of Criminal Law* (2014), 379, 383.

37 Farmer, *supra* note 36, 396; cf. C. von Savigny, *On the Vocation of Our Age for Legislation and Jurisprudence*, translated by A. Hayward (1831), 21; Jansen, 'Legal Authority', *supra* note 36, 363.

38 U. di Fabio, 'Systemtheorie und Rechtsdogmatik', in G. Kirchof, S. Magen & K. Schneider (eds), *Was weiß Dogmatik?* (2012), 63, 65, 66.

discrepancy between positive law and justice reaches a level so unbearable that the statute has to make way for justice".[39]

Furthermore, in a modern understanding, legislation is conceptualized as a collective act of recognizing law,[40] which (only) carries a material presumption of correctness.[41] Wherever legal science and practice therefore operate and participate 'inside' a legal system constituted on the rule of law, the legislated norms have primacy.[42] Whenever legal scholarship engages in theoretical research and the assessment of the current legal framework from an external (critical) perspective, however, they cannot be bound to follow the legislated law, because this would negate the characterization of legal thought as science.[43] This differentiation results in the accepted usage of the well-known dichotomy of *de lege lata* and *de lege ferend*a.[44] Whether a clear distinction between interpretation/application and development/legislation is indeed possible, remains the object of an ongoing debate.[45] The 'doctrine of the limits of the wording',[46] nonetheless, safeguards the separation of powers and acknowledges that it is the codified text in which the validity and authority of law are ultimately based in a democratic society.[47]

To conclude, the centrality of sources and the focus on their binding force guarantees *Dogmatik*'s contextual significance and normative weight in the existing legal system compared e.g. to detached legal theory.[48] Moreover, by sharply distinguishing between the law as it is and as it should be, *Dogmatik* allows at the same time to practice law in its current (codified) limits and to

39 G. Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht', 1 *Süddeutsche Juristen-Zeitung* (1946) 5, 105, 107; translated by K. Ambos, *National Socialist Criminal Law* (2019), 111.

40 M. Pöcker, *Stasis und Wandel der Rechtsdogmatik* (2007), 52; cf. I. Venzke, *How Interpretation Makes International Law* (2010), 18.

41 J. Brauns, *Deduktion und Invention* (2018), 284.

42 *Ibid*., 5.

43 *Ibid*., 5.

44 Comp. J. Bung, 'New Approaches to Legal Methodology', *Anchilla Juris* (2007) 80, 81.

45 Cf. H. Kudlich & R. Christensen, 'Wortlautgrenze: Spekulativ oder pragmatisch?', 93 *Archiv für Rechts- und Sozialphilosophie* (2007) 1, 128.

46 Cf. on the difference to "strict construction", M. Klatt, *Making the Law Explicit* (2008), 5, 6.

47 *Ibid*., 6.

48 Comp. M. Welker, 'Juristische und theologische Dogmatik', 75 *Evangelische Theologie* (2015) 5, 325, 333.

translate critical academic arguments into (progressive) legislative proposals.[49] In short, *Dogmatik* is going on the basis of the law beyond the law.[50]

2. System and Systematization

Codification and the perception of 'sources', however, presuppose an ascertainable order in the law. *Dogmatik* is then necessarily concerned with conceptualizing law as a normative system. The starting point is the premise that single norms do not exist parallel to each other in an isolated manner, but are interrelated and form a complex of meaning.[51] For one, single legal terms such as 'guilt' for example, cannot be grasped in isolation, they become comprehensible only in their systematic context.[52] Secondly, most legal systems contain a variety of norms, some of which attain a prominent position as leading principles enshrining the normative values of a society.[53] In this regard, 'system' not only means the logical structuring of single norms but the creation and preservation of a meta-normative web of societal values, which are sometimes expressly and sometimes implicitly contained in the legal framework: the so-called 'inner system'.[54] The integral task of *Dogmatik* is the integration of specific norms and principles "within a larger fabric or ecology of surrounding legal rights, duties, and official processes."[55] Law, understood as such a combination of inner and outer system, is then based on the premise of unity: a knowledge-total ordered according to principles;[56] a "totality of law".[57]

The modern debate concedes, however, that older conceptions of a closed system of law with a finite number of (discoverable) axioms cannot be achieved.[58]

49 S. Vogenauer, 'An Empire of Light? II: Learning and Lawmaking in Germany Today', 26 *Oxford Journal of Legal Studies* (2006) 4, 627, 633.

50 Brauns, *supra* note 41, 52.

51 K. Larenz, *Methodenlehre der Rechtswissenschaft*, 5th ed. (1995), 420.

52 H.-J. Strauch, *Methodenlehre des gerichtlichen Erkenntnisverfahrens* (2017), 408.

53 Comp. Art. 21 (3) *Rome Statute*.

54 Cf. Larenz, *supra* note 51, 420.

55 M. Osiel, *The Right to Do Wrong: Morality and the Limits of Law* (2019), 11.

56 Comp. I. Kant, 'Metaphysical Foundations of Natural Science', in M. Friedman (ed.), *Kant: Metaphysical Foundations of Natural Science* (2004), 3.

57 T. Vesting, *Legal Theory* (2018), 39.

58 U. Diederichsen, 'Auf dem Weg zur Rechtsdogmatik', in R. Zimmermann (ed.), *Rechtsgeschichte und Privatrechtsdogmatik* (1999), 65, 69; E. Schmidt-Aßmann, *Verwaltungsrechtliche Dogmatik* (2013), 4. Cf. Lesaffer, 'European Legal History', *supra* note 36, 448.

Instead the 'ideal of coherence'[59] must be seen in the context of overwhelming normative complexity and plurality: the acceptance of dynamic legal change leads then to a process-orientated, evolutionary concept of systemic coherence.[60] By decontextualizing norms and abstracting meaning, the generalizing propensity of *Dogmatik* itself contributes to creating this crucial minimum consistency in the respective material of study.[61] *Dogmatik* represents the willingness to achieve scientific and practical totality of law even in appreciation of the contingency of 'real' life.[62] The goal of a system of law remains,[63] even though frictions and fragmentation may lead to the concession that the ideal of system vanishes into being a mere postulate.[64] *Dogmatik's* role in a plural, democratic society, in which the legal order is a mitigated compromise affected by social change,[65] might be, however, to achieve what democratic legislation itself might not be able to do comprehensively: the integration of legislated rules into a model of unity.[66] Two important tenets follow from a conception of law as a hierarchically ordered whole. On the one hand, single terms and concepts are interpreted in relation to the coherence of the system and its general premises (systematic interpretation).[67] On the other hand, the value of theories and principles "will be tested before the forum of practice"[68], in that the exceptional case will ultimately decide whether a general theory is tenable and coherent in the light of the system.[69] In conclusion,

59 See generally A. Amaya, *Nature of Coherence and its Role in Legal Argument* (2015).

60 Buhmke, *supra* note 29, 46; cf. T. Vesting, 'Systemtheorie des Rechts als Herausforderung für Rechtswissenschaft und Rechtsdogmatik', 8 available at https://www.jura.uni-frankfurt.de/43748222/Kein_Anfang_und_kein_Ende.pdf (last visited 18 July 2022).

61 I. Augsberg, 'Lob der Dogmatik', *rescriptum* (2014) 1, 63, 65; cf. Strauch, *supra* note 52, 417.

62 Welker, *supra* note 48, 334; cf. H. Kelsen, *Pure Theory of Law* (1965), 65.

63 Diederichsen, *supra* note 58, 69; cf. W. Canaris, *Systemdenken und Systembegriff in der Jurisprudenz*, 2nd ed. (1983), 12.

64 K. Engisch, 'Sinn und Tragweite juristischer Systematik', 10 *studium generale* (1957), 173, 177–178.

65 Diederichsen, *supra* note 58, 69.

66 A. Aarnio, *Denkweisen der Rechtswissenschaft* (1979), 50, 51; A. Somek, *Rechtssystem und Republik: Über die politische Funktion des systematischen Rechtsdenkens* (1992), 9; cf. M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', 70 *Modern Law Review* (2007) 1, 1, 15, fn. 66 [Konskenniemi, 'Fate of PIL'].

67 Cf. W. Gast, 'Juristische Rhetorik', 5th ed. (2015), 283; F. Bydlinski, *Juristische Methodenlehre und Rechtsbegriff*, 2nd ed. (1991), 442–443.

68 H. Gadamer, 'Lob der Theorie', in H. Gadamer, *Lob der Theorie: Reden und Aufsätze* (1983), 38; translated by A. Peters, 'Realizing Utopia as a Scholarly Endeavor', 24 *European Journal of International Law* (2013) 2, 533, 543.

69 Kuntz, *supra* note 35, 284.

Dogmatik describes the systematic-scientific approach, as well as the product of this endeavor; one could say, *Dogmatik* means to use and to build the system at the same time.[70] Even more succinct: *Dogmatik* is the assumption of system and test of systematicity at the same time.[71]

3. Abstraction and Reduction

To establish such a hierarchically ordered whole in the first place, the abstraction and reduction of single decisions into general principles and broader concepts is necessary. In this context, *Dogmatik* has been portrayed as the memory of law and legal practice: fundamental normative debates need not be discussed and decided anew in every single case but can be answered in reference to previous decisions and established views.[72] For instance, a lower court in a standard case will not engage with the philosophical, ethical, and psychological dimensions and abysses of criminal intent,[73] but will (just) employ the 'generally accepted' definition. The multiplicity of features of legal decisions is reduced and abstracted into a set of principles, templates, and normative criteria, which can be handled in future practice.[74] This explains the central importance *Dogmatik* has not only for legal practice but also for legal education, which traditionally has a practical orientation in Germany.[75]

Even more important, however, just as for the human brain, is the capacity to 'forget':[76] *Dogmatik* allows to disregard all factors, which could have (had) a theoretical influence on the individual decision-maker, but do not form part of the legal decision-making program.[77] Because it teaches one to ignore the noise and to focus on the relevant normative decision criteria only, it relieves the decision-maker from the overwhelming myriad of possible viewpoints, factors, and questions, and thereby ensures that there can be decisions at all.[78] At the same time, however, the abstraction of reality into normative concepts must not

70 Schmidt-Aßmann, *supra* note 58, 5.
71 Welker, *supra* note 48, 334.
72 Augsberg, *supra* note 61, 63; Buhmke, *supra* note 29, 2, 54.
73 See e.g. H. L. A. Hart, *Punishment and Responsibility*, 2nd ed. (2011), 113–157.
74 R. Stürner, 'Die Zivilrechtswissenschaft und ihre Methodik', 214 *Archiv für die civilistische Praxis* (2014) 1, 7, 11 [Stürner, 'Zivilrechtswissenschaft und ihre Methodik'].
75 R. Stürner, 'Das Zivilrecht der Moderne und die Bedeutung der Rechtsdogmatik', 67 *Juristenzeitung* (2012) 1, 10, 11.
76 Comp. L. Gravitz, 'The Importance of Forgetting', 571 *Nature* (2019), 12, 12.
77 Augsberg, *supra* note 61, 63.
78 Cf. O. Ballweg, *Rechtswissenschaft und Jurisprudenz* (1970), 72.

go too far. *Dogmatik* and law generally, to serve the purpose of ordering and structuring social life, must stay connected to it in being understandable and realistic: the so-called 'affinity' of law.[79] Quixotic legal fictions, which negate meaningful distinctions in social life, will not only prove ineffective but might also violate the negative side of the principle of equal treatment, namely to not arbitrarily treat equal, what is basically unequal.[80]

