

WHAT IS LEGAL THEORY?

O QUE É A TEORIA JURÍDICA?

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ABSTRACT: In recent years, legal theory has developed into a generic term for multidisciplinary legal thinking. Under the heading of legal theory, scholars have explored novel pathways to legal research by using insights and methodologies from a multitude of research fields ranging from cultural studies and economics to genetics and neuroscience. This development stands in contrast to the classic field definition of 20th-century legal theory and 19th-century general jurisprudence. The classic view conceived both legal theory and its precursor, general jurisprudence, as deliberately anti-philosophical approaches to theoretical reflection on the general structures of positive law. More recently, however, a shift in the internal structure as well as the epistemic aims of legal scholarship has taken place. The present article analyses this development within the framework of the history and philosophy of science. It suggests that interdisciplinary knowledge is a vital and indeed intrinsic part of legal scholarship. An uncharted space nevertheless remains between the disciplinary and the multi-, inter- and transdisciplinary forms of legal knowledge. The recent shift in the research agenda of legal theory highlights this theoretical vacuum, and it is precisely here that the present article situates the potential for a philosophically sophisticated legal theory. It argues that legal theory can best fulfil its goal if it provides tools for multidisciplinary theorising as well as categories for critical reflection on the preconditions of legal epistemology. This essay thus presents legal theory as a philosophical theory of multidisciplinary jurisprudence.

KEYWORDS: legal theory; general jurisprudence; multidisciplinary; philosophy of science; history of science.

RESUMO: Nos últimos anos, a teoria jurídica evoluiu para um termo genérico para o pensamento jurídico multidisciplinar. Sob o título de teoria jurídica, os estudiosos exploraram novos caminhos para a pesquisa jurídica utilizando insights e metodologias de uma multiplicidade de campos de pesquisa que vão desde estudos culturais e econômicos até genética e neurociência. Este desenvolvimento contrasta com a definição clássica do campo da teoria jurídica do século 20 e da jurisprudência geral do século 19. A visão clássica concebeu tanto a teoria do direito quanto sua precursora, a jurisprudência geral, como abordagens deliberadamente anti-filosóficas à reflexão teórica sobre as estruturas gerais do direito positivo. Mais recentemente, porém, houve uma mudança na estrutura interna, bem como nos objetivos epistêmicos da bolsa de estudos jurídicos. O presente artigo analisa este desenvolvimento dentro da estrutura da história e da filosofia da ciência. Ele sugere que o conhecimento interdisciplinar é uma parte vital e intrínseca da bolsa de estudos jurídicos. Um espaço não cartografado, contudo, permanece entre o conhecimento disciplinar e as formas multi, inter e transdisciplinares de conhecimento jurídico. A recente mudança na agenda de pesquisa da teoria do direito destaca este vácuo teórico, e é precisamente aqui que o presente artigo situa o potencial para uma teoria jurídica filosoficamente sofisticada. Argumenta que a teoria do direito pode cumprir melhor seu objetivo se fornecer ferramentas para a teorização multidisciplinar, bem como categorias para a reflexão crítica sobre as condições prévias da epistemologia do direito. Este ensaio apresenta assim a teoria do direito como uma teoria filosófica da jurisprudência multidisciplinar.

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RDP, Brasília, Volume 20, n. 108, 363-382, out./dez. 2023, DOI: 10.11117/rdp.v20i108.7725 | ISSN:2236-1766



PALAVRAS-CHAVE: Teoria jurídica; Jurisprudência geral; Multidisciplinaridade; Filosofia da ciência; História da ciência.

A common way for philosophers to start their inquiries is to ask questions beginning with »What is...?«. In the case of legal theory, such an inquiry might look odd at first given the long-standing tradition of this discipline, reaching back far into 19th-century legal positivism and 20th-century analytical jurisprudence. Yet, more recent times have seen novel uncertainty about the research agenda and intellectual scope of legal theory². Legal positivism, a hotly debated field especially in Anglo-American jurisprudence up to the millennium, has declined in attention ever since. Likewise, in German legal theory, the old opposition between legal positivism and natural law has lost much of its theoretical power during the last decades³. Overall, the tradition of analytical philosophy seems somewhat exhausted. As the German legal philosopher Eric Hilgendorf put it, the development of legal theory has arrived at a dead end. Its stalemate has become tangible in »fruitless formalizations, scholasticization, and an impoverished research agenda«, which reflects » the crisis of legal philosophy, and, ultimately, of all theoretical fields of jurisprudence in German legal academia«. Yet, Hilgendorf also suggests that there might be a light on the horizon stemming from new research questions⁴.

