1

Introduction

The future of international legal positivism

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1 Prolegomenon

Such a thing as post-modern*ist* international legal positivism cannot exist. Legal positivism – at least the modern variants discussed in this book – is inextricably linked to Modernism and cannot leave that basis, foundation and context without unravelling. This is a central premise of this book. Yet, and this is another cardinal assumption that informs the following pages, studies constructed around positivist methodological moves can benefit from those who question Enlightenment rationality and/or deconstruct orthodox understandings of international legal scholarship in a critical spirit. The claim is thus not that positivism is or should be based to any meaningful degree on the writings and ideas of those usually considered to be 'post-modernists' (or 'crits', even if not 'post-modernists' in a narrow sense). The ambition, as this introduction makes clear, lies elsewhere. For the sake of this book, the temporal dimension of the 'post-modern' (the post-modern *world*) and a particular approach (post-modern*ism*) must be distinguished; the former is partially an expression of the power-structures in our part of the scholarly sub-system; the latter is a particular world view, just as positivism or naturalism are.

2 Sociology: the Guild of International Lawyers

The concept of law is parochial.[1] Different communities, past and present, have different concepts of law without one having any ascendancy other

[1] Joseph Raz, 'Can There Be a Theory of Law?' in Martin P. Golding, William A. Edmundson (eds), *The Blackwell Guide to Philosophy of Law and Legal Theory* (Blackwell Publishing 2005) 324–342; Robert Alexy, 'On Two Juxtapositions: Concept and Nature, Law and Philosophy: Some Comments on Joseph Raz's "Can There Be a Theory of Law?"' 20 *Ratio Juris* (2007) 162–169 at 163; See also Brian H. Bix, 'Ideals, Practices, and Concepts in Legal

than social.[2] From such a sociological vantage point, legal scholarship is, as a result, a battleground where the legal scholar – even the nihilist – is necessarily an activist advocating a certain vision of the law and, hence, a given way to make sense of the world. Confrontation is the fate of the legal scholar.[3] In this adversarial mayhem, subtle argumentative engineering is being deployed through theories, doctrinal constructions, technicalities, ancestral names or traditions, aesthetics, or even intimidating tactics with a view to securing persuasion among peers as well as actors exercising law-based powers. The refinement of some of the argumentative ammunition used by the participants engaged in this pandemonium is particularly noteworthy, but certainly not surprising. Confrontation does not exclude finesse and delicacy. Rather, the former can constitute the driving force for the latter. As a result, it is tempting to simultaneously conceive the legal scholar not only as an activist, but also as a craftsman. What is more, craftsmen, like activists, generally coalesce in (what the former call) guilds designed around expertise, skills and political projects. Indeed, legal scholars – sometimes unconsciously – federate into groups designed along paradigmatic and methodological lines, political aspirations or, more simply, attitudes and mindsets.[4] In that sense, the binding agent among members of a guild of legal scholars is not necessarily faith or belief in a given paradigm or methodology; it can also be doubt and contestation, or, more modestly, a shared interest in a given *problematique*. This also explains why legal scholars potentially and subconsciously join multiple guilds

Theory' in Jordi Ferrer Beltrán, José Juan Moreso, Diego M. Papayannis (eds), *Neutrality and Theory of Law* (Springer 2013) 33–47 at 35.

[2] Among others, see Liam B. Murphy, 'Better to See Law this Way' 83 *New York University Law Review* (2008) 1104–1108; Frederick Schauer, 'Positivism as Pariah' in Robert P. George (ed.), *The Autonomy of Law: Essays on Legal Positivism* (Clarendon Press 1996) 31–56 at 34; Jeremy Waldron, 'Normative (or Ethical) Positivism' in Jules L. Coleman (ed.), *Hart's Postscript: Essays on the Postscript to* The Concept of Law (Oxford University Press 2001) 411–433; Jason Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisites of Law' 12 *EJIL* (2001) 627–650 at 648.