4. Concretization and Construction

This necessity of tangibility requires one to find ways to effectively connect law with life. In that respect, *Dogmatik* serves to concretize the law by transforming general maxims and principles into specific decision rules, which can be applied to the factual pattern of an individual case and which are suitable for ordering concrete life situations.[81] Because of law's abstract nature, it is the task of interpretive application to bring the abstract normative program of the law and the concrete factual situation together.[82] This undertaking is traditionally conceptualized as a 'legal syllogism', in which the relevant facts (sub-premise) are subsumed under the normative criteria set out by the relevant norms (premise) in the form of a 'logical' *conclusio*.[83] However, this 'logical' conclusion is grounded on two much more complicated and problematic steps: the concretization and construction of premise and sub-premise.[84]

In this respect, the understanding that any application of law must be aimed at achieving equal treatment under the rule of law might indeed be the key to a deeper understanding of *Dogmatik*.[85] The principle, which is based on law's generality and universality,[86] must also be applied when the law itself is indeterminant in deciding a specific case.[87] Legal practice must nonetheless

79 Diederichsen, *supra* note 58, 74.
80 Comp. J. Rabe, *Equality, Affirmative Action and Justice* (2001), 177.
81 Brauns, *supra* note 41, 23–26.
82 *Ibid*., 23.
83 Cf. Strauch, *supra* note 52, 304.
84 K. Röhl, 'Grundlagen der Methodenlehre I: Aufgaben und Kritik' (2013), in: IVR, *Enzyklopädie zur Rechtsphilosophie*, para. 41, available at http://www.enzyklopaedie-rechtsphilosophie.net/inhaltsverzeichnis/19-beitraege/78-methodenlehre1 (last visited 17 July 2023) [Röhl, 'Methodenlehre I'].
85 Cf. Alexy, 'Argumentation', *supra* note 30, 327, 335–336; T. Lieber, *Diskursive Vernunft und formelle Gleichheit* (2007), 244.
86 G. Kirchhof, *Die Allgemeinheit des Gesetzes* (2009), 140.
87 Röhl, 'Methodenlehre-I', *supra* note 84, para. 12.

decide rule-based and with the willingness to apply the same rule to a similar factual situation in the future, even where said rule is just created in the process of application.[88] Thus, the idea of equality and predictability is the legitimation for system-building and concretization in a legal system based on the rule of law.[89] Because the judiciary is restricted to deciding individual cases,[90] it is traditionally the genuine task of legal scholarship to address a field of law holistically and to structure the social, cultural, and normative pre-understandings regarding an area of law.[91] Such (pre-)conceptualized systematic legal structure with socially established legal terms and concepts can subsequently be used by the legislator to increase the regulative effectiveness and societal affinity of the statutory law: *Dogmatik* then serves as a toolbox.[92]

On the other hand, constructing the sub-premise means to filter from the infinite number of facts of the specific case those relevant for the legal decision; to reduce the factual situation to its normative relevant core.[93] Starting from legal preconceptions,[94] norms and facts will be identified in a reciprocal process of approximation, which has been famously depicted as the 'wandering gaze between normative premise and factual situation'.[95] During that process, norms will be evaluated in light of the facts, while the factual situation will be analyzed and further investigated in light of the normative elements the initially identified laws require.[96] Especially in the procedural setting of law application, any assessment and understanding of facts is predetermined by normative

88 E. von Savigny, 'Die Rolle der Dogmatik', in U. Neumann, J. Rahlf & E. von Savigny (eds), *Juristische Dogmatik und Wissenschaftstheorie* (1976), 106; cf. P. Birks, 'The Academic and the Practitioner', 18 *Legal Studies* (1998) 4, 397, 406.

89 H. Jung, 'Zum Gegenwärtigen Stand einer „Dogmatik des Völkerstrafrechts"', 43 *Archiv des Völkerrechts* (2005) 4, 525, 534.

90 Brauns, *supra* note 41, 25.

91 Cf. A. von Bogdandy, 'The Past and Promise of Doctrinal Constructivism', 7 *International Journal of Constitutional Law* (2009) 3, 364, 391 [von Bogdandy, 'Coctrinal Constructivsm']; F. Cownie, 'Are We Witnessing the Death of the Textbook Tradition in the UK', 3 *European Journal of Legal Education* (2006) 1, 75, 76.

92 Diederichsen, *supra* note 58, 75.

93 Brauns, *supra* note 41, 33.

94 Cf. J. Esser, *Vorverständnis und Methodenwahl der Rechtsfindung* (1970), 133.

95 K. Engisch, *Logische Studien zur Gesetzesanwendung*, 3rd ed. (1963), 15; C. Starck, *Der demokratische Verfassungsstaat* (1995), 107.

96 K. Röhl, 'Grundlagen der Methodenlehre II: Rechtspraxis, Auslegungsmethoden, Kontext des Rechts' (2013), in: IVR, *Enzyklopädie zur Rechtsphilosophie*, para. 7, available at http://www.enzyklopaedie-rechtsphilosophie.net/inhaltsverzeichnis/19-beitraege/77-methodenlehre2 (last visited 18 July 2023) [Röhl, 'Methodenlehre II'].

pre-conditions.[97] Furthermore, by using legal fictions, rules of evidence, and presumptions the law not only chooses from the totality of facts but creates its own facts to use, it creates its own 'reality'.[98]

Concretization is therefore not an isolated operation, but adds to and is interconnected with the systemic alignment of *Dogmatik*.[99] Because systematization as such could only guarantee the consistency of the normative framework, the enrichment of the system with concreteness is necessary to close in the systems abstract structure towards the level of application and to effectively program legal decisions by representing in (still) abstract terms all phenotypic legal conflicts possible in the respective legal framework.[100] The final *subsumption* however, – the "jump from language to life" – stays the genuine task of the judiciary and legal practice.[101] System-building and concretization are therefore not polar opposites, but just different perspectives of the general endeavor of Dogmatik to make the application of law possible and feasible: while system-building puts an emphasis on general coherence and compliance with the principle of equal treatment,[102] concretization and construction focusses on the suitability, appropriateness, and effectiveness in relation to individual factual scenarios.[103]

5. Rationality and Normativity

The process of concretization and construction poses one of the most pressing questions for *Dogmatik* and the legal profession as such: How can 'scientific' interpretation and concretization extract and lead to (normative) results, which are *prima vista* not determined by the law itself? Historically, the occupation of lawyers and judges was often portrayed to be limited to the

97 C. Alchourrón, 'Limits of Logic and Legal Reasoning', in E. Bulygin *et al.* (eds), *Essays in Legal Philosophy* (2015) 252, 259.

98 G. Teubner, 'How the Law Thinks: Toward A Constructivist Epistemology of Law', 23 *Law&Society Review* (1989) 5, 727, 744; D. Nelken, 'The Truth about Law's Truth', EUI Working Paper Law 1990/01, 11.

99 Brauns, *supra* note 41, 32.

100 *Ibid.,* 23; cf. Kirchhof, *supra* note 86, 89.

101 Brauns, *supra* note 41, 29; Engisch, *Logische Studien zur Gesetzesanwendung*, *supra* note 95, 101.

102 Savigny, 'Die Rolle der Dogmatik', *supra* note 88, 106.

103 Brauns, *supra* note 41, 24.

discovery and logical deduction of a decision from the applicable law.[104] By now, it is widely accepted that the vagueness of language and law's application to inconclusive social facts inevitably leads to legal indeterminacy,[105] so that multiple solutions can be reasonable and justifiable under the normative framework.[106] Nonetheless, German legal scholarship traditionally claims to engage in a rational determination of the law,[107] which is seen as the necessity to provide comprehensible and publicly available criteria for maneuvering and deciding inside the undetermined grey zone the law leaves open.[108] In this understanding, juristic argumentation serves to enable intersubjective understanding and criticism of legal decisions, despite how the decision was reached *de facto*.[109] Namely, even where the legal decision appears to be an application of the legal syllogism, the construction of its premises often cannot be explained logically.[110] The 'subsumption' is then only a style of presentation and reasoning, while the real method of the decision remains disguised.[111] Rationality in this limited sense approaches precision through a procedure of unlimited critique geared towards the results of 'finding the law',[112] as a rational mode of persuasion, which is yet not logically conclusive.[113] In this respect, *Dogmatik* offers the communicative

104 H.-P. Haferkamp, 'Begriffsjurisprudenz: Jurisprudence of Concepts', in: IVR, *Enzyklopädie zur Rechtsphilosophie*, para. 1, available at http://www.enzyklopaedie-rechtsphilosophie.net/inhaltsverzeichnis/19-beitraege/105-jurisprudence-of-concepts (last visited 18 July 2023); O. Lepsius, 'Rechtswissenschaft in der Demokratie', 52 *Der Staat* (2013) 2, 157, 185.

105 J. Raz*, Between Authority and Interpretation: On the Theory of Law and Practical Reason* (2009), 242; comp. S. Kirkegaard, 'The Concept of Irony', in E. Hong & H. Hong (eds), *Kierkegaard's Writings*', Vol. 2 (1990), 9.

106 Comp. Kelsen, 'Pure Theory of Law', *supra* note 62, 82, 95; M. Goldmann, 'Dogmatik als rationale Rekonstruktion', 53 *Der Staat* (2014) 3, 373, 374.

107 P. Glenn, *Legal Traditions of the World* (2007), 19.

108 F. Wieacker, 'Zur praktischen Leistung der Rechtsdogmatik', in R. Bubner, K. Cramer & R. Wiehl (eds), *Hermeneutik und Dialektik – Hans-Georg Gadamer zum 70. Geburtstag* (1970), 311, 311; cf. R. Alexy, *Recht, Vernunft, Diskurs – Studien zur Rechtsphilosophie* (1995), 71; Vesting, 'Systemtheorie des Rechts', *supra* note 60, 13.

109 Röhl, 'Methodenlehre-II', *supra* note 96, paras 9–10, 19.

110 J. Bung, 'A Few Basic Considerations on the Method of Finding the Law', *Ancilla Juris* (2009), 35, 39; W. Hassemer, 'Gesetzesbindung und Methodenlehre', 40 *Zeitschrift für Rechtspolitik* (2007) 7, 213, 218.

111 Gast, *supra* note 67, para. 65; K. von Schlieffen, 'Das Enthymem – Ein Modell juridischen Begründens', 42 *Rechtstheorie* (2011) 4, 601.

112 Brauns*, supra* note 41, 12, 29.

113 C. Perelman, *The Idea of Justice and the Problem of Argument* (1963), vii.

framework of reference which professional jurists use to engage in discussions about law and legal decisions.[114]

Consequently, there cannot be any 'dogmas' inside a legal *Dogmatik*; the authority and normativity of the 'better' or 'right' interpretation are always contextual and historically contingent: while being rhetorically advanced at a given point in time, an interpretation never achieves the status of a timeless truth, but remains a rationalistic balancing of coherence and effectiveness.[115] Instead, it is said, that the hint of science in legal scholarship attaches to a dual-test of rationality in respect to legal axioms: First, as an expression of the 'hermeneutical' moment in *Dogmatik*, any interpretation and application of the law must conform with the legal framework, which is to be determined by using with the accepted methods of interpretation.[116] Secondly, the *meta*-task of establishing the legal methodology for the 'negative test' must be aimed at minimizing the margin for subjectivity and arbitrariness – the scope of the 'positive test' – as far as possible.[117] Namely, if multiple interpretations are still possible under the legal framework, a 'positive test' will determine the most reasonable and rationally convincing interpretation.[118] In this respect, the classical rhetoric conception of 'topics',[119] understood as the collection of sources and templates for individual arguments, is seen as a constraining framework for the acting legal professional to further structure and facilitate the finding of the most reasonable solutions within the scope of the 'positive test'.[120]

The reality of law, however, does not allow for endless discourse, rational discussions, and open-ended complexity: pragmatism ousts idealism in light of the necessity to decide a myriad of cases in short amounts of time even where factual uncertainty and normative indeterminacy reigns.[121] In that regard, it is

114 Röhl, 'Methodenlehre-II', *supra* note 96, para. 20.

115 Rüthers, 'Rechtsdogmatik', *supra* note 29, 17; cf. K. Popper, *Die offene Gesellschaft und ihre Feinde-II*, 8th ed. (2003), 281.