I share Hilgendorf's impression. This seems to be the right time to ask anew just what legal theory is, what kind of questions it poses or answers, or what guidance it can give to the study of law. In the present article, I propose an understanding of legal theory as the foundation of a theoretically challenging jurisprudence. Legal theory, in my view, should be capable of connecting doctrinal law with philosophy, but also with the insights and methods of many other fields of scientific inquiry ranging from cultural studies to sociology, history, political science and economics, to fields as remote as physics, biology, medicine or geoscience. In short, I propose an understanding of legal theory as a philosophical theory of multidisciplinary

² For the full version of the argument presented in this article, see Auer (2018a).

³ For the development of legal theory in the 30 years of the »Berlin Republic«, see Auer (2018b).

⁴ Hilgendorf (2013) 114: »Der seit den 1990er Jahren zu konstatierende Stillstand in der deutschen Rechtstheorie, der sich u. a. in fruchtlosen Formalisierungen, Scholastifizierung und Themenarmut bemerkbar macht, wird damit zum Symbol für eine Krise der Rechtsphilosophie und letztlich der gesamten juristischen Grundlagenforschung in Deutschland. In jüngster Zeit mehren sich allerdings Anzeichen, dass es gelingen könnte, die Sackgasse zu verlassen und neue Fragestellungen zu erschließen.« All translations of German language quotations are the author's.



jurisprudence. In what follows, I address questions such as: How is this approach supposed to work? What is the added value of such a seemingly anarchical, »fancy« multidisciplinary legal theory? Why is it not enough to limit legal scholarship to the Science of doctrinal law or, at best, to individual fields of interdisciplinary study such as law and history or law and economics?

None of these questions can be answered without first addressing another fundamental question: What is the epistemic status of legal knowledge? Put differently, what is the goal of legal scholarship? What is there to know about the law, and how do we know it? In the present article, I set out to give at least a tentative answer in four parts. I begin with the status of academic law as a scientific enterprise, contested between doctrinal law and the classic ancillary »law and ...« subjects such as law and economics or law and literature. Second, I discuss this contested status from the point of view of the history of science by introducing a classic author, namely Hermann Kantorowicz. Third, I turn to the history and current academic status of legal theory, which increasingly seems to be torn between a novel »fancy theory« on the one side and the classic middle ground between legal doctrine and legal philosophy on the other. From this vantage point, I finally set out to conceptualize legal theory as a philosophical theory of multidisciplinary jurisprudence.

I. LEGAL THEORY: A CONTESTED MIDDLE GROUND

The German tradition of legal scholarship is still mainly focused on doctrinal law and, much to the ridicule of international observers, conceptualized as »legal science«⁵. This conception of the field, however, burdens the epistemic status of legal scholarship with riddles. Ever since Julius von Kirchmann's famous saying that three corrective words of the legislator are sufficient to turn entire law libraries into maculation⁶, it is tempting to use the contingency of legal doctrine, or the ephemerality of positive law more generally, as an argument against its suitability as an object for serious scholarly inquiry. Serious science seems

⁵ For the recent German debate on the academic status of legal doctrine, see, e. g. Kirchhof / Magen / Schneider (2012); Jestaedt (2014); Bumke (2014); Kuntz (2016); Bumke (2017); Lennartz (2017); Auer (2017); Jansen (2020). For French perspectives and critiques, see Jestaz / Jamin (2004); Kiesow (2014). For an Anglo-American view, see, e. g. Balganesch (2015).

⁶ Cf. Kirchmann (1848) 23.

to be an enterprise in need of an independent, unchanging object of study. But doctrinal jurisprudence necessarily falls short of this demand because its object, legal doctrine, is in a constant flux of change. Worse even, doctrinal change occurs in part precisely because of the deliberate normative impact exercised by doctrinal scholarship on the development of legal doctrine⁷. There is, in other words, no way of separating the academic theory from the practice of doctrinal law. Yet, this objection against the scientificity of legal scholarship, already put forward by Kirchmann, loses much of its force when one takes into account that there is no shared understanding of what legal doctrine actually is in the German academic discourse. To date, defenders and critics only agree on the vague point that the academic pursuit of legal doctrine is inextricably linked to legal practice⁸. This insight, however, gives rise to yet another problem for the scientificity of legal study. Legal doctrine, understood as a hybrid between legal science and legal practice, seems to suffer from an incurable epistemological contradiction in terms: What if theory cannot be practice or vice versa.