[3] Jean d'Aspremont, 'Wording in International Law' 25 *LJIL* (2012) 575–602. See also Sahib Singh, 'International Law as a Technical Discipline: Critical Perspectives on the Narrative Structure of a Theory' in Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (2nd edn Oxford University Press 2013) 236–261 (also forthcoming, *BYBIL*).

[4] David Feldman, 'The Nature of Legal Scholarship' 52 *Modern Law Review* (1989) 498–517 at 513.

at the same time. In this respect, international legal scholarship is no different.[5]

This volume takes a critical look at the shared paradigmatic, methodological and political choices as well as the common doubts, mindsets and attitudes of those international legal scholars whose education, geographical origin, affiliation, inheritance and training, as well as personal experience of scholarly confrontation and craftsmanship have stirred an interest in the possible value of international legal positivism. In their case, the interest in legal positivism does not necessarily involve fealty to a number of methodological and conceptual positions (and, perhaps, the political projects) that are commonly associated with legal positivism, such as formalism, autonomy or the separation of law and morals. Their intellectual appetite is whetted, rather, by the combination of two factors: sharing (to an extent) the common claim of a 'dead end' reached by 'classical' legal positivism, as well as the very radical and dismissive nature of most of the critiques of legal positivist approaches to law.[6] In that sense, what unites many of these scholars is both the rejection of the main tenets of classical legal positivism and a feeling of boredom with those objections against traditional legal positivism which either mechanically and uncritically repeat earlier critique, or are simply less than convincing in their argumentative capacity. It is obvious, however, that the guild into which they may have potentially coalesced is in constant flux.[7]

This volume gathers together the contributions of a wide range of scholars interested in debating the contemporary value of positivist approaches to international law. It rests on an endeavour to see where the positivist approach to international legal scholarship stands at the end of the first

[5] The way in which the confrontation of ideas unfolds and federations of participants emerge is similar for craftsmen and international legal scholars.

[6] Legal positivism has been the object of systematic condemnation in American jurisprudence, e.g. James Boyle, 'Ideals and Things: International Legal Scholarship and the Prison-House of Language' 26 *Harvard International Law Journal* (1985) 327–359. For the debate on positivism, see the remarks in Nicholas Onuf, 'Global Law-Making and Legal Thought' in Nicholas Onuf (ed.), *Law-Making in the Global Community* (Carolina Academic Press 1982) 1–81. On the negative implication of the use of the term 'positivism' in literature, see Georgio Gaja, 'Positivism and Dualism in Dionisio Anzilotti' 3 *EJIL* (1992) 123–138. For some exceptions in American international legal scholarship, see Alexander Somek, 'Kelsen Lives' 18 *EJIL* (2007) 409–451.

[7] In that sense, guilds bear great resemblance to communities of practice. See generally Emmanuel Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations* (Routledge 2005) 14.

decade of the twenty-first century and what conceptual, methodological and epistemological value it has. This also means taking a hard look at whether positivism remains a cogent and useful approach for the future of international legal scholarship. The chapters in this book accordingly enquire whether the current state of international society and of international legal scholarship still calls for some form of positivist 'package', or whether it can be shown that abandoning any move that could be classified as 'positivist' is the only viable solution if one wants to make sense of international law today and in the future.

3 Moving away from 'classical' international legal positivism

It is important to repeat at this stage that the contributions in this volume do not seek to rehabilitate classical legal positivism.[8] 'Classical' variants of positivism in international legal scholarship are commonly said to be marked by a number of distinctive features. Most prominently, what we like to call 'old school' positivism is claimed to be focused nearly exclusively on the state. States, so the argument is reconstructed, are the exclusive makers of international law[9] and the only originary subjects of international law. Nineteenth-century positivists advocated, this narrative reports, that international law obliges and empowers only states and that individuals are mediated by the state. The most specific, powerful and controversial expression of this mentality can be found in the idea of consensualism: state consent is the (pre-legal) criterion giving law its binding force and legitimacy.[10] According to this construction, '[t]he rules of law binding upon States are said to emanate from their own free will'.[11] This famous passage from the judgment of the Permanent Court of International Justice in *Lotus* (1927) has been interpreted as supporting (and became the embodiment of) an extreme consensualism.[12] This

[8] Subject to Christakis, Chapter 16 at 423.