116 Brauns, *supra* note 41, 11, 284; Alexy, Argumentation', *supra* note 30, 261 ('internal justification').

117 E. Kramer, *Juristische Methodenlehre*, 6th ed. (2019), 47; Larenz, *supra* note 51, 248.

118 Brauns, *supra* note 41, 11; Alexy, Argumentation', *supra* note 30, 261 ('external justification').

119 See generally: J. White, 'Law as Rhetoric, Rhetoric as Law', 52 *The University of Chicago Law Review* (1985) 3, 684.

120 Gast, *supra* note 67, para. 53.

121 B. Rüthers, *Rechtstheorie* (1999), para. 314, 823; Strauch, *supra* note 52, 424; H. Dedek, 'Die Schönheit der Vernunft – (Ir-)Rationalität von Rechtswissenschaft in Mittelalter

a core feature of *Dogmatik* to enable the reduction of normative complexity to stabilize the law, *inter alia* by allocating relative authority to specific theories and opinions: the so-called '*herrschende Meinung*' ('prevailing/dominant opinion').[122] By referring to the majority opinion the debate of the past is incorporated in the current case, without having to (re-)argue the legal question.[123] While in turn any new solution requires special justification for breaking with tradition,[124] the (relative) authority of a dominant opinion stays at its core justified only by *imperio rationis* and can be disregarded in the legal discourse of the future.[125] Similiarly, the constitutional principles of equal treatment and legal certainty require a normative justification for any deviation from a previous judgment to avoid arbitrariness:[126] the deviating decision carries the burden of argumentation, even though judicial independence is not limited by any formal rule of precedent in Germany.[127]

To conclude, neither the ontological-hermeneutical view of discovering the pre-existing law nor the reduction of legal application to mere decisionism appropriately captures the practices of legal professionals engaging in *Dogmatik*.[128] In the self-conception of German legal scholarship, *Dogmatik* is better understood as a multi-dimensional procedure, which combines aspects of descriptive truthfulness and non-legislative claims of normativity and validity.[129] It defies decisionism and upholds a dimension of formalism despite the acknowledgment of law's indeterminism when it claims that a decision can

und Moderne', 1 *Rechtswissenschaft* (2010), 58, 60, 61.

122 R. Zimmermann, *Die Relevanz einer herrschenden Meinung für Anwendung, Fortbildung und wissenschaftliche Erforschung des Rechts* (1983), 84; N. Foster & S. Sule, *German Legal Systems and Laws*, 4th ed. (2010), 137.

123 Jansen, 'Legal Authority', *supra* note 36, 105–136; T. Drosdeck, *Die herrschende Meinung – Autorität als Rechtsquelle* (1989), 79.

124 Alexy, Argumentation', *supra* note 30, 268; cf. N. Jansen, 'Informal Authorities in European Private Law', in R. Cotterrell & M. Del Mar (eds), *Authority in Transnational Legal Theory* (2016), 191, 206.

125 Vogenauer, 'Learning and Lawmaking in Germany Today', *supra* note 49, 631, 632.

126 M. Kriele, *Theorie der Rechtsgewinnung* (1967), 243.

127 M. Payandeh, *Judikative Rechtserzeugung* (2017), 478, 485, 492.

128 Röhl, 'Methodenlehre-I', *supra* note 84, para. 39; N. Jansen, 'Rechtsdogmatik im Zivilrecht', in IVR, *Enzyklopädie zur Rechtsphilosophie*, paras 9–10, available at http://www.enzyklopaedie-rechtsphilosophie.net/inhaltsverzeichnis/19-beitraege/98-rechtsdogmatik-im-zivilrecht (last visited 18 July 2023).

129 N. Jansen, 'Theoriebildung in der europäischen Privatrechtsdogmatik', in: R. Alexy (ed.), *Juristische Grundlagenforschung* (2005), 29, 32.

be substantiated with reasonable or unreasonable arguments:[130] the 'one-right answer thesis'[131] remains at least a 'regulative idea'.[132] Generating knowledge is therefore understood as a multi-layered process of attributing meaning and developing a common understanding of rationality in the context of a plural society.[133]

6. Openness and Closedness

Dogmatik is consequently characterized by its contextuality:[134] On a macro level, traditions and societal values will influence the application and interpretation of the law; in that especially general principles of law are responsive to societal change.[135] On a meso level, the current legal order is used as a functional political tool, to control behavior, address specific social problems, and push political agendas.[136] Lastly, on a micro level, concrete societal conflicts, the conflicting interests of individuals, have to be balanced to decide each case on its merits and to achieve justice in each individual case.[137] In all these instances, *Dogmatik* is characterized by a specific openness: While *Dogmatik* undoubtedly has a preserving and stabilizing function, it simultaneously allows to react to social and political change.[138] It is not made for eternity but describes a temporal, dynamic state of legal knowledge in relation to a specific legal framework, which is based on a specific historical, political, and societal environment.[139] The more the legislator uses open concepts to allow these considerations to take effect, the more the hermeneutical enterprise of legal interpretation is affected and stabilized by its concrete empirical context and can become an important driver of legal development.[140]

130 Alexy, 'Argumentation', *supra* note 30, 261.
131 Comp. R. Dworkin, *A Matter of Principle* (1985), 119.
132 U. Neumann, 'Theorie der juristischen Argumentation', in A. Kaufmann, W. Hassemer & U. Neumann (eds), *Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart*, 8th ed. (2011), 333, 343.
133 W. Hoffmann-Riem, *Innovation und Recht – Recht und Innovation* (2016), 700.
134 Comp. D. Nelken, 'Beyond the Study of „Law and Society"?', 11 *Law & Social Inquiry* (1986) 2, 323, 325.
135 Hoffmann-Riem, *supra* note 133, 700.
136 *Ibid.*
137 *Ibid.*
138 Comp. Schmidt-Aßmann, *supra* note 58, 5.
139 Rüthers, 'Rechtsdogmatik', *supra* note 29, 8.
140 Diederichsen, *supra* note 58, 69; Vesting, 'Legal Theory', *supra* note 57, 120.

Dogmatik achieves this contextual openness by sticking to normative closedness.[141] By reframing any argument along the binary pattern of 'lawful/unlawful', the legal system – understood as a social network of communications – makes any argument about the legal system a legal argument.[142] The emerging system is self-referential and requires to adopt an internal perspective to participate;[143] it reproduces itself by interconnecting legal arguments in an endless process and is productive in being able to create new norms: the so-called 'autopoiesis' of law.[144] The autonomy of the legal system is then based not on the absence of external influences, but on the specific way it incorporates and acknowledges the empirical reality.[145] By selectively translating and reconstructing external arguments from the social reality into legal arguments,[146] an 'inside' and 'outside' is created,[147] by which legal discourse becomes independent and autonomous in relation to the general practical discourse;[148] a technique which is necessary for its functionality.[149]

To conclude, while these system-theoretical considerations were just recently adopted in the general debate, they eventually just describe the traditional functioning of law and *Dogmatik* in new terms.[150] In this respect 'contextual openness' and 'normative closure' might indeed be important *topoi* to better understand the functioning of law as a social phenomenon.[151]

141 Cf. Vesting, 'Systemtheorie des Rechts', *supra* note 60, 2.

142 Cf. M. Pöcker, 'Unaufgelöste Spannung und Blockierte Veränderungsmöglichkeiten im Selbstbild der juristischen Dogmatik', 37 *Rechtstheorie* (2006) 2, 151, 157–160.

143 Buhmke, *supra* note 29, 59; cf. J. Smits, 'Wat is juridische Dogmatik', in M. Groenhuijsen, E. Hondius & A. Soeteman (eds), *Recht in Geding II* (2016), 27, 29.

144 K.-H. Ladeur, 'The Theory of Autopoiesis as an Approach to a Better Understanding of Postmodern Law', EUI Working Paper Law 1999/03, 9; G. Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism', 13 *Cardazo Law Review* (1991) 5, 1443, 1459.

145 Teubner, 'Toward a Constructivist Epistemology of Law', *supra* note 98, 749; cf. P. Westerman, 'Open or Autonomous?', in M. van Hoecke (ed.), *Methodologies of Legal Research* (2011), 87.

146 G. Teubner, 'Altera Pars Audiatur: Law in the Collision of Discourses', in R. Rawlings (ed.), *Law, Society and Economy* (1997), 149, 165.

147 R. Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (2006), 30.

148 Jansen, 'Rechtsdogmatik im Zivilrecht', *supra* note 128, para. 3.

149 Cf. A. Lang, 'New Legal Realism, Empiricism and Scientism: The Relative Objectivity of Law and Social Science', 28 *Leiden Journal of International Law* (2015) 2, 231, 248.

150 Smits, *supra* note 143, 36.

151 Comp. Starck, *supra* note 95, 106.

II. Conclusion, Limitations and Critique

The preceding discussion showed that *Dogmatik*, though ubiquitously used in the German discussion, remains an elusive and abstract concept. It evolved over a long period of time under specific historical, cultural, and political conditions and depending on the general history of thought.[152] Consequently, a comprehensive theory or a conclusively defined concept of *Dogmatik* cannot be offered. What has been presented here, is only a rough sketch of the dominant views on *Dogmatik* in their evolution in the German debate over time: there is no single monolithic entity named *Dogmatik*, but multiple competing versions and views.[153] Furthermore, the main characteristics of *Dogmatik* are open to criticism. For one, the systematic orientation may deteriorate into a self-defeating obsession: creating an intellectual automatism, which emphasizes the normative over the factual even where a system actually does not exist.[154] Secondly, the constructive and theorizing propensity of *Dogmatik* comes with the danger of creating a level of complexity and differentiation, which cannot be adequately comprehended and which might prove ineffective for legal practice.[155] Lastly, the relative normativity, which *Dogmatik* creates by interpreting and concretizing the law, poses serious legitimacy questions: why should a professional elite – "a caste of lawyers"[156] – have such a dominant and uncontrolled role in developing and effectively creating the law?[157]

In this sense, German history should indeed raise awareness towards the potential use of *Dogmatik* as an instrument of power. Legal scholarship has had a significant influence in deriving quite diametrical (re-)interpretations from the same (or to a large proportion unchanged) legal framework,[158] during

152 Diederichsen, *supra* note 58, 77.

153 Comp. M. Dubber, *The Dual Penal State – The Crisis of Criminal Law in Comparative-Historical Perspective* (2018), 232.

154 M. Everson, 'Is it Just Me, or is There an Elephant in the Room?', 13 *European Law Journal* (2007) 1, 136, 138.

155 J. Esser, 'Möglichkeiten und Grenzen dogmatischen Denkens im modernen Zivilrecht', 172 *Archiv für die civilistische Praxis* (1972) 2, 97, 120.

156 A. Simpson, 'The Common Law and Legal Theory', in A. Simpson (ed.), *Oxford Essays in Jurisprudence* (1973), 77, 94.

157 Cf. M. Hailbronner, 'We the Experts: Die geschlossene Gesellschaft der Verfassungsinterpreten', 53 *Der Staat* (2014) 3, 425.