At first glance, this practice-bound understanding of legal scholarship also conceptually excludes or at least burdens the possibility of legal theory as a separate field of inquiry. If there is something like a relevant objective of legal theory, it seems to describe a conceptual lacuna, a topical absence in the place where a theoretical methodology of jurisprudence should be situated. This is where the classic »law and ...« fields come into play. Among them are research subjects such as law and economics, law and literature, philosophy of law, sociology of law, legal history, legal anthropology or comparative law. All of these classic pathways of interdisciplinary legal study share the aim to find scientificity in legal study by linking it to a field outside the law. In this vein, in a much cited report on the perspectives of German legal scholarship issued in 2012, the German Council of Science and Humanities (Wissenschaftsrat) maintained that in order to fully exhaust the depth of its matter of inquiry, academic legal research needs to incorporate the entire breadth of »historical, linguistic, philosophical, social, political, economical, psychological, criminological, and other perspectives«, as well as the

⁷ For a pointed critique, see Lepsius (2012).

⁸ See only Esser (1972) 97; Jestaedt (2012) 137; Jestaedt (2014) 5–6.

respective repertoires of methods. The Council concludes that there can be no such thing as legal scholarship without interdisciplinary references⁹.

Taken literally, however, this poses a serious challenge for legal scholarship as an independent field of research. While the Council of Science and Humanities is certainly right in urging more inter-disciplinary research in law, this demand appears to be rather unfortunately framed by deliberately widening the existing antagonism between legal doctrine and interdisciplinary legal scholarship. However, this antagonism, mirrored in many statements within the recent debate on the scientificity of legal scholarship, unnecessarily burdens the relationship between both sides of the discipline. It obscures or even completely cancels out the complexity of research located precisely in the contested middle ground between legal doctrine and interdisciplinary legal scholarship. Yet, it is precisely this middle ground where the interesting research questions of current legal theory are situated. Thus, researchers who are interested in a theoretically sophisticated jurisprudence should not have to decide between either legal doctrine or interdisciplinary research, but should rather aim at combining both approaches towards legal scholarship in the middle ground of multidisciplinary legal theory.

Just to dwell on the unnecessary antagonism between legal doctrine and interdisciplinary scholarship a little longer: It should be clear that both sides suffer a loss of epistemic resources by pursuing their antagonistic opposition. Moreover, when taken individually, both approaches towards legal scholarship tend to produce distorted pictures of the respective other half of the discipline. For the classic formalistic account of doctrinal jurisprudence, one may refer to the German pandectist Bernhard Windscheid's infamous saying that it is not the task of the jurist »as such« to be concerned with the ethical, political or economic deliberations governing the legislative branch¹⁰. Interestingly enough,

⁹ German Council of Science and Humanities (Wissenschaftsrat) (2012) 33: »When legal scholarship integrates historical, linguistic, philosophical, social, political, economic, psychological, criminological, and other perspectives, it simultaneously adopts their methodologies. It appropriates different epistemological methods to understand its object of inquiry, thereby unfolding the rich variety of meaning naturally entailed in the law (the conditions of its creation and validity, the legal permeation of various areas of life and of different social spheres, the durability and resilience of norms, questions of justice, etc.). Legal scholarship cannot, therefore, afford to dispense with these interdisciplinary relations.«

¹⁰ Windscheid (1904) 112: »Die Gesetzgebung steht auf hoher Warte; sie beruht in zahlreichen Fällen auf ethischen, politischen, volkswirtschaftlichen Erwägungen oder auf einer Kombination dieser Erwägungen, welche nicht Sache des Juristen als solchen sind.«

however, the same insular thinking also comes to the fore in the opposite progressive camp which rejects the primacy of doctrinal law and opts for interdisciplinary legal scholarship instead. In a recent article, the German legal philosopher Thomas Gutmann compared the centerperiphery model of legal discourse orbiting around legal doctrine with the geocentric model in astronomy¹¹. But this polemic, comprehensible as it may seem from the philosophical fringes of the juridical universe, again only serves to restate and reinforce the classic formalistic view of an autonomous legal doctrine with no real use for interdisciplinary research. More precisely, what is still lacking is a description of the uncharted middle ground, the unexplored relation between both fields. The question of just what this in-between means, how precisely doctrine and interdisciplinary theory interact in this middle ground, how each of them contributes to the epistemic performance of legal scholarship as a whole remains unanswered. To use Gutmann's metaphor, all we have is a theory of space which presents us with a choice between geocentric and heliocentric models of the solar system – but regardless of the model we choose, we nevertheless remain equally ignorant of what happens in the interspace.