[9] E.g. Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (Cambridge University Press 2010) 28–30.

[10] *S.S. 'Lotus' (France v. Turkey)*, Judgment of 7 September 1927, PCIJ Series A No. 10 (1927) at 43–44 (Diss. Op. Weiss).

[11] *Lotus* (1927), n. 10 at 18.

[12] For some common criticisms of *Lotus*, see the individual opinions appended to *Nuclear Weapons* (*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports (1996) 226, e.g. at 268–274 (Dec. Bedjaoui), 394–396 (Sep. Op. Shahabuddeen); Jörg Kammerhofer, 'Gaps, the *Nuclear Weapons* Advisory Opinion and the Structure of International Legal Argument between Theory and Practice' 80 *BYBIL* (2009) 333–360. More recently, see *Accordance with International Law of the Unilateral Declaration*

interpretation has survived throughout the twentieth century and into the twenty-first.[13] It is therefore no surprise that several of the authors of this volume pick up on the *Lotus* debate as central to our understanding and critique of (classical) international legal positivism.[14]

As the foregoing makes clear, this volume does not seek to resuscitate the classical versions of international legal positivism. The reasons for this are obvious. First, because, as some of the contributions in this volume will show,[15] the archetypical classical international legal positivist is – to an extent – a straw-man, a latter-day reconstruction of a historical fiction and its positions have never been advocated as such or as simplistically as claimed.[16] Indeed, it is not easy to find in scholarly writings those who actually espouse what James Leslie Brierly (discussing *Lotus*) has termed 'the extreme positivist school that the law emanates from the free will of sovereign independent states [only]'.[17] Second, classical legal positivism, irrespective of whether it has had any actual existence in scholarship, has been constructed on foundations – like apologetic consensualism/voluntarism – which cannot be reconciled with positivism's claim to fidelity to the law 'as it is', rather than as it should be. It is also often more indirectly in conflict with the philosophical and 'theory-of-science'

of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010, ICJ Reports (2010) 403 at 479 (Dec. Simma); Jörg Kammerhofer, 'Begging the Question? The Kosovo Opinion and the Reformulation of Advisory Requests' 58 *Netherlands International Law Review* (2011) 409–424; Alain Pellet, 'Lotus que de sottises on profère en ton nom! Remarques sur le concept de souveraineté dans la jurisprudence de la Cour mondiale' in Jean-Pierre Puissochet, Edwige Belliard (eds), *Mélanges en l'honneur de Jean-Pierre Puissochet: L'État souverain dans le monde d'aujourd'hui* (Pedone 2008) 215–230.

[13] For criticisms of voluntarism, see Gerald G. Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' 92 *Receuil des Cours* (1957) 1–227 at 36; Alain Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' 12 *Australian Yearbook of International Law* (1989) 22–53 at 26; Bruno Simma and Andreas L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' 93 *AJIL* (1999) 302–316 at 304.

[14] Collins, Chapter 2 at 26–27, 39–40; Klabbers, Chapter 10 at 286; Tams and Tzanakopoulos, Chapter 19 at 501.

[15] Collins, Chapter 2 at 48.

[16] Again, Théodore Christakis' contribution is perhaps best seen as an attempt to vindicate and modernise a *reconstructed* classical-consensualist position that historically might not have existed in this form: Christakis, Chapter 16.

[17] James Leslie Brierly, 'The "Lotus" Case', reprinted in Hersch Lauterpacht, CHM Waldock (eds), *The Basis of Obligation in International Law and Other Papers by the Late James Leslie Brierly* (Clarendon Press 1958) 142–151 at 143–144. For a recent perpetuation of the straw-man of consensualism, see Ronald Dworkin, 'A New Philosophy for International Law' 41 *Philosophy and Public Affairs* (2013) 2–30 at 8.