158 Rüthers, 'Rechtsdogmatik', *supra* note 29, 8, 36.; cf. B. Rüthers, *Die Wende-Experten* (1995).

the rapid changes of the German political system in the last century.[159] In the darkest chapter of this turbulent history (1933–1945), the judiciary and legal scholarship not only – as the "legend" of a (pure) positivistic mindset goes[160] – applied and interpreted inhumane law and sentenced untold thousands to death, but exhibited anticipatory and overzealous obedience in re- and deconstructing the law to serve the Nazi regime.[161] The Nazi state was not lawless, it did not disable the legal system, but it combined state terror with juristic normalcy in a sickening way; it utilized and abused the law for its inhumane purposes and *Dogmatik* put itself to service for ideology.[162] To conclude, both the pride and the misery of German legal scholarship stems from the same sources:[163] pride in a high level of systematization and abstraction, but misery in creating overly complex and ineffective concepts; pride in a concept of rational interpretation and argumentation, but misery in the fact that a moment of subjectivity and arbitrariness cannot be ruled out; pride in an autonomous existence, while staying receptive for social change and legal development; but misery in the possibility of being abused as an instrument of political power.

Thus, a cautious and modest approach must withdraw from any idealistic elevation of *Dogmatik* to be a philosophical system or meta-theory of law and must question any naïve promotion of the concept in the international realm.[164] The investigation showed that no clear principles or guidance for practice can be derived from the concept as such, only structural ideas and descriptive characteristics, which in turn entail problematic aspects. *Fletcher's* urge for an ICL *Dogmatik* then seems to be a paradox: how is a vague, non-unified concept supposed to help unify the allegedly non-unified field of ICL and to establish a normative foundation of shared values and general principles in the international realm? One reason may be, that *Dogmatik* simultaneously emerges as a hybrid format of thought in between theory and practice, which

159 Namely: 1918/19 – 1933 – 1945/49 – 1989/90.

160 Cf. M. Dubber, 'Judicial Positivism and Hitler's Injustice', 93 *Columbia Law Review* (1983) 7, 1807, 1808.

161 Röhl, 'Methodenlehre-I', *supra* note 84, para 82; cf. M. Lippman, 'They Shoot Lawyers Don´t They?: Law in the Third Reich and the Global Threat to the Independence of the Judiciary', 23 *California Western International Law Journal* (1993) 2, 257, 275.

162 K. Marxen & H. Schlüter, 'Terror und "Normalität": Urteile des nationalsozialistischen Volksgerichtshofs' (2004), 5; comp. for the "shock-troop faculty" at the University Kiel, Ambos, *National Socialist Criminal Law*, *supra* note 39, 113.

163 Comp. von Bogdandy, 'Doctrinal Constructivism', *supra* note 91, 378.

164 Auer, *supra* note 33, 14.

by providing a common framework of reference for legal argumentation bridges the rifts between different actors in the legal system and creates the necessary conditions for an autonomous legal discourse in a "symbiotic relationship" between legal scholarship and legal practice.[165] *Dogmatik*, in this sense, is a practical discipline,[166] which enables to find answers to the seminal question of how a given fact situation should be legally judged,[167] and thereby provides mutual reinforcement for law and legal scholarship alike.[168] It connects and grounds current legal challenges and debates within the larger context of legal history and societal change, and thereby lays the groundwork for cautious and gradual development.[169] Therefore, *Dogmatik* can be seen as a specific solution for the never-ending task of balancing the factual and the normative, which is intrinsic to law's nature as a social phenomenon:[170] "not something we know, but something that we do."[171] Besides the specific characteristics discussed above, it might just be this general core of *Dogmatik* as an evolving argumentative rationality, which could have been meant by *Fletcher* and which will now be assessed in relation to the international sphere.

C. A German Specificum? *Dogmatik* Internationally

I. National Jurisdictions

Is *Dogmatik* the specific "German approach" of doing legal science?[172] This often-used common place quickly vanishes into a more ambiguous picture when engaging in a comparative analysis. It has been conclusively shown elsewhere that all legal traditions utilize ideas of system, coherence, and abstracted

165 Kuntz, *supra* note 35, 280; M. Jestaedt, 'Wissenschaftliches – Rechtsdogmatik als gemeinsames Kommunikationsformat von Rechtswissenschaft und Rechtspraxis', in G. Kirchof, S. Magen & K. Schneider (eds), *Was weiß Dogmatik?* (2012), 117, 137.

166 Bung, 'New Approaches to Legal Methodology', *supra* note 44, 80.

167 R. Siltala, *Law, Truth and Reason: A Treatise on Legal Argumentation* (2011), 105.

168 Augsberg, *supra* note 61, 63; Waldhoff, *supra* note 33, 19.

169 Comp. C. Möllers, 'Vorüberlegungen zu einer Wissenschaftstheorie des öffentlichen Rechts', in M. Jestaedt & O. Lepsius, *Rechtswissenschaftstheorie* (2008), 151, 167.

170 Comp. R. Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?', 25 *Journal of Law and Society* (1988) 2, 171, 187.

171 A. Leff, 'Law and', 87 *Yale Law Journal* (1978) 5, 989, 1011.

172 C. Schönberger, *Der „German Approach": Die deutsche Staatsrechtslehre im Wissenschaftsvergleich* (2013), 40; cf. K. Grechenig & M. Gelter, 'The Transatlantic Divergence in Legal Thought', 31 *Hastings International and Comparative Law Review* (2008) 1, 295.

principles of law, which enable legal argumentation in the first place.[173] Practice-orientated doctrinal work is at the core of legal scholarship in many countries;[174] familiar debates over the proper methods of legal scholarship occurred in most jurisdictions,[175] and it is even debated, whether some form of *Dogmatik* is indeed a necessary element of any legal system and concept of law.[176] The following analysis is merely presented to illustrate these similarities and to increase the responsiveness and receptiveness for the functional ideas of *Dogmatik* in the international realm.

1. Civil Law Tradition

As a member of the civil law tradition, the French jurisdiction uses the term *la doctrine*, which – in exclusively referring to academic scholarship – reveals a narrower understanding compared to Germany, where the judiciary is included in forming the *Dogmatik*. [177] This clear institutional division between legal scholarship and *la jurisprudence* (the judiciary and its judgments) indicates a different allocation of responsibilities in the legal system, in that the judiciary has the predominant role for legal practice in productively developing the codified law by introducing general legal principles and normative concepts.[178]

173 Z. Bankowski *et al.,* 'On Method and Methodology', in N. MacCormick & R. Summers (eds), *Interpreting Statutes – A Comparative Study* (1991), 9, 19; Glenn, *supra* note 107, 132, 226; R. Summers & M. Taruffo, 'Interpretation and Comparative Analysis', in N. MacCormick & R. Summers (eds), *Interpreting Statutes – A Comparative Study* (1991), 461, 465. For an account on the Hindu, Islamic and Roman Tradition, see F. Pirie, *The Anthropology of Law* (2013), 73.

174 A. von Bogdandy, 'Deutsche Rechtswissenschaft im Europäischen Rechtsraum', 66 *JuristenZeitung* (2011) 1, 1, 4–5 [von Bogandy, 'Deutsche Rechtswissenschaften im Europäischen Rechtsraum']; cf. J. Merryman, 'The Italian Style I: Doctrine', 18 *Stanford Law Review* (1965) 2, 39, 45.

175 Comp. R. van Gestel & H.-W. Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What about Methodology?', EUI Working Paper Law 2011/05, 11; cf. S. Bartie, 'The Lingering Core of Legal Scholarship', 30 *Legal Studies* (2010) 3, 345.

176 M. van Hoecke & M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine', 47 *International and Comparative Law Quartely* (1998) 3, 495, 522; R. Alexy, 'Juristische Begründung, System und Kohärenz', in O. Behrends & M. Diesselhorst (eds), *Rechtsdogmatik und praktische Vernunft* (1990), 95, 106.

177 C. Atias, *Epistémologie juridique* (2002), 193; P. Jestaz & C. Jamin, *La doctrine* (2004), 19, 219.

178 E.g. the general principle *d'équité, qui défend de s'enrichir au détriment d'autrui,* cf. P. Schlechtriem, 'Unjust Enrichment by Inference with Property Rights', in K. Zweigert & U. Drobnig (eds), *International Encyclopaedia of Comparative Law – Vol. X: Restitution – Unjust Enrichment* (1981) 8, 91.

La doctrine, on the contrary, is generally understood as the analytical summary of core developments of the law by legal scholarship.[179] As a result of leaving out the middle-range theories and concepts, it is argued, that the argumentative control and rationalization of judgments by legal scholarship is less pronounced than in Germany.[180] The noticeable difference, one might conclude, is the self-perception and role legal scholarship has in the French jurisdiction. It misses the same confidence and sense of autonomy German legal scholarship exhibits when using *Dogmatik* to engage with legal practice and the judiciary.[181]

Also in the Netherlands, *Dogmatiek* is a long-established legal concept.[182] The given definitions for *dogmatiek* resemble the German understanding of the concept, namely as the systematic analysis, synthesis, and structuring of the applicable law.[183] However, while Dutch legal scholarship aims to create a system of knowledge in respect of the applicable law through methodologic argumentation and rational discourse,[184] the concept as such has not reached the same importance as it did in Germany.[185] Recently, and probably more enthusiastic than in the German debate, a claim for a renewed appreciation of *dogmatiek* as the "alpha and omega of any legal scholarship" has been made: *dogmatiek* is said to be worth it.[186]

2. Common Law – Tradition

While Germany, France, and The Netherlands share a common heritage as civil law jurisdictions,[187] the common law tradition has generally been depicted as the antagonistic approach of 'doing law'.[188] Concerning the traditional focus

179 Comp. D. Thym, 'The Limits of Transnational Scholarship on EU Law: A View from Germany', EUI Working Paper Law 2016/14, 21, fn. 132.

180 Stürner, 'Zivilrechtswissenschaft und ihre Methodik', *supra* note 74, 11.

181 Cf. Schönberger, *supra* note 172, 39.

182 Just note: E. Meijers, *Dogmatische Rechtswetenschap* (1903).

183 A. Hartmann, *Over de grenzen van de dogmatiek en into fuzzy law* (2011), 15.

184 See e.g. for criminal law: J. Remmelink, 'Actuele stroningen in het Nederlandse strafrecht', in C. de Buer & S. Faber (eds), *Strafrecht in Perspectief* (1980), 31–65. Cf. C. Stolker, 'Over de statut van de Rechtswetenshap', 15 *Nederlands Juristenblad* (2003) 766–778.

185 G. Langemeijer, 'Juridische Dogmatiek', 25 *Mededelingen der Koninklijke Nederlandse Akademie Van Wetenschappen, Afd. Letterkunde Nieuwe Reeks* (1962), 561, 561–562; Smits, *supra* note 143, 28.

186 Smits, *supra* note 143, 33, 41.

187 Comp. G. Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (2015), 260.

188 See generally, T. Lundmark, *Charting the Divide between Common and Civil Law* (2012).

on the judiciary and binding precedents based on non-codified common law, as well as the late establishment of a meaningful legal scholarship and a focus on equity in the single case,[189] it is said that the common law has an "irreducibly different mentality"[190], which resists the building of any doctrinal system before the case.[191] However, the employed legal methods and the hermeneutical core of legal practice are not different in principle.[192] The common law also represents a method of reasoning along normative principles with the aspiration that any law ascertained by precedent should be stable, consistent, and "consonant with justice and right reason".[193] The possibly most notable difference between both traditions is the perception of 'system': while in the continental tradition 'system' connotes substance, namely an ordered structure of material rules and principles from which legal solutions can be deduced (top-down); the common law traditionally understands system more formal in relation to the factual operations of the law, in finding solutions to legal conflicts (bottom-up).[194] In addition, and especially in relation to the US law school culture, a different approach to legal scholarship becomes apparent. Legal scholarship is carried out with a focus on theory but leaves legal practice and the application of law 'out in the cold';[195] to the extent, that it is said, that doctrinal work will negatively impact an academic career.[196]

189 P. Birks, 'Adjudication and Interpretation in the Common Law: A Century of Change', 14 *Legal Studies* (1994) 2, 156, 178; F. Cownie, *Legal Academics: Culture and Identities* (2004), 69.