II. HERMANN KANTOROWICZ AND THE THEORY OF LEGAL SCIENCE

In the present part, I will highlight the problem of the uncharted interspace between the legal subdisciplines from a historical perspective. In an article published in the 1928 volume of the *Columbia Law Review*, Hermann Kantorowicz, founder of the German free law movement, developed a system of categorization for all academic subdisciplines of legal scholarship¹². The article, co-authored and commented on by the American scholar of jurisprudence Edwin W. Patterson, was the result of Kantorowicz's first foray into American legal academia. Among other noteworthy insights, it contains the following »division

¹¹ Gutmann (2015) 109: »Wir sind, wenn wir wissen wollen, was das Recht leistet und anrichtet, wie es funktioniert, woraus es lebt, woher es kommt und wohin es sich bewegt, auf eine Vielzahl von Beobachter- perspektiven verwiesen, von denen keine für sich reklamieren kann, die entscheidende zu sein. In diesem wissenschaftlichen Universum ist daseben genannte Zentrum-Peripherie- Modell einer allein um die Dogmatikkreisenden Rechtswissenschaft in et- wa so relevant und tragfähig wie das geozentrische Weltbild seit 1650«.

¹² Kantorowicz / Patterson (1928) 679–707. With regard to Kantorowicz, see generally Muscheler (1984); Ibbetson (2004); Auer (2015); Jansen (2020); Augsburg / Lettmaier / Meyer-Pritzl (2020) with further references.

of the whole of legal science«.¹³

	<i>Constructive branches</i> (dealing with the objective meaning of law)	<i>Empirical branches</i> (dealing with the realization of law)	<i>Deontological branches</i> (dealing with the value of law)
<i>Systematical cognition of law in general</i> (constitutional, penal, commercial, maritime law, etc.)	General Jurisprudence	Sociology of the Law	Philosophy of the Law
<i>Individualizing cognition of a particular law</i> (Roman, English, German, European law, etc.)	Particular Jurisprudence	Historical Jurisprudence	Legislative Jurisprudence

As its title suggests, Kantorowicz's system aims at a comprehensive classification of all contemporary fields of legal research. It offers a six-part classification scheme that is divided twofold: vertically, into constructive, empirical and deontological branches, and horizontally, into systematic general and particular-individual fields of legal research. Both directions are construed as crosscutting, thus doubling the number of possible research fields to six. The left column comprises all subjects usually identified as »doctrinal«, namely, the doctrinal study of any particular legal system, to be found under the heading »particular jurisprudence« in the lower left box. The adjacent center and right columns are the domains of interdisciplinary legal research. Here, we find the philosophy and sociology of law (upper right and upper center) as well as »historical jurisprudence« or legal history in the lower center box. On the lower right, there is a further field entitled »legislative jurisprudence«. This field can be mapped onto recent legal policy approaches, such as normative readings of law and economics. There are, on the other hand, some fields missing in Kantorowicz' scheme that one would expect to be included in a comprehensive map of legal research today, most notably law and economics as a general theory with not only normative and legislative but also descriptive and analytical relevance for the study of law.

There is one remaining category in Kantorowicz' scheme which has not been

¹³ Kantorowicz / Patterson (1928) 691.

addressed yet, namely, the upper left box labeled »general jurisprudence«. What is the significance of this field, and what would be its contemporary counterpart? The equivalent in German early 20th-century scholarship is the so-called »Allgemeine Rechtslehre«. Around the turn of the 20th century, the *Allgemeine Rechtslehre* (or general jurisprudence) became the common denomination for a theoretical – albeit decidedly non-philosophical – reflection of the concept and foundations of law¹⁴. Its distinctive characteristic was precisely that it did not understand itself as a part of the philosophy of law, but rather as a general chapter of the science of positive law. Its rise was, not surprisingly, closely linked to the rise of legal positivism since the late 19th century. It aimed at conceptualizing general features and structures of the law, such as objective and subjective right, obligation, duty and liberty, the architecture of the state, the so-called »statics« and »dynamics« of law. Defined by this epistemic interest, the *Allgemeine Rechtslehre* became the precursor to modern legal theory. Its most elaborated version may be seen in Hans Kelsen's »Pure Theory of Law«. Consistent with this view, Kantorowicz locates the study of general jurisprudence in the left column and aligns it with doctrinal legal scholarship, whereas he divorces it from both the center and right columns, especially from the upper right box containing the philosophy of law.