foundations espoused by positivism (often implicitly). Very often, classical positivism is just as precipitate as naturalism and, in a way, is merely a statist variant of natural law doctrine.[18] It is therefore no surprise that many international lawyers have repudiated it in the second half of the twentieth century. 'If one does natural law', they could be said to be arguing, 'then why should one not proudly declare one's position; why hide behind a false fidelity to positive law?' Thus, those in this volume who do espouse non-classical forms of positivism have tried to refrain from this argumentative displacement of the 'political' by the allure of technocratic rationalities (à la 'governance'). These rationalities plant the idea in scholars' and decision-makers' minds that there is a 'technical' and 'scientific', a truly neutral and objective solution to political problems, empowering scholars and scientists and putting them in their 'right place' above mere politicians. This, however, is a chimera which leads to delusions of grandeur and orgies of essentialism.[19] Also, it cannot be said to promote hermeneutical necessity in law-ascertainment or content-determination processes. This is why many of the following chapters discuss the idea that legal interpretation can no longer be thought of as an act of cognition of a pre-existing truth, but is rather geared towards persuasion, whose validation hinges on the recipient epistemic community.[20] In that sense, this volume should not be seen as an attempt to salvage and renew the metanarrative of naive rationality associated with traditional positivism.[21] Modern forms of international legal positivism, instead, celebrate the role

[18] It may be helpful to remind ourselves of a rather forgotten fact: throughout history, natural law arguments have been used much more often to justify a state's powers (or the extant law) than to criticise them; one need only look to the decidedly natural law arguments to found the divine provenance of absolutist monarchs (Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1945) 416–417).

[19] See generally Jörg Kammerhofer, 'Law-Making by Scholarship? The Dark Side of 21st Century International Legal "Methodology"' in James Crawford, Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law: Third Volume: International Law 1989–2010: A Performance Appraisal. Cambridge, 2–4 September 2010* (Hart 2012) 115–126; Jörg Kammerhofer, 'Law-Making by Scholars' in Catherine Brölmann, Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Law-Making* (forthcoming, Edward Elgar 2014); Gerald J. Postema, 'Law's Autonomy and Public Practical Reasoning' in Robert P. George (ed.), *The Autonomy of Law: Essays on Legal Positivism* (Oxford University Press 1996) 79–119.

[20] Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Duke University Press 1989) 488–491; see also d'Aspremont, n. 3.

[21] Both Hart and Kelsen recognise that there is no meta- (or external) narrative against which the meaning of a rule can be determined; see Kammerhofer, Chapter 4 and d'Aspremont, Chapter 5.

of politics in international reality and, indeed, international legal practice even where they separate the realms of politics and scholarship.

We must also be clear in this introduction that, while not seeking to vindicate classical legal positivism, this book is not a project for the renewal, vindication or revolution of positivist thought, as attempted elsewhere.[22] *This book* does not contain an essentialist project to reconstruct a universal concept of international law[23] – the following chapters seek to evaluate, critique, contextualise and apply classical and non-classical forms of international legal positivism, not to push the agenda of one or the other approach. In the same vein, no one (the editors in their contributions included) seeks to offer a 'post-modern*ist*' or Critical Legal version of legal positivism – a concept rightly seen as a contradiction in terms.[24] Any 'ambition' this book has is far more modest: we seek to provide analysis and (self-)reflection by a group of scholars of a particular theoretical approach. Our aim as editors was to assemble contributions that go beyond uncritical espousal of traditional legal positivism, but also go beyond the all-too-common mechanical and unreflective rejection of positivism. This modesty is informed by the belief that legal positivism does not need to be rehabilitated or rejuvenated, but more simply needs to be aware of its own limitations and must continuously reflect on (the value of) its methodological and paradigmatic moves.[25]

4 A multitude of agendas

The self-reflection on which the contributors of this volume embark is not carried out agnostically and without prejudice. Even the doubts

[22] E.g. Olivier Corten, *Le discours du droit international: Pour un positivisme critique* (Pedone 2008); Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge 2010); Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press 2011).