190 P. Legrand, 'European Legal Systems are not converging', 45 *The International and Comparative Law Quarterly* (1996) 1, 52, 64.

191 M. Bohlander, 'Language, Culture, Legal Traditions, and International Criminal Justice', 12 *Journal of International Criminal Justice* (2014) 3, 491, 507.

192 von Bogdandy, 'Deutsche Rechtswissenschaft im Europäischen Rechtsraum', *supra* note 174, 31; cf. D. Kennedy, 'The Structure of Blackstone's Commentaries', 28 *Buffalo Law Review* (1979) 2, 205, 210–211.

193 W. Rossington, 'The Wilderness of Single Instances', 14 *American Lawyer* (1906) 4, 167, 168.

194 R. Brouwer, 'On the Meaning of System in the Common and Civil Law Traditions: Two Approaches to Legal Unity', 34 *Utrecht Journal of International and European Law* (2018) 1, 45, 53.

195 O. Lepsius, 'Einfluss deutscher Rechtsideen in den USA', in J. Raab & J. Wirrer (eds), *Die deutsche Präsenz in den USA* (2008), 581, 587; von Bogdandy, 'Doctrinal Construcivism', *supra* note 91, 387.

196 C. Saiman, 'Public Law, Private Law, and Legal Science', 56 *American Journal of Comparative Law* (2008) 3, 691, 696.

At the same time, however, multiple authors warned that the increasing focus on theory and interdisciplinarity is endangering the existence of law as an autonomous discipline.[197] The renewed urge to appreciate the "woefully understudied",[198] "disinterested legal-doctrinal analysis" as the "indispensable core of legal thought",[199] resembles similar discussions in the 18th and 19th century, in which multiple writers supported the search for the "gladsome light of jurisprudence".[200] Quite recently, the Council of Australian Law Deans acknowledged in a public statement that the doctrinal aspect of legal scholarship makes legal research distinctive and indeed forms the "basis, starting point, platform or underpinning" for every other aspect of legal research.[201] Even in common law systems, we not only find comparable concepts and ideas to *Dogmatik*, but at times outright support for doctrinal legal research.

3. Conclusion

The emerging picture questions, whether the assertion of 'irreducible' differences between the legal tradition can be maintained unqualified. Instead, one might conclude that all discussed jurisdictions are connected in a shared commitment to derive equal and rational decisions from normative sources in a rational manner. While the allocation of roles and responsibilities sometimes considerably differs in the respective legal systems,[202] elements of doctrinal analysis, which aims to achieve and maintain coherence in the law, can be widely identified.[203] Furthermore, 'law' is generally perceived as a system: either through the shared constructive practices of judges and lawyers or by referring

197 R. Posner, 'The Decline of Law as an Autonomous Discipline', 100 *Harvard Law Review* (1987) 4, 761, 766; Cf. H. Edwards, 'The Growing Disjunction between Legal Education and the Legal Profession', 91 *Michigan Law Review* (1992) 1, 34.

198 E. Tiller & F. Cross, 'What is legal doctrine?', 100 *Northwestern University Law Review* (2006) 1, 517, 517.

199 Posner, *supra* note 197, 777.

200 Comp. the compilation of arguments in M. Hoeflich, *The Gladsome Light of Jurisprudence* (1988). Cf. B. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (2010), 13, 200; C. Wells, 'Langdell and the Invention of Legal Doctrine', 58 *Buffalo Law Review* (2010) 3, 551, 552.

201 Council of Australian Law Deans, 'Statement on the Nature of Legal Research' (2005), 3, available at https://cald.asn.au/wp-content/uploads/2017/11/cald-statement-on-the-nature-of-legal-research-20051.pdf (last visited 18 July 2023).

202 W. Twining *et al.,* 'The Role of Academics in the Legal System', in M. Tushnet & P. Cane (eds), *The Oxford Handbook of Legal Studies* (2005), 920, 935.

203 von Bogdandy, 'Doctrinal Constructivism', *supra* note 91, 387.

to the systematizing endeavor of legal science.[204] Nonetheless, different cultural approaches towards law remain: historically grown attitudes embodied in the modes of thinking and the specific intellectual styles used in the respective academic elites.[205] The understanding of legal decisions still lingers between 'finding objective truth' and pragmatic 'dispute resolution'.[206] The differences in how legal cultures approach legal reason in between an explicit classificatory system ('knowing that') and implicit practical knowledge ('knowing how') are still significant.[207] How these may be reconciled in the future is a major quandary for any law and legal scholarship beyond the state.

II. Public International Law

Approaching this question, *Martti Koskenniemi* once described IL as a German discipline.[208] While this assertion was mainly focused on a historical account of how German lawyers and intellectuals shaped the development of IL,[209] he later identified theoretical abstraction and doctrinal construction as the core elements of international legal thought.[210] This already indicates that the observation that doctrinal analysis is a widely shared method of law most likely might also be sustained for the international level.[211] IL is generally perceived as a 'legal system',[212] which as a theoretical endeavor has been riddled

204 Comp. Koskenniemi, 'Fate of PIL', *supra* note 66, 18.

205 Comp. J. Galtung, 'Structure, Culture and Intellectual Style', 20 *Social Science Information* (1981) 6, 817, 849–850.

206 Comp. M. Dubber, 'The Promise of German Criminal Law: a Science of Crime and Punishment', 6 *German Law Journal* (2005) 7, 1049, 1067.

207 Legrand, *supra* note 190, 65.

208 M. Koskenniemi, 'Between Coordination and Constitution: International Law as a German Discipline', 15 *Redescriptions* (2011) 1, 45 [Konskenniemi, 'IL as a German Discipline']; P.-M. Dupuy & K. Traisbach, 'Taking International Law Seriously – On the German Approach to International Law', EUI Working Paper Law 2007/34.

209 Koskenniemi, 'IL as a German Discipline', *supra* note 208, 62, 65.

210 M. Koskenniemi 'International Legal Theory and Doctrine' (2007), in A. Peters & W. Wolfrum (eds), *Max Planck Encyclopedia of International Law*, para 1 [Koskenniemi, 'International Law and Legal Doctrine'].

211 Cf. A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008), 9, 285, 583.

212 *Report of the Study Group of the International Law Commission to the Fifty-Eighth Session, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law,* UN Doc. A/CN.4/L.682, 13 April 2006, 7–25.

with its foundations from the very beginning.[213] In that regard, the apparent and troublesome relationship between theoretical foundations and the concrete application of IL,[214] allows one to spotlight interesting parallels between debates on the domestic and international level.

To begin with, the International Law Commission concluded during the drafting process of the Vienna Convention on the Law of Treaties, that "the certainty of the law of treaties [will] depen[d] mainly on the certainty of the rules of interpretation."[215] This statement resonates with an understanding of the international legal system according to which not determinative sources but legal practice and the act of interpretation ultimately produces the meaning of norms and completes the law-making process.[216] However, the whole practice of interpretation might then emerge as a hegemonic activity, if interpretation in IL is indeed not more than an undetermined (political) act of seeking acceptance for one's own view.[217] *Ingo Venzcke* tries to evade this unsettling conclusion by upholding the idea that persuasion – besides being an expression of power – is also possible by reaching a normative consensus.[218] In his view, arguments in law, understood as a concrete communicative practice, are entrenched in a discursive framework, a 'grammar of IL', consisting of cognitive frames, linguistic symbols, and which is linked to past practices and the aspiration of future persuasion.[219] This shared habitus of legal professionals limits the indeterminacy of the law and its interpretation in practice, as the form of interpretation requires interests to be formulated in an accepted style of legal argumentation.[220] Building upon the much older idea of a distinctive "college of international lawyers"[221], the

213 Comp. H. Grotius, 'De Jure Belli ac Pacis: On the Law of War and Peace' (1625), in J. Scott (ed.), *Classics of IL Series* (1925), 9–30; cf. A. Orford and F. Hoffman, 'Introduction: Theorizing International Law', in A. Orford & F. Hoffman (eds), *The Oxford Handbook of the Theory of International Law* (2016), 1.

214 Comp. A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005).

215 *Yearbook of the International Law Commission* (1964), Vol. I, 23, para. 34.

216 Venzke, *supra* note 40, 4, 10; cf. D. Hollis, 'Existential Function of Interpretation in International Law', in A. Bianchi, D. Peat, & M. Windsor (eds), *Interpretation in International Law* (2015), 78.

217 Cf. M. Koskenniemi, 'International Law and Hegemony: A Reconfiguration', 17 *Cambridge Review International Affairs* (2004) 2, 197, 199.

218 Venzke, *supra* note 40, 62.

219 *Ibid.,* 49.

220 *Ibid.,* 32, 46.

221 O. Schachter, 'Invisible College of International Lawyers', 72 *Northwestern University Law Review* (1978) 2, 217.

hypothesis is that legal professionals in the international arena (implicitly) share a common understanding of how international law functions and should be interpreted.[222] Consequently, professional assumptions on the process of legal interpretation shared among international lawyers may impose meaningful limits on how new interpretations are assessed as valid and which views and arguments are ultimately accepted.[223]

From this account, we might already draw quite astonishing connections to our previous discussion of German *Dogmatik*. It seems, as if, IL is in the process of determining its methodological constitution, the role distribution between legal scholarship, judges, and government officials: in short, its normativity and rationality as a legal system.[224] However, any endeavor in this direction must recognize the often-voiced critique that (international) legal thought is inevitably political;[225] that any idealistic attempt to justify (international) law rationally, is deemed to fail in the trilemma of infinite regress, circular reasoning, and unprovable ultimate justifications.[226] While this "politicization of international legal thought"[227] was originally driven by the idea of reflecting on the political nature of legal practice,[228] it prepared the ground to replace the classical legal language of justification with political

222 N. Stappert, 'Practice theory and Change in International Law', 12 *International Theory* (2020) 1, 33, 34–35. Cf. J. von Bernstorff, 'International Legal Scholarship as a Cooling Medium in International Law and Politics', 25 *European Journal of International Law* (2014) 4, 977, 989–990.; Peters, *supra* note 68, 533; N. Stappert, 'A New Influence of Legal Scholars? The Use of Academic Writings at International Criminal Courts and Tribunals', 31 *Leiden Journal of International Law* (2018) 4, 963, 979–980.

223 I. Johnstone, *The Power of Deliberation* (2011), 36. Cf. J. von Bernstorff, 'Specialized Courts and Tribunals as the Guardians of International Law?', in A. Follesdal & G. Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (2018), 17.

224 Cf. A. Orford, 'Scientific Reason and the Discipline of International Law', 25 *European Journal of International Law* (2014) 2, 369.

225 Comp. D. Roth-Isigkeit, *The Plurality Trilemma: A Geometry of Global Legal Thought* (2018), 261 [Roth-Isigkeit, 'Plurality Dilemma']; Cf. R. Unger, *The Critical Legal Studies Movement* (2015), 96.

226 Comp. A. Paulus, 'International Law After Postmodernism: Towards Renewal or Decline of International Law', 14 *Leiden Journal of International Law* (2001) 4, 727, 746–747, 752; cf. H. Albert, *Traktat über die kritische Vernunft* (1968), 15.

227 Cf. J. von Bernstorff, 'Sisyphus was an International Lawyer', 7 *German Law Journal* (2006) 12, 1015, 1023 [von Berstorff, 'Sisyphus was an International Lawyer'].