Kantorowicz' model is still well suited to reflect upon the current position of legal theory between »general jurisprudence« as a general part of legal doctrine, on the one hand, and a non-doctrinal, interdisciplinary research agenda, on the other. The middle ground between both views of legal theory is precisely what is missing in Kantorowicz's scheme and what still remains unaccounted for in the current discussion. But this is not the only take-away from Kantorowicz' scheme of legal sciences relevant for today's efforts at mapping the legal landscape in terms of the theory and history of legal science. There are at least three further reasons why Kantorowicz's model still merits a closer look today:

First, its three-columned structure is not a random feature but reflects a neo-Kantian world-view which continues to exert influence on the methodological division between the modern sciences and humanities. By expanding the well-known Kantian dualism of Is / Ought,

¹⁴ With regard to the development of general jurisprudence and legal theory in the 19th century, see in particular Brockmüller (1997); Funke (2004).

early 20th-century neo-Kantian philosophers and jurists like Wilhelm Windelband, Heinrich Rickert, Emil Lask and Gustav Radbruch developed a tripartite worldview of epistemic and ontological realms¹⁵. For Neo-Kantianism, there exists a third world sphere apart from both Is and Ought. This third realm is sometimes referred to as the world of »value« (Wert), while others call it, less normatively laden, the realm of »sense« or »meaning« (Sinn). Kantorowicz subscribes to the latter view, while he also uses the Heideggerian notion »being- as-it-is« (So-Sein) for this intermediate sphere of the non-ideal, yet non-neutral, man-made sphere of »meaning« between what there is (Da-Sein) and what ought to be (Dasein-Sollen)¹⁶. The reason fin-de-siècle Neo-Kantians invented this third sphere was the realization that, after the demise of idealistic natural law in the 19th century, the old idealist Ought category was no longer adequate to describe the thoroughly contingent nature of culturally shaped normative phenomena such as positive law. Thus, the third category of »value« or »sense« emerged as an independent ontological and epistemic way to describe human culture, artifacts and other man-made spheres of meaning. In the landscape of the theory of science around 1900, this insight is reflected in the widening gap between the empirical sciences, on the one hand, and the hermeneutical humanities, on the other. Ever since the late 19th century, the sphere of the Is had been the domain of the expanding former, while the Ought, bound to pre-modern metaphysics and incompatible with modern conceptions of scientific objectivity, had lost its epistemic power. In this situation, the neo-Kantian category of »value« or »sense« provided a new epistemic and ontological bracket for the humanities with their hermeneutical methods and contingent normativities.

Second, where does the law fit into this picture? At first sight, law provides the perfect example of a cultural artifact with contingent normativity and hermeneutical methodology. Legal scholarship thus seems predisposed to fit into the neo-Kantian category of »value« or »sense«. Kantorowicz's answer, however, is more complex. One of Kantorowicz's most significant insights about the structure of legal scholarship, which can be derived from his model above, is that it actually replicates the tripartite structure of neo-Kantian epistemology within

¹⁵ See Jansen (2020) with further references.

¹⁶ Kantorowicz / Patterson (1928) 682–686: »sciences of reality«, »sciences of value«, and »sciences of objective meaning«. With respect to Kantorowicz's version of Neo-Kantianism, see Muschler (1984) 45–65; Saltger (2007) 245–247; Auer (2015) 802–803; Auer (2018a) 23.

its internal organization. In Kantorowicz's view, legal scholarship cannot be aligned with any single epistemic path in its entirety. Rather, the law comprises all three worldviews as distinguished by Neo-Kantianism – the empirical, the normative, and the cultural¹⁷. More precisely, Kantorowicz restricts the culturalist or »constructive« dimension of law, aligned with the neo-Kantian domain of »value« or »sense«, to the research fields in the left column, i. e. the doctrinal branches of legal scholarship and general jurisprudence. All other fields of jurisprudential inquiry – notably the fields in the center and right columns, such as history, philosophy, and sociology of law fall outside the realm of »meaning«. According to Kantorowicz, the fields in the center and right columns are part of the intra-legal domains of the Is and the Ought, with their respective empirical and normative methodologies. The upshot is that legal research can only realize the full depth of its potential when all epistemic pathways are pursued in their entire breadth. Kantorowicz even suggests that this feature singles out the science of the law from the canon of most of the other sciences and humanities, which appear to be much more tightly tied to their respective empirical, hermeneutic, or normative methodologies. It is this insight which makes Kantorowicz's theory of science still relevant. It almost forestalls the German Council of Science and Humanities' recent statements.

Lastly, one important question remains unanswered. Does one have to be a believer in neo-Kantian epistemology in order to approve of Kantorowicz's model of legal science? The obvious answer to this question is a clear »No«. Kantorowicz's model has much to offer even if it is only read as an attempt at mapping interdisciplinary legal pluralism. According to this reading, it offers the insight that legal scholarship should place at least equal importance on both doctrinal and extra-doctrinal research, if not more on the latter. Kantorowicz, however, goes one crucial step further. The tripartite model of Neo-Kantianism does more than just arranging legal research fields into a pluralistic enterprise. It proposes something deeper than a mere arbitrary collection of epistemic pathways. Rather, it offers a comprehensive theory of the world by claiming a necessary connection of the three spheres: the Is, the Ought, and the Value. This further claim, however, can only be raised on metaphysical grounds¹⁸. At this point, scholars interested in interdisciplinary legal research

¹⁷ For a close reading and further references, see AUer (2015) 803; AUer (2018a) 24–25.