[23] On this debate, see Leslie Green, 'The Concept of Law Revisited' 95 *Michigan Law Review* (1996) 1687–1717; Frederick Schauer, 'Hart's Anti-Essentialism' in Luís Duarte d'Almeida, James Edwards, Andrea Dolcetti (eds), *Reading HLA Hart's 'The Concept of Law'* (Hart 2013) 237–246. Hart himself seems to have despised those engaged in the construction of the 'essential nature' of law (HLA Hart, *The Concept of Law* (Clarendon Press 1961) 1).

[24] Singh, Chapter 11 at 297.

[25] David Sugarman, 'Hart Interviewed: HLA Hart in Conversation with David Sugarman' 32 *Journal of Law and Society* (2005) 267–293 – Hart argues that the limits to analytical positivism is the beginning of the answer (290); see, however, the attempt to rehabilitate analytical jurisprudence by William Twining, 'Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context' 1 *International Journal of Law in Context* (2005) 5–40.

about the value of legal positivism that are expressed in some of the following chapters are formulated within the remit of assumptions and with certain goals in mind. Although primarily of a self-reflective nature, the various pieces of this volume are thus functionally prejudiced. There necessarily remains an 'agenda'. More precisely, there is a vast multitude of agendas, ideologies and values at play in this introduction as well as all the other texts of this volume. These agendas sometimes collide and sometimes harmonise, but always influence the product. For the editors, it is clear that this introduction is the place to thematise some of these biases/prejudices (or, as Gadamer's improved understanding of the term *Vorurteil* very helpfully clarifies: the inevitable pre-judgments we all bring to any epistemic process)[26] or 'politics' that inform the contributions offered here. Despite significant divergences between the various agendas, there are a few common threads underlying many of the contributions in this book.

Among the several aspirations infusing this project, one could first mention a search for theoretical refinement. Such a move – which has been understood as a quest for aesthetics[27] – is certainly not uncommon, as one can say that international legal theory is entirely geared towards theoretical refinement. We think and would like to emphasise that we believe all of the contributors to this volume are very much aware that such theorising – and, for some, the construction of aesthetics that come with it – is also an exercise of power.[28] Even a self-reflecting exercise like the one initiated here inevitably contributes to a certain system of knowledge that is penetrated by power and leads to the creation of a given image of the world.[29] This insight, with all its inevitability, does not, in our view, attach a negative moral value to 'power',[30] nor does it invalidate scholarship per se – although some have inferred this consequence.

[26] Hans-Georg Gadamer, *Wahrheit und Methode: Grundzüge einer philosophischen Hermeneutik* (6th edn J. C. B. Mohr (Paul Siebeck) 1990).
[27] Singh, Chapter 11 at 293.
[28] See in particular Michel Foucault, *Surveiller et punir* (Gallimard 1975); Michel Foucault, *Histoire de la sexualité I: La volonté de savoir* (Gallimard 1976); Venzke, Chapter 7 at 199–203; Singh, Chapter 11 at 291–294.
[29] Venzke, Chapter 7 at 199–203.
[30] 'Il faut cesser de toujours décrire les effets de pouvoir en termes négatifs: il "exclut", il "réprime", il "refoule", il "censure", il "abstrait", il "masque", il "cache". En fait le pouvoir produit; il produit du réel; il produit des domaines d'objets et des rituels de vérité.' Foucault, *Surveiller et punir*, n. 28 at 227.

Another important aspect of the agenda shared by several of the following contributions pertains to the need felt by many authors to keep (particular forms of) inter-disciplinarity at bay.[31] Indeed, the preservation of law-ascertaining tools, which is one of the primary functions bestowed upon positivism, is vindicated by several authors. In so doing, they manifest some attachment to the necessity of drawing boundaries between disciplines. It is certainly not a rejection of all forms of inter-disciplinarity, but rather a repudiation both of over-inclusive approaches to law and of hegemonic moves of other scholarly enterprises on the scholarly cognition of law/rules/norms. It is an epistemological concern for distinction and autonomy. This undoubtedly can also be called a political – perhaps even protectionist – choice made by a group of professionals that assumes a politics of 'counter-disciplinarity'[32] and autonomy.[33]

While critiquing forms of inter-disciplinarity, some authors express sympathy for the idea that positivism can work in tandem with other approaches,[34] including Critical Legal Studies (CLS). This is especially so with regard to scholars like Martti Koskenniemi, whose plea for a 'culture of formalism'[35] – while not being grounded in a positivistic theoretical background itself[36] – has continued to carry out a project of universality

[31] Singh, n. 3.