228 See e.g. E. MacDonald, *International Law and Ethics after the Critical Challenge* (2011), 23–24.

legitimacy and ethical concerns.[229] The initial encouragement "to be normative in the small"[230] now poses the danger of collapsing the distinction between law and instrumental regulation altogether; to make "legalization a policy choice with strategic considerations in the background"[231] by international lawyers with a "managerial mindset".[232] Possibly feeling uncomfortable with the development he contributed to, *Koskenniemi* later emphasized that also an instrumental, deformalizing approach to IL based on empiricism and sociology cannot form an objective foundation for international legal thought. [233] Even presumably 'rational' terms used by legal realists like 'interest' and 'power' require a normative dimension of meaning to be comprehended.[234] Instead, such theories, which disregard the normative dimension of IL altogether, may not only legitimize what power achieves in a given society,[235] but *de facto* abandon law as an autonomous discipline.[236] As an alternative, *Koskenniemi* offers a minimal positive vision for IL, a descriptive project for a *grammar*[237] of IL.[238] This *project* is grounded in the idea that to accept the inevitable indeterminacy and political nature of legal thought in principle, does not mean that the pursuit of formalism would not be meaningful, in that laws can still be authoritative

229 Roth-Isigkeit, 'Plurality Trilemma', *supra* note 225, 263; J. d'Aspremont, 'Uniting Pragmatism and Theory in International Legal Scholarship', 19 *Revue québécoise de droit international* (2006) 1, 353, 355 [d'Aspremont, 'Uniting Pragmatism and Theory'].

230 M. Koskenniemi, *From Apology to Utopia,* reissue with new epilogue (2006), 555 [Koskenniemi, 'FATU']; cf. d'Aspremont, 'Uniting Pragmatism and Theory', *supra* note 229, 357.

231 Koskenniemi, 'Fate of PIL', *supra* note 66, 25.

232 M. Koskenniemi, 'Constitutionalism as Mindset: Reflection on Kantian Themes About International Law and Globalization', 8 *Theoretical Inquiries in Law* (2007) 1, 9, 12 [Koskenniemi, 'Constitutionalism as a Mindset'].

233 Comp. the added epilogue in Koskenniemi, 'FATU', *supra* note 230, 480, 563.

234 Koskenniemi, 'Constitutionalism as Mindset', *supra* note 232, 15.

235 Koskenniemi, 'International Legal Theory and Doctrine', *supra* note 210, para. 23, 28.

236 Comp. H. Morgenthau, 'Positivism, Functionalism and IL', 34 *American Journal of International Law* (1940) 2, 260–284; cf. M. Koskenniemi, 'Carl Schmitt, Hans Morgenthau and the Image of Law in International Relations', in M. Buyers (ed.), *The Role of Law in International Politics* (2000), 17–34.

237 Cf. D. Pulkowski, 'Universal IL's Grammar', in U. Fastenrath *et al*. (eds), *From Bilateralism to Community Interest* (2011), 138, 145; D. Roth-Isigkeit, 'The Grammar(s) of Global Law', 99 *Critical Quarterly for Legislation and Law* (2016) 3, 175, 181 [Roth-Isigkeit, 'The Grammar(s) of Global Law'].

238 Koskenniemi, 'FATU', *supra* note 230, 563; cf. M. Koskenniemi, 'The Politics of IL – 20 Years Later', 20 *European Journal of International Law* (2009) 1, 7–19.

reference points and interpretive practices meaningful constraints.[239] Such autonomous legal discourse demands justification and foundation in historical practices for any proposed argument and resists the unfiltered pursuit of interests by demanding the necessary translation of personal interests into a legal form.[240] While international lawyers should reflect on the inevitable indeterminacy and subjectivity of their craft, *Koskenniemi* now urges to have *faith* in the abstract counter-hegemonic negativity formal legal argumentation entails.[241] Negativity, in this sense, means, that exactly the previously criticized indeterminacy gap between normativity and concreteness ensures that the legal system can always be criticized to have perverted the values it claims to be built upon and thereby guards the law against being completely captured by the "managerial mindset".[242] Instead, the view is based on the *faith* that inside the epistemic indeterminacy of IL there still might be a weak contingency, namely the idea of conceptual unity, a system of global law.[243] Accordingly, legal professionals should not give up this *relative autonomy* and *simplifying rigor*, but defend law's (negative) modesty.[244] Legal thought, understood as a constitutional mindset,[245] emerges as a balancing task between two extremes, between the normative and the factual, between a "sense of rigorous formalism and […] political open-endedness",[246] without being able to be reduced to either.[247]

One cannot but note that this discussion revolves around issues quite similar to the substantial dimensions of *Dogmatik* analyzed above. Quite tellingly, *Jean d'Aspremont* coined the term "*Koskenniemi's* general doctrinal[!] project".[248] *Jochen von Bernstoff*, in turn, asserts that *Koskenniemi's grammar* is an attempt to conceptualize "law's intrinsic aspiration to formal equality by

239 Cf. Roth-Isigkeit, 'Plurality Trilemma', *supra* note 225, 119.
240 Koskenniemi, 'FATU', *supra* note 230, 617.
241 M. Koskenniemi, *The Gentle Civilizer of Nations* (2002), 502.
242 M. Koskenniemi, 'Law's (Negative) Aesthetic: Will it save us?', 41 *Philosophy and Social Criticism* (2015) 10, 1039, 1045.
243 Roth-Isigkeit, 'Plurality Trilemma', *supra* note 225, 260; Koskenniemi, 'FATU', *supra* note 230, 567; d'Aspremont, 'Uniting Pragmatism and Theory', *supra* note 229, 358.
244 J. Klabbers, 'The Relative Autonomy of IL or The Forgotten Politics of Interdisciplinarity', 1 *Journal of International Law & International Relations* (2004–2005) 1–2, 35, 41–42; P. Weil, 'Towards Relative Autonomy in IL', 77 *American Journal of International Law* (1983), 413, 441.
245 Cf. Koskenniemi, 'Constitutionalism as Mindset', *supra* note 232, 9, 31.
246 Koskenniemi, 'FATU', *supra* note 230, 562.
247 Koskenniemi, 'International Legal Theory and Doctrine', *supra* note 210, para. 24.
248 d'Aspremont, 'Uniting Pragmatism and Theory', *supra* note 229, 354.

reference to general norms" as a "normative communicative culture based on legal argumentation".[249] What emerges is the suspicion that what was presented in 'FATU' as the 'fall of man' of international legal scholarship – indeterminism and the political nature of any legal thought –, is ultimately not a specific challenge of IL, but a more general problem of law as a social phenomenon. When *Koskenniemi* examines the contrast between *formalism* and *realism* as an incident of the standard experience of any international lawyer;[250] I would like to propose that it might just be the standard experience of any legal professional, who is confronted with the oscillation of law between normativity and concreteness. *Lea Brilmeyer* already noted in 1991, that "the book [FATU] is not about IL specifically", but that the argument depends "on failings of legal rules (such as indeterminism) that are present also in domestic cases".[251] *Cristoph Möllers* further adds that the theoretical foundations of the argument are "phrased in a way that allows for fundamental criticism of every modern legal order."[252] Finally, *Koskenniemi* himself acknowledged in a recent interview, that the 'culture of formalism' is "just another way to give expression to that old tension [between what is and what ought to be] in modern law".[253]

If we understand *Dogmatik* as the specific answer the German legal system historically found for the task of establishing a normative communicative culture based on legal argumentation, *grammar* might be the emerging answer of IL. What is discussed under the term 'interpretive practices' or 'grammar of IL' are attempts to determine the relationship between normative actors in the international realm, to establish a discursive framework for legal arguments, and to settle the attitude legal professionals take towards the law.[254] In this respect, the preceding discussion of the historical development of German *Dogmatik* might help to reveal, that legal grammar itself is subject to dynamic development

249 von Bernstorff, 'Sisyphus was an International Lawyer', *supra* note 227, 1029.

250 Koskenniemi, 'FATU', *supra* note 230, 565.

251 L. Brilmayer, 'From Apology to Utopia: The Structure of International Legal Argument. By Marti Koskenniemi. Helsinki: Finnish Lawyers', 85 *American Political Science Review* (1991) 2, 687, 687.

252 C. Möllers, 'It's About Legal Practice, Stupid.', 7 *German Law Journal* (2006) 12, 1011, 1013.

253 D. van den Meersche, 'Interview: Koskenniemi on IL and the Rise of the Far-Right', OpinioJuris (10 December 2018), available at http://opiniojuris.org/2018/12/10/interview-martti-koskenniemi-on-international-law-and-the-rise-of-the-far-right/ (last visited 18 July 2023).

254 Venzke, *supra* note 40, 13; J. d'Aspremont, *Formalism and the Sources of IL* (2011), 34.

dependent on changing background conditions and influential (political) narratives.[255] Looking for a *grammar of IL* then becomes a process of continuous searching, an issue of mutual conditioning of system and order,[256] "not as much one of rightness or wrongness as of continuing revision and reform."[257]

D. Dogmatik for International Criminal Law?

Taking the preceding analysis into account, what did *Fletcher* presumably mean when he urged for an ICL *Dogmatik*? As a reminder, *Fletcher* claimed that there cannot be an effective ICL without an international or universal *Dogmatik*, a supporting culture of ideas and principles.[258] To approach this question, one must understand the current state of ICL as a discipline and situate *Fletcher's* argument in the general scholarly debate. By now, ICL is generally perceived as an autonomous field of IL.[259] However, only a few commentators attest ICL *maturity* as an increasingly theorized scholarly discipline.[260] The consensus remains that ICL is (still) a rudimentary area of law in need of consolidation and theoretical development.[261] The rules codified in the general part of the Rome Statute, for example, only sketch the outlines of a theory of ICL and require further doctrinal elaboration.[262] Furthermore, the current ICL *system* remains characterized by dynamic layers of complexity: a multitude of international,

255 Comp. J. Otten, 'Narratives in IL', 99 *Critical Quarterly for Legislation and Law* (2016) 3, 187.

256 Comp. Roth-Isigkeit, 'The Grammar(s) of Global Law', *supra* note 237, 182.

257 G. Warnke, *Justice and Interpretation* (1992), 137.

258 Fletcher, 'New Court, Old Dogmatik', *supra* note 14, 179.

259 J. Dugard, 'Foreword' in C. Stahn & L. van den Henrik (eds), *Future Perspectives on International Criminal Justice* (2010), v.

260 See e.g. R. Cryer, D. Robinson & S. Vasiliev, *An Introduction to International Criminal Law and Procedure*, 4th ed. (2019), 24, fn. 143.

261 K. Ambos, *Internationales Strafrecht*, 5th ed. (2018), 163 [Ambos, 'Internationales Strafrecht']; C. Stahn, *Critical Introduction to ICL* (2018), xiii, 296. Cf. M. Bassiouni, 'Introduction to ICL', 2nd ed. (2013), 253–254; C. Kreß, 'Towards a Truly Universal Invisible College', *Torkel Opsahl Academic EPublisher Occasional Papers Series* (2014), 7; D. Robinson, 'A Cosmopolitan Liberal Account of ICL', 26 *Leiden Journal of International Law* (2013) 1, 127, 152 [Robsinson, 'A Cosmopolitan Liberal Account of ICL'].

262 J. Ohlin, 'Co-perpetration: German Dogmatik of German Invasion', in C. Stahn (ed.), *The Law and Practice of the ICC* (2015), 517, 525–526 [Ohlin, 'Co-perpetration: German Dogmatik of German Invasion']. Partly in a concession to the necessary openness for legal development, cf. R. Clark, 'Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations on the Rome Statute of the International Criminal Court and by the Courts First Substantive Law Discussion in the Lubanga Dyilo Confirmation

hybrid, or domestic courts grounded on a non-hierarchical, universal community using different regulatory frameworks to engage atrocities committed in various socio-political contexts in a culturally and morally pluralistic world.[263] In this regard, it is often said that different legal traditions meet in a *clash of cultures*, unable to look beyond domestic doctrinal labels and unsettled in fights over foundational issues.[264] *Fletcher* uses the term 'local culturally-specific forms of *Dogmatik*' to describe the same problem.