¹⁸ Cf. AUer (2018a) 25–26. Against Pawlik (2020), this claim does not imply the author's commitment to a neo-Kantian foundation of the philosophy of science. For the author's epistemological commitments, see *infra* n. 24.



should ask themselves just what the unspoken metaphysics of their own research agenda implies. There is always a personal philosophy inherent in research projects which resort to the Is in some parts, to the Ought in others, and to the Value whenever convenient. When left unexamined, such philosophy amounts to no less than ideology. I will return to this point in the concluding part of this article.

III. THE DEVELOPMENT OF LEGAL THEORY

Before returning to Kantorowicz in the final part, I will look more closely at the historical development of legal theory as a separate field of academic legal study. Recent times have witnessed the blurring of the seemingly clear epistemic borders between fields such as philosophy of law, legal history, and law and economics. Crosscutting research projects have paved the way for a novel amalgam of these and further fields without distinct borders. These novel research combinations are increasingly labeled as »legal theory«. This can be framed as the hypothesis that modern legal theory has grown into a new umbrella concept for almost any kind of intra- as well as interdisciplinary research on legal foundations today.

This development stands in some contrast to the early development of legal theory since the late 19th century. As discussed above, the origin of legal theory as a field of study was rooted in the late 19th-century general jurisprudence¹⁹. The key feature of this field was its deliberate opposition to the classic philosophy of law and, consequently, its close alignment with positive law. Around 1900, general jurisprudence had begun to challenge the much older philosophy of law as the core concept of theoretical thinking about law. The concept »philosophy of law« had emerged from the legacy of post-Kantian natural law around 1800²⁰. Its initial purpose, still visible today, was post-metaphysical theorizing about normative questions of universal right. During the 19th century, however, it became evident that more was needed than a philosophical theory of justice to deal with the novel theoretical questions posed by positive law. By the late 19th century, both philosophy of law and general jurisprudence struggled for dominance within the same contested middle

¹⁹ Supra n. 13.

²⁰ For the history of legal philosophy, see, e. g. Vesting (2015) 16–19.

ground between doctrinal jurisprudence and extra-legal philosophical scholarship²¹. What resulted was an ongoing intellectual and institutional battle for the pre-eminent theoretical approach to the fundamentals of law. The initial aim of general jurisprudence to develop an analytical general theory of law was preserved in legal theory throughout the 20th century, notably in its positivistic branch from Hans Kelsen to H. L. A. Hart and his followers. On the other hand, the normative philosophy of law has experienced a renaissance beginning with John Rawls's »Theory of Justice« and has been back in the game ever since this »normative turn«. Even today, some legal philosophers maintain that legal theory is no more than an analytical subdiscipline of legal philosophy²².

The more recent development of legal theory, however, disproves the latter contention. Legal theory has moved away from analytical philosophy into realms of multidisciplinary scholarship hitherto unknown, including sociological systems theory, media theory, peace and conflict theory, historical and cultural studies, behavioral psychology, bioethics, and many other fields²³. Thus, there is no way how the boundaries of legal philosophy could still serve as the disciplinary perimeter of legal theory today. We are in fact witnessing an almost complete reversal of the traditional relationship between legal philosophy and legal theory: The latter is replacing the former as the generic, higher-order concept for theoretical research on the foundations of law. Compared with the classic normative philosophy of law, modern legal theory, dealing with almost any kind of interdisciplinary research, follows a much broader and methodologically more unspecific approach. The tail seems to be wagging the dog.

What does this development imply for the perspectives of legal theory as a field of legal research? There are, as always, at least two possible views of the cathedral. One is to welcome the pluralization of interdisciplinary legal discourses. The new style of multidisciplinary studies which has developed under the old heading of legal theory seems to match exactly the vision of future legal scholarship as devised by the German Council of Sciences and Humanities. The result is a novel and unforeseeable amalgam of theory, or, to use a term borrowed from the

²¹ Dreier (2007) 28–32.

²² For a critique, see Dreier (2007) 28–32.

²³ Cf. Auer (2018b) 125–137.