[32] The expression is from: Martti Koskenniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity' 26 *International Relations* (2012) 3–34; for a reaction, see Mark Pollack, 'Is International Relations Corrosive of International Law? A Reply to Martti Koskenniemi' 27 *Temple International and Comparative Law Journal* (2013) 339–375.

[33] Collins, Chapter 2 at 24.

[34] Klabbers, Chapter 10 at 269.

[35] The notion of a 'culture of formalism' has been spelled out by Martti Koskenniemi in several of his works; e.g. *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2002) 502–509; 'What is International Law For?' in Malcolm Evans (ed.), *International Law* (3rd edn Oxford University Press 2010) 32–57 at 43–44. See also Martti Koskenniemi, 'Carl Schmitt, Morgenthau, and the Image of Law in International Relations' in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press 2000) 17–34 at 32–33.

[36] For a tentative interpretation of Martti Koskenniemi's culture of formalism, see, among others: Emmanuelle Jouannet, 'Présentation critique' in Martti Koskenniemi (ed.), *La politique du droit international* (Pedone 2007) 7–48 at 32–33. Also Ignacio de la Rasilla del Moral, 'Martti Koskenniemi and the Spirit of the Beehive in International Law' 10 *Global Jurist* (2010) 1–42. See above all the insightful book review: Nicholas Tsagourias, '[Book Review:] Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of

of legal argumentation.[37] This belief in the possibility of ecumenical coexistence and cooperation between theories inevitably presupposes that the various approaches discussed here are *alia*, i.e. make arguments of a categorically different nature and do not neutralise one another.[38] It goes without saying that constructing such a relationship of theories is itself based, to an extent, on insularism that should not be obfuscated here.[39]

Finally, it should be acknowledged that many of the agendas found in the exercise carried out here have an epistemological dimension. Indeed, many of the contributions found in this book are also informed by a quest for 'maintain[ing] a structure within which meaningful discussion can occur'.[40] Albeit recognising the parochial character of law and the inherently pluralistic and non-essentialist nature of conceptual debates about international law, the self-reflection that unfolds in this volume does so against the backdrop of a concern for the possibility of communication within the epistemic community of international law.[41]

These considerations are just a few of the cross-cutting prejudices and aspirations shared by many of the contributors. It is needless to say that awareness thereof in itself neither dooms nor salvages[42] the theoretical foundations of the exercise. Yet, as indicated above, this book does not purport to cast a new positivist theory. In this volume we find, more simply, a group of scholars questioning the contemporary value of positivism in international legal scholarship without seeking to give self-sustaining and self-referential theoretical grounds to their scholarship (if only because such an enterprise is impossible).

International Law 1870–1960 (2002)' 16 *LJIL* (2003) 397–399, esp. 398–399; Hoffmann, Chapter 13 at 374–376.

[37] For that reason, Martti Koskenniemi has been categorised as (only) a mild 'crit' for attempting to domesticate deconstruction. Such attempts to domesticate deconstruction have long been the object of criticism in general legal theory, e.g. Pierre Schlag, '"Le Hors de Texte, C'est Moi": The Politics of Form and the Domestication of Deconstruction' 11 *Cardozo Law Review* (1989–1990) 1631–1674.

[38] Thomas S. Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press 1962).

[39] Singh, Chapter 11 at 301–307.

[40] Brian H. Bix, 'Conceptual Questions and Jurisprudence' 1 *Legal Theory* (1995) 465–479 at 469.

[41] On this aspect, see Timothy Meyer, 'Review Essay: Towards a Communicative Theory of International Law: Jean d'Aspremont, Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules (2011)' 13 *Melbourne Journal of International Law* (2012) 921–939.

[42] Singh, Chapter 11 at 291.