Many commentators have acknowledged that any attempt to develop a real universal international theory of crime, to establish a genuine "general part" of ICL based on universal principles and values,[265] must cautiously resolve the intrinsic plurality, not only of ICL, but of IL in general.[266] To establish a meaningful ICL debate, it is proposed to break down legal debates to their philosophical roots; taking the comparative assessment of domestic solutions just as a starting point and inspiration to be able to tackle the real question, namely how criminal responsibility is structured in respect of an international crime.[267] Such an approach urges to develop – not a descriptive, but a functional – system of criminal law, which incorporates the specific purpose of and political considerations underlying ICL.[268] Furthermore, it is said that ICL needs to find a balance between traditional sources of IL, comparative assessment of domestic

Proceedings', 19 *Criminal Law Forum* (2008) 19, 519, 532, 535 [Clark, 'Drafting a General Part to a Penal Code'].

263 Van Sliedregt & Vasiliev, 'Pluralism', *supra* note 11, 3–6. Cf. Sato, *Multilayered Structures of International Criminal Law* (2021).

264 D. Guilfoyle, 'Responsibility for Collective Atrocities: Fair Labelling and Approaches to Commission in International Criminal Law', 64 *Current Legal Problems* (2011) 1, 255, 256. Cf. A. Clapham, 'Three Tribes Engage on the Future of International Criminal Law', 9 *Journal of International Criminal Justice* (2011), 3, 689, 690; D. Robinson, 'The Identity Crisis of International Criminal Law', 25 *Leiden Journal of International Law* (2008), 4, 925, 925–926; B. Broomhall, *International Justice and the ICC* (2004), 67.

265 K. Ambos, 'Remarks on the General Part of International Criminal Law', 4 *Journal of International Criminal Justice* (2006) 4, 660, 661; F. Matovani, 'The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer', 1 *Journal of International Criminal Justice* (2003) 1, 26–38; Steward & Kiyani, *supra* note 13, 393, 404; E. van Sliedregt, 'Pluralism in International Criminal Law', 24 *Leiden Journal of International Law* (2012) 4, 847, 852.

266 Comp. Clapham, *supra* note 264, 690; Robinson, 'The Identity Crisis of International Criminal Law', *supra* note 3, 925–926.

267 C.-F. Stuckenberg, *Vorstudien zu Vorsatz und Irrtum im Völkerstrafrecht* (2007), 29 [Struckenberg, Vorstudien].

268 *Ibid*., 34, fn. 160.

criminal law systems, and the development of its own fundamental legal principles and philosophical starting points.[269] Others add that an autonomous system of ICL in turn has to be universal regarding its sources, open for and receptive to all legal traditions, as well as, effective and understandable.[270] It becomes obvious, how *Fletcher's* arguments relate to a more general discussion on how to create a universal, *sui generis* system of ICL.

One pressing issue in that regard is language and the omnipresent danger of misunderstandings and miscommunication.[271] With the plurality of languages detached "semi-autonomous debates" on the international and national levels may form,[272] even though "discursive bridges" are urgently needed to translate and mediate between both levels as more and more domestic courts engage with ICL.[273] A specific challenge of ICL in this context of language seems to be, that it is forced to use traditional terms and concepts, which have developed and evolved for centuries in the national legal systems (e.g. guilt, responsibility, intent) and as a consequence carry serious normative preunderstandings and emotional overtones.[274] More specifically: With English becoming the *lingua franca* of ICL, there is a potential risk of seeing ICL primarily through the linguistic concepts of the common law "with all the cultural legal baggage that comes with it".[275] Therefore, it is necessary to reflect on conceptual limits, cultural assumptions, and the legal history engrained in any given (legal) language.[276] ICL has the task to develop its own vocabulary and terminology – a search for a common and autonomous 'language'.[277]

269 Ambos, *Internationales Strafrecht*, *supra* note 261, 163.

270 van Sliedregt, 'Pluralism in International Criminal Law', *supra* note 265, 852.

271 Cf. L. Swigart, 'Linguistic and Cultural Diversity in International Criminal Justice', 48 *Pacific Law Review* (2016) 2, 197, 210–211.

272 Comp. E. Fronza, 'A General Part of International Criminal Law', 16 *Criminal Law Forum* (2006) 3, 395, 396, 399.

273 Comp. Thym, *supra* note 179, 14. Cf. H. van der Wilt, 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court', 8 *International Criminal Law Review* (2008) 1–2, 229.

274 C.-F. Stuckenberg, *Vorstudien*, *supra* note 267, 30.

275 Bohlander, *supra* note 191, 495; cf. C. Tomuschat, 'The (Hegemonic?) Role of English Language', 86 *Nordic Journal of International Law* (2017) 2, 196.

276 Bohlander, *supra* note 191, 495, 512–513; cf. G. M. Lentner, 'Law, Language and Power – English and the Production of Ignorance in International Law', 8 *International Journal of Language & Law* (2019), 50, 56.

277 M. Delmas-Marty, 'The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law', 1 *Journal of International Criminal Justice* (2003) 1, 13, 18.

Besides specific terms and concepts, the aspiration for an autonomous system also entails that in relation to theories and doctrines 'legal transplants' or 'domestic analogies' cannot work effectively in the long term.[278] Because any field of law is more than a collection of its statutory norms and rules, doctrinal conflicts, which ensue on the level of interpretation, are dependent on more fundamental normative assumptions contained in the corpus of historical-cultural knowledge about the systemic order of a specific field of law.[279] Following *Fletcher's* argument, that ICL needs a supporting culture of ideas and principles, recent debates in ICL accordingly shifted towards theoretical, structural, and philosophical considerations;[280] something, which has been termed "soul-searching" for the discipline's "great narratives".[281] There is arguably an ongoing search for a legal (meta-) culture, which is shared by all participants and serves as the primary reference for all legal debate:[282] a basic consensus about the origin, rationale, and methodology of ICL.[283] The core question now discussed, is how ICL can be grounded in an interculturally acceptable theory and justification of criminal law and punishment. After decades of being a matter of fact, the paramount question "Why punish perpetrators of mass atrocities?" is back on the table.[284] Looking back to our analysis of the substantial dimensions of *Dogmatik*, ICL can be said to be in a process of *systematization*: integrating its different sources, normative foundations, and pluralistic manifestations into a coherent whole: a *system*.

278 Comp. van Sliedregt, 'International Criminal Law: Over-studied and Underarchieving?', *supra* note 6, 3; C. Steer, 'Legal Transplants or Legal Patchworking', in van Sliedregt & Vasiliev (eds), *supra* note 11, 39, 67 [Steer, 'Legal Transplants or Legal Patchworking'].

279 F. Mégret, 'Beyond 'Fairness': Understanding the Determinants of International Criminal Procedure', 14 *UCLA Journal of International Law and Foreign Affairs* (2009) 1, 37, 46, 49; Cf. J. G. Stewart, 'Complicity', in M. Dubber & T. Hörnle (eds), *Oxford Handbook of Criminal Law* (2014), 534, 536; N. P. Munõz, *The Non-Positivistic Nature of International Criminal Legality, Criminal Law and Philosophy* (2022).

280 Comp. as a paramount example, D. Robinson, *Justice in Extreme Cases: Criminal Law Theory Meets International Criminal Law* (2020) [Robsinson, 'Justice in Extreme Cases'].

281 K. Heller *et al.*, 'Introduction', in K. Heller *et al.* (eds), *Oxford Handbook on International Criminal Law* (2020), 2; Cf. L. E. Gissel, 'Nomos and Narrative in International Criminal Justice: Creating the International Criminal Court', 20 *Journal of International Criminal Justice* (2022) 1, 117, 119–22.

282 van Sliedregt & Vasiliev, *supra* note 11, 31–32.

283 Nouwen, 'ICL – Theory All Over the Place', *supra* note 4, 739.

284 F. Jeßberger & J. Geneuss (eds), *Why punish perpetrators of mass atrocities?* (2020).

Another dimension of developing a universal system of ICL is the need to agree on a shared understanding of methodology and the role different legal actors (may) play in the normative landscape. A huge point of controversy is the role of legal scholarship and the status of legal writing,[285] which has become most visible in the debate around the "modes of liability" in the jurisprudence of the ICC. However, in the opinion of the author, there have been major misunderstandings regarding the meaning of *Dogmatik* in this discussion; namely, to equate *Dogmatik* either with a 'rule of scholars' or with specific material doctrines from the German legal system.

As *Jain* rightly pointed out, it is an important – methodological – question, which sources and authorities should lead a court in concretizing abstract norms. While her elaborate argument cannot be engaged with in-depth in this article, her criticism that legal writings did become a '*de facto* source of law' because the ICC attempted to develop a *Dogmatik* is not convincing.[286] Granted, the ICC in its initial jurisprudence on modes of liability fell short of the ideal of a pluralistic or universal system of ICL, by citing almost exclusively legal authorities from one legal tradition and more specifically the teachings of one renowned German scholar, *Claus Roxin*.[287] Granted, the concept of Dogmatik might indeed imply a central role of legal scholarship in the process of concretizing legal norms and conceptualizing normative theories. However, there are strong arguments against the view that the concept of *Dogmatik* entails that scholarly writings become an authoritative source of law.

First, it would already be hastily to conclude that the ICC merely copied a German theory in establishing the *control theory*. Far from taking the scholarly writings as a binding source, the ICC – while undoubtedly being inspired by the domestic conception – attempted to develop an autonomous concept for the specific needs of ICL. This is reflected in the argumentation of the ICC, which presents the "control theory" as a genuine interpretation of Art. 25 ICC-Statute; an analysis of its "consistency with the statute."[288] In contrast, it deems

285 Comp. Jain, 'Teachings', *supra* note 16, 106 with further references.

286 *Ibid*., 121.

287 See the excellent analysis by Jain, *Ibid*., 125. Cf. F. Jeßberger & J. Geneuss, 'On the Application of a Theory of Indirect Perpetration in Al Bashir: German Doctrine at The Hague?', 6 *Journal of International Criminal Justice* (2008) 5, 853, 859.

288 See e.g. *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga and Matheeu Ngudjolo Chui,* Decision on the Confirmation of Charges, ICC-01/04-01/07-717 (Pre-Trial Chamber I), 30 September 2008, paras 481–

other approaches to be interpretations, which 'would engender an asystematic *corpus juris* of unrelated norms'.[289] It should be further noted that the material concretization and definitional use of the 'control theory' at the international level differs so significantly from the original domestic conception of *Tatherrschaft* as an *open concept*,[290] that one should question the alleged *authority* as something more than a loose *inspiration*.[291] More specifically, the ICC substantially altered the domestic conception of indirect perpetration to serve a specific purpose in the realm of ICL, e.g. by making the definitional element of 'fungibility' more flexible.[292] At last, it seems (even) possible to argue that *Roxin's* theory itself is an early piece of ICL scholarship, because his motivation in developing the concept was the feeling that the existing modes of liability were insufficient to capture the structure of crimes in the Nazi era and to bring those *most responsible* to account.[293] Consequently, one of the reasons for the argumentative, normative force of the 'indirect perpetration through an organization' conception was, and is, that the theory – by design – was developed to address international crimes and to customize the classic understanding of individual responsibility.[294]

Secondly, as the previous analysis of *Dogmatik* showed, the understanding of legal writings as 'sources' and not just 'arguments' is something quite specific to IL.[295] In the German understanding, scholarly arguments have authority only by argumentative rationality, they present themselves as interpretations and/or

482 [Katanga and Ngudjolo Chui, CoC], *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. T. Lubanga Dyilo,* Decision on the Confirmation of Charges, ICC-01/04-01/06, (Pre-Trial Chamber I), 29 January 2007, para. 328, 333 [Lubanga, COC].