American critical legal theorist Duncan Kennedy, a »fancy theory«. Kennedy notably uses three attributes to describe his own fancy theory: the »assimilation«, »cannibalization«, and, ultimately, the simple »use« of theoretical fragments borrowed from other disciplines, in particular the French and German critical theories in the tradition of Marx and Freud²⁴. If one subscribes to this bold view, it is neither possible nor necessary for a fruitful multidisciplinary legal theory to fully comply with the original conceptual and methodological framework of the extra-juridical theories imported into the law. To use another fancy term coined by the French anthropologist Claude Lévi-Strauss, multidisciplinary legal theory rather functions in the mode of »bricolage«²⁵. Bricolage literally describes the handicraft work which fits together new theoretical buildings out of existing theory fragments which, in the ideal case, gain new, unexpected meaning in the light of their new contextualization. The resulting multi-disciplinary theory amalgam has the interesting property of finally transcending the borders of intra-legal and extra-legal research: Where general jurisprudence and analytical legal theory were battling to cover the middle ground between doctrinal law and the classic »law and ...« fields, the new multidisciplinary legal theory has gone full way towards transcending the disciplinary boundaries between law and its surroundings. This way of doing legal theory is more than just another field of study. Rather, it offers a fluid theoretical resource, equivalent to the constant capacity of legal discourse to modernize itself by taking on the insights and methods of other disciplines. Seen in this way, legal theory might be the pathway to finally overcome the much-criticized antagonism between doctrinal law and interdisciplinary legal study.

The downside of this development is that legal theory might lose its scholarly contours if it abandons any plan of what to take from which field of science and how to use it. After all, the agenda of analytical philosophy, which had shaped the contours of legal theory from the days of H. L. A. Hart up to around the millennium, provided intellectual coherence and a visible research agenda for the field. The concept »legal theory« stood for a distinguishable intellectual

²⁴ Kennedy (1993) xi: »The Continental »fancy theory« is based on Freud and Marx, but I am mainly conscious of trying hard to assimilate, to cannibalize and then actually use, structuralism, neo-Marxism, phenomenology, existentialism, and postmodernism (and, I suppose, whatever else may come into fashion).«

²⁵ See fundamentally Lévi-Strauss (1997) 29–36; Derrida (2016) 241. For bricolage in legal theory, see Gutmann (2015) 113. Closely related is the concept of »rhizome-thinking«, cf. Deleuze / Guattari (1977).



enterprise with its own research questions, styles, and institutional resources. By contrast, this clear focus of legal theory seems to be vanishing²⁶. Yet, it is a trade-off because the previous clarity came at the cost of an »impoverished research agenda«, as rightly criticized by Hilgendorf above²⁷. It should be regarded as a gain rather than a loss that legal theory has ended its almost exclusive engagement with the fine points of legal positivism in the past years. However, there is a remaining risk that legal theory will lose its disciplinary focus together with its sources in fields like sociology, philosophy, anthropology, or economics if the result of their fusion is no more than an unclear transdisciplinary theorizing around a re-emerging core of doctrinal jurisprudence. Understanding legal theory as a catchall phrase for any theory transplant that can-not be integrated into doctrinal scholarship under a more specific heading will ultimately harm legal theory – or, for that matter, philosophy of law, law and sociology, law and economics, or any other field of interdisciplinary legal study. To return to something like the 19th-century general jurisprudence, i. e. legal-style philosophizing without philosophy, might indeed give rise to the renewed question whether it is necessary to invest academic funding or to endow chairs for research on the fundamentals of law at all. This recurring question has obviously been a major institutional challenge to all theoretical endeavors in the law throughout the past decades. Seen this way, the declaration of a new fancy theory of unclear multidisciplinary pedigree might thus indeed be regarded as a symptom of crisis rather than as a sign of fruitful innovation.

IV. MULTIDISCIPLINARY LEGAL THEORY: PHILOSOPHICAL FOUNDATIONS

How can legal theory avoid this pitfall and continue on its recent path of fruitful multidisciplinary research? My sense is that it is better not to worry too much about institutional concerns. Multidisciplinary legal theory offers enough internal substance to fuel research agendas that cover entire academic careers. But where lies the origin of this internal substance? I propose the following answer: Well-reasoned legal theory needs a philosophical

²⁶ For this development, see Auer (2018b) 137–141 with further references.

²⁷ Supra n. 3.

grounding in a philosophy of science. A fruitful approach to legal theory should encompass or at least be conscious of its own philosophical presuppositions about the epistemic structure of legal research. At first view, this return to philosophy may come as a surprise. After all, it was the metaphysical baggage of natural law and normative philosophy of law which caused its steady decline and the concurrent rise of the anti-metaphysical research agenda of general jurisprudence since the 19th century. Why, then, should today's legal theory start a novel inquiry into its philosophical foundations?