289 *Lubanga*, COC, para. 329, 334–337; *Katanga and Ngudjolo Chui*, CoC paras 482–483.

290 Cf. C. Roxin, *Täterschaft und Tatherrschaft*, 10th ed. (2019), 29, 119 [Roxin, 'Täterschaft und Tatherrschaft'].

291 Cf. J. Ohlin, E. van Sliedregt & T. Weigend, 'Assessing the Control-Theory', 26 *Leiden Journal of International Law* (2013) 3, 725, 733, fn. 36; see also *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. T. Lubanga Dyilo*, Judgement, ICC-01/04-01/06-2842, Trial Chamber I, 14 March 2012, Separate Opinion *Judge Fulford*, 6.

292 T. Weigend, 'Perpetration through an Organization', 9 *Journal of International Criminal Justice* (2011) 1, 91, 107; H. van der Wilt, 'The Continuous Quest for Proper Modes of Criminal Responsibility', 7 *Journal of International Criminal Justice* (2009) 2, 307, 312.

293 C. Roxin, 'Straftaten im Rahmen organisatorischer Machtapparate', 110 *Goltdammer's Archiv für Strafrecht* (1963), 163 refers to the Eichmann trial and urges for an 'supranational criminal law' to adequately address international crimes.

294 Comp. N. Jain, 'The Control Theory of Perpetration in International Criminal Law', 12 *Chicago Journal of IL* (2011) 1, 159, 196.

295 Comp. *Charter of the United Nations*, 24 October 1945, Art. 38 (1), 1 UNTS XVI.

constructions based on the relevant normative framework and the wider societal context of a given legal norm. Tellingly, German courts, which are not bound to scholarly writings, dismiss scholarly arguments on a regular basis, especially in the criminal law domain. This results in the well-known distinction and conflict between the *herrschende Lehre* (dominant opinion in legal scholarship) and the *ständige Rechtsprechung* (established case law).[296] Especially, in relation to modes of liability, one cannot but note that German criminal courts in general start from a subjective criterion approach.[297] Consequently, the *control theory (Tatherrschaftslehre)* is not *the* German doctrine, but just one of many models, how to interpret and conceptualize modes of liability, which are discussed in the realm of German Criminal Law *Dogmatik*.

Consequently, the urge for an ICL *Dogmatik* should also not be (mis-)understood to argue for the adoption of German legal theories on the international level. Even *Fletcher*, who at one point equates *Dogmatik* with 'individual criminal responsibility' und uses the term to argue against collective theories of attribution like the *JCE* doctrine,[298] therefore confounds the general structural (formal) concept of *Dogmatik* on the one hand, and specific (material) legal theories and solutions as part of a given *Dogmatik* on the other hand. Instead, the structural idea of *Dogmatik* as a form of argumentative rationality itself is value-neutral as to the material theories discussed in it. Conversely, it is the dependency of Dogmatik on the respective legal framework, as well as the consideration of the unique context of collective criminality, which requires to determine *from scratch*, which abstract principles are contained in the normative system of ICL and which decision rules in relation to the attribution of responsibility can be rationally derived from them.

Therefore, as has been argued above, decisions of ICTs should not be primarily scrutinized along the line, whether a court follows legal tradition "A"

296 Röhl, 'Methodenlehre-I', *supra* note 84, para. 15; Jain, 'Teachings', *supra* note 16, 121 only refers to *herrschende Lehre* and the *authoritativeness of doctrine*. In an earlier article, *Jain* had recognized the different approaches of the Federal Court of Justice and parts of the scientific literature, N. Jain, Individual Responsibility for Mass Atrocity, 61 *American Journal of Comparative Law* (2013) 4, 831, 849.

297 Comp. Foster & Sule, *supra* note 122, 371–373. Cf. Roxin, *Täterschaft und Tatherrschaft*, *supra* note 290, 626–767.

298 Fletcher, 'New Court, Old Dogmatik', *supra* note 14, 179.

or legal tradition "B",[299] but more substantially – with the presumption, that the court engages in *sui generis* ICL theory and attempts to develop an international *Dogmatik*.[300] The relevant question should be, whether the solution found is consistent with the legal framework and effectively achieves the aims of ICL.[301] What seems necessary then, is to look beyond diametrical labels and to examine the underlying principles, values, and challenges of ICL as such.[302] In that regard, *Jain* is completely right in pointing out that one "need[s] to be conscious of the limits of using scholarship developed in the context of domestic legal systems to craft a *Dogmatik* for [ICL]."[303] That is, because even the most basic assumptions of domestic criminal law, such as 'individual criminal responsibility' might play out differently in the specific context of ICL due to the collective nature of international crimes.[304]

Luckily, by now, a vibrant scholarly debate has been established, which offers a rich reservoir of genuine concepts and theories exclusively aimed at ICL.[305] For example, modern approaches attempt to reconcile the different theories on co-perpetration in a uniform (international) concept, which is also owed to the fact that beyond the diametrical labels the approaches to 'modes

299 See for the danger of a *pendulum swing*: J. Ohlin, 'Organizational Criminality', in van Sliedregt & Vasiliev (eds), *supra* note 11, 107, 107–108.

300 Comp. B. Schmitt, 'Legal Diversity at the International Criminal Court: Reflections of a Judge', 19 *Journal of International Criminal Justice* (2021) 3, 485, 509; G. Vanacore, 'Legality, Culpability and Dogmatik: A Dialogue between the ECtHR, Comparative and International Criminal Law', 15 *International Criminal Law Review* (2015) 5, 823, 860 [Vanacore, 'Legality, Culpability and Dogmatik'].

301 Ohlin, 'Co-perpetration: German Dogmatik of German Invasion', *supra* note 262, 525, 537.

302 Comp. Steward & Kiyani, 'The Ahistorism of Legal Pluralism in International Criminal Law', *supra* note 13, 447–449; G. Fletcher, 'The Theory of Criminal Liability and ICL', 10 *Journal of International Criminal Justice* (2012) 5, 1029, 1031–1032; D. Robinson, 'A Cosmopolitan Liberal Account of International Criminal Law', *supra* note 261, 152.

303 Jain, 'Teachings', *supra* note 16, 125.

304 Cf. C. Backer, 'The Führer Principle in IL: Individual Responsibility and Collective Punishment', 21 *Penn State International Law Review* (2003) 3, 509; M. Drumble, 'Collective Violence and Individual Punishment', *supra* note 4, 566; C. Steer, *Translating Guilt: Identifying Leadership Liability for Mass Atrocity Crimes* (2017), 12.

305 Comp. M. J. Christensen, Z. Godzimirska, & J. Jarland, 'The International Criminal Justice Marketplace of Ideas', 20 *Journal of International Criminal Justice* (2022) 1, 97 for a sociological analysis of this process in relation to sexual violence.

of liability' are often surprisingly close in their material substance.[306] Leaving the 'clash of (legal) cultures' narrative behind, ICL then emerges as a cultural system on its own, which contains a dynamic and contested set of values not predetermined by existing legal traditions, but representing "something new"[307] in need of autonomous development and concretization.[308] Such *sui generis* approach might then also produce and detect those legal principles, which are so widely shared globally, that they indeed may be 'universal'.[309] It is paramount to avoid that ICL becomes a *western project*, which neglects legal traditions from the global south,[310] and uses regional conceptions rather than global principles.[311] Again, looking back to our analysis of *Dogmatik*, we can now better understand that all of these issues are symptoms of ICL's struggle to define its normativity and legitimacy in the unique social context of extreme atrocities of concern to the international community as a whole.[312]

To conclude, the call for an ICL *Dogmatik* enunciates the necessity to establish ICL as an autonomous normative framework of concepts and terms, a *sui generis* system. In that sense, ICL forms its own *Dogmatik* as we speak. *Dogmatik* is neither the rule of scholars nor the adoption of German doctrines. It is not a fixed solution, but merely stands for an abstract vision, which may help to organize legal thinking in ICL, to structure and systemize the field, and, most importantly, to raise awareness for the necessity to develop a shared and coherent language, which enables productive discourse and normative argumentation between all legal families.[313]

306 M. Cupido, 'A Practical View on ICC's Hierarchy of Liability Theories', 29 *Leiden Journal of International Law* (2016), 897.

307 Clark, 'Drafting a General Part to a Penal Code', *supra* note 262, 552.

308 Campbell, 'The Making of Global Legal Culture and International Criminal Law', *supra* note 5, 161; Schmitt, *supra* note 300, 509–511.

309 Comp. W. Cheah, 'International Criminal Law and Culture', in K. Heller *et al*. (eds), *Oxford Handbook International Criminal Law* (2020), 748, 758–759.

310 Steer, 'Legal Transplants or Legal Patchworking', *supra* note 278, 50, 59.

311 Robinson, 'A Cosmopolitan Liberal Account of International Criminal Law', *supra* note 261, 142; cf. K. Ambos, 'Towards a Universal System of Crime', 28 *Cardazo Law Review* (2006–2007) 6, 2647, 2653–2654; B. B. Jia, 'Multiculturalism and the Development of the System of International Criminal Law', in S. Yee & J. Morin (eds), *Multiculturalism and International Law* (2009), 629, 633, identifies nine *families of law*.

312 Cf. Robinson, Justice in Extreme Cases, *supra* note 280 and the following debate in the Special Issue, 35 *Temple International and Comparative Law Journal* (2021) 1, 1–155.

313 Vanacore, 'Legality, Culpability and Dogmatik', *supra* note 300, 829, 835, 860.

E. Conclusion

Dogmatik is less a coherent theory or concept, which can be readily transplanted into the international realm, but more a specific habitus and mindset, which entails ideas and thinking patterns providing for an autonomous legal discourse fueled by the aspiration of a coherent normative system based on argumentative rationality and close cooperation of legal scholarship and legal practice. Classical tenets of *Dogmatik* are widely shared structural features of modern legal systems and in turn, the infinite oscillation between normativity and concreteness, which became especially apparent in IL's struggle in between apology and utopia, might at its core just be a general dilemma of law as a social phenomenon. While the term *Dogmatik* is therefore a specific cultural expression, the substance of the concept more generally refers to and echoes universal challenges of law and legal science. Broken down, the urge for an ICL *Dogmatik* is an acknowledgment, that *law* and *legal system* is nothing given, but something that must be established. Any legal system, whether codified or not, is dependent on some form of commonality, on a minimum of consensus and intersubjective understanding: something that cannot be presumed but needs to be achieved – especially in the realm of ICL. To master the tension between opposing forces and impulses in ICL, it might therefore be best to adopt a reflexive tolerance for ambiguity: legal professionals should see themselves as *artists of doubt*[314], who should understand law not as a statement of determinant truths, but as a social forum for argumentative discourse, in which indeterminacy is compatible with reason in that plural claims of value inevitably demand justification and are open for rational scrutiny[315] Such mindset of modesty and hope would mean to adhere to the universal promise of an intersubjective perspective,[316] to "seek to encompass the whole"[317] and to have the faith to find "justice in the contests themselves, in the tensions of open opposition, always renewed".[318]

314 C. Möllers, 'Juristen: Künstler des Zweifels', ZeitOnline (6 May 2020), available at https://www.zeit.de/2020/20/juristen-differenzierung-unklarheit-rechtskultur-coronavirus (last visited 18 July 2023).

315 C. Kutz, 'Just Disagreement: Indeterminacy and Rationality in the Law', 103 *The Yale Law Journal* (1994) 4, 997, 1030.

316 Roth-Isigkeit, 'Plurality Trilemma', *supra* note 225, 119.

317 M. Koskenniemi, 'Constitutionalism, Managerialism and Legal Education', 1 *European Journal of Legal Studies* (2007) 1, 8, 20.

318 S. Hampshire, 'Justice is Strife', 65 *Proceedings and Addresses of the American Philosophical Association* (1991) 3, 19, 26.