To better understand this, it might help to start the argument from the opposite side of philosophy as an academic discipline. Given the irrevocable demise of precritical metaphysics, which went hand in hand with the rise of the empirical sciences since the 19th century, one may ask oneself why philosophy is still on the map of academic endeavors today at all. Yet, one brief look at the book review or comment section in any major newspaper is enough to show that philosophy unchangingly matters whenever fundamental questions on human life, society, knowledge, and action are at issue. To date, philosophy continues to live from its ancient Greek root as the origin of all human insight. Although it has lost its ancient, medieval, and even early modern role as the leading field of intellectual inquiry, it still provides a necessary structural resource, or metaepistemology, to question the borders of modern science. Philosophy of science can teach when and how to transcend the borders of given fields of knowledge and to merge them into something new. In short: Philosophy has survived in the form of philosophy of science as the origin of multidisciplinary thinking in any field of scientific inquiry²⁸.

Therefore, it is a fundamentally philosophical insight that legal scholarship cannot restrict itself to doctrinal jurisprudence or mere »law and ...« studies in classic foundational fields such as legal history, legal philosophy, or law and economics. The landscape of legal scholarship can and should be mapped onto the entire landscape of the sciences and humanities. If law is to remain a relevant field of future academic inquiry, legal scholarship should offer relevant insights about the society as a whole and the world as it is shaped by the law. Thus, it is certainly possible to practice legal scholarship on a solely doctrinal basis or to restrict it to singular interdisciplinary fields such as the examples given above. Nonetheless, it should become clear at this point why the German Council of Sciences

²⁸ See, classically, Windelband (1921) 1–8; cf. Auer (2018a) 47–50.

and Humanities is right in demanding a broader, multidisciplinary approach in order to exhaust the depth of legal inquiry. According to this picture, philosophy of science comes into play as a meta-methodology which allows for the reintegration of the insights taken from fields as diverse as sociology, economics, linguistics, psychology, history, cultural studies, bioethics, or climate science into a comprehensive picture of the world as addressed by the law. This is finally where legal theory can be reframed as a philosophical theory of multidisciplinary jurisprudence: Its philosophical thrust will help us understand that the epistemic goals of doctrinal legal research and any other inquiry within the legally shaped world are much closer related than it may at first seem. However, this also presupposes imagining something else entirely under the heading of philosophy of law than what is usually practiced under this heading in law schools. In particular, there can be no closed canon of philosophical insights, findings, or concepts which specifically pertain to the law. Rather, any epistemological insight might be relevant for the law. Philosophy of science is no more and no less than the structural resource behind the methods and epistemic goals of each and any field of science. It provides the inexhaustible source of further inquiry whenever the individual disciplines reach their limits of cognition.

If this is correct, there can be no legal theory without philosophy of science. At this point, Kantorowicz's model of legal sciences merits one further glance. Kantorowicz's model implied not just a plurality but also a systematic order of epistemic pathways of legal inquiry. As seen above, however, it is not necessary to share Kantorowicz's neo-Kantian assumptions about the existence of such a metaphysical unity in order to gain insights from his model²⁹. Thus, it is doubtlessly possible to conduct successful multidisciplinary legal research without ever questioning the metaphysical groundings of one's own epistemic beliefs. Yet, the mere avoidance of reflecting the metaphysical preconditions of one's research agenda does not amount to showing its being free from metaphysics. In fact, the opposite is true: There is no such thing as a rational epistemology without metaphysical presuppositions about the ontological coherence of the world observed. Consequently, there is no fundamental legal theory without a philosophy of science which questions its own metaphysical groundings. This is the final challenge to multidisciplinary legal theory: to

²⁹ See supra n. 17.

bring to light the unquestioned metaphysical preconditions of law's epistemic pathways. In the words of Karl Popper:

»Even the analysis of science – the ›philosophy of science‹ – is threatening to become a fashion, a specialism. Yet philosophers should not be specialists. For myself, I am interested in science and in philosophy only because I want to learn something about the riddle of the world in which we live, and the riddle of man's knowledge of that world. And I believe that only a revival of interest in these riddles can save the sciences and philosophy from narrow specialization and from an obscurantist faith in the expert's special skill, and in his personal knowledge and authority; a faith that so well fits our ›post-rationalist‹ and ›post-critical‹ age, proudly dedicated to the destruction of the tradition of rational philosophy, and of rational thought itself³⁰.«

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³⁰ Popper (2002) xxvi (Preface to the first English edition, 1959).

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RDP, Brasília, Volume 20, n. 108, 363-382, out./dez. 2023, DOI: 10.11117/rdp.v20i108.7725 | ISSN:2236-1766



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Artigo Convidado

