

waning influence and where formerly colonized peoples are transforming the institutional and normative landscape.

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Sondre Torp Helmersen. ***The Application of Teachings by the International Court of Justice***. Cambridge: Cambridge University Press, 2021. Pp. 232. £85. ISBN: 9781108844147.

Sondre Torp Helmersen's book is part of the most recent crop of socio-empirical legal studies on international law, its lawyers and its institutions; it is a product of the recent focus on the workings of international courts and tribunals. Originally written as a doctoral dissertation at one of the premier research centres in that field – PluriCourts in Oslo – the book analyses how 'teachings' – the exact term used in Article 38(1)(d) of the Statute of the International Court of Justice – are 'applied' by and in the International Court of Justice (ICJ), with an emphasis on the question of how much 'influence' teachings have on the Court's decision-making – that is, how much 'weight' the Court's judges accord to teachings in their individual opinions (at 16).¹ This book partakes of the earnestness and precision of the new wave of international socio-legal scholarship and is a welcome change from the traditional approach to the question of how the Court actually operates, an approach which has tended to lean heavily on anecdotal reports and hearsay. As a contribution to legal sociology based on consistent methodological decisions, it makes for valuable reading and will significantly enhance our knowledge of how the Court actually works.

In a nutshell, the book's research question is this: how does the ICJ apply the 'teachings of the most highly qualified publicists' and what role and how much of a role do these texts play in the Court's decision-making? As a first step, Helmersen defines 'teachings' (at 18–42); this is achieved by way of a rather formalist legal-doctrinal interpretation of Article 38(1)(d) of the ICJ Statute, which serves to exclude certain texts, such as those produced by the International Law Commission (ILC), and defines the data set for his later empirical work. His next central step, comprising Chapters 3–5 (at 43–156), is an attempt to measure the 'weight' or influence of teachings in the Court's decision-making. Here, Helmersen is forced to use a double proxy: as is discussed below, he relies on citations to writings in individual opinions rather than on any direct statements by the Court. The result, unsurprisingly, is that the weight of 'teachings' is limited, but that there are significant variations between cited works and citing judges. The conclusion (at 157–184) contains interesting comparisons to other international tribunals and some non-threatening advice on diversity and

¹ Statute of the International Court of Justice, 1945, 33 UNTS 993.

transparency in line with current ideas of political correctness, although I doubt that most of us will need empirical studies to agree with the political point that the Court would benefit from more diversity. The book is technically well executed and methodologically much more aware than many other legal empirical works, and, more importantly, its scope is consciously tightly limited, which the author should not be faulted for. If anything, the limited scope is admirable: it is well suited to the question, and, unlike many other doctoral dissertations (mine included), Helmersen's work does not attempt to bite off more than it can chew.

Yet the point I wish to stress in this review is that the book's results are of much less interest to me than the methodological choices leading up to them. As discussed below, the choices that underlie the analysis raise a number of issues that could and should have been addressed in more depth. In the following, I will highlight two issues: 'pseudo positivism' as one methodological issue of legal-doctrinal scholarship proper in this book and the 'double proxy' problem as an example for the issues that empirical scholarship of the legal ecosystem will have to face. In addition, although this is an unintended outcome of the current enthusiasm for empirical legal studies rather than part of Helmersen's plan, we are liable to make too much of this type of study and to draw conclusions that are too far-reaching: the book is likely to be taken as proof that scholarly writings play a very limited role in the Court's work *tout court*, which cannot be concluded from the data presented.

The first problem with Helmersen's method arises when he argues in the legal-doctrinal mode in Chapter 2. Recently, those who practise what I call 'default legal positivism'² – that is, the dominant pragmatic approach to international legal scholarship – have started producing a new pattern of argument, one that is partly reminiscent of the critical legal studies (CLS) 'trashing' technique: "Take specific arguments very seriously in their own terms [and] discover they are actually *foolish*."³ In default positivism, admittedly, the italicized denouement is left to the reader's imagination rather than spelled out. Default legal positivism's new pattern could be called 'pseudo positivism': a peculiar combination of strictly formalist 'positivist' legal analysis at points where the strictness matters little, on the one hand, with orthodoxy's pragmatic-instrumentalist largesse where it does matter as a matter of legal scholarship, on the other hand. Chapter 2 of Helmersen's book is an orthodox legal phrase-by-phrase interpretation of Article 38(1)(d) of the ICJ Statute in the mould of legal commentaries, with a long section devoted to defining 'teachings' (at 29–42). The book contains hints of a strikingly narrow legal voluntarism such as that '[t]eachings lack official authority, since they are not created by states' (at 59) or that the 'essential difference between international courts ... and scholars, on the other, [is that] the former are created and empowered by and interact with states' (at 84). As I have sought to show elsewhere,⁴ this type of argument is a pragmatic form of 'etatism', a belief in the necessary and

² See, e.g., Kammerhofer, 'International Legal Positivist Research Methods', in R. Deplano and N. Tsagourias (eds), *Research Methods in International Law: A Handbook* (2021) 96.

³ Kelman, 'Trashing', 36 *Stanford Law Review* (1984) 293, at 293.

⁴ Kammerhofer, *supra* note 2.

absolute capacity of states (only) to create international law. It is not an expression of true legal positivism as a legal-philosophical approach to law, which would try to find contingent empowerment norms in international law that may or may not, in turn, empower states.

Yet this hyper-formality, leading to an exclusion of all texts produced by states or inter-governmental organizations (particularly the ILC) from his data set, is not necessary. Given, as Helmersen recognizes, that even within the narrow remit of Article 38 both judicial decisions and teachings are a subsidiary means for the determination of law only, it is highly unclear which, if any, legal requirements for the Court follow from Article 38(1)(d) of the ICJ Statute: the Court is probably not even required to consider scholarship in coming to its decision. *A fortiori*, this question is irrelevant for the definition of a data set for an empirical study.

On the other side, I would have welcomed a more thorough legal scholarly argument of the rather apodictic statement that ‘the ICJ Statute Article 38(1)(d) applies equally to individual judges’ (at 57). I doubt that ‘the Court shall apply’ incorporates a duty for judges, in their individual opinions, to ‘apply’ Article 38: why should individual judges be ‘the Court’; how would they ‘apply’ the law if their opinions are not legally binding? Also, the idea that Article 38 ‘reflects customary international law’, while generally agreed, is problematic. More so is the conclusion that ‘the provision is [legally(?)] relevant to other courts and tribunals too, as well as to anyone else seeking to interpret and apply international law’ (at 23). Has anyone done serious research into the state practice on Article 38 rather than count blanket assertions by courts and scholars? Does this custom extend to the ‘subsidiary means’? Can we really say that a customary law equivalent rule for Article 38 creates an obligation for all humankind to apply international law in this manner? The pseudo-positivist combination of hyper-formalism for certain questions and of largesse for others and the fact that stringency and leniency both occur where it suits the orthodox majority position might just border on the mainstream unwittingly doing the work of CLS writers for them.

Equally, Helmersen’s empirical method must face a central question: how can we measure whether ‘teachings’, however defined, have an ‘impact’ on the ICJ’s decision-making? Empirical scholarship must confront the problem that the influence of teachings for the Court’s decision-making process cannot be measured directly; as a result, we will have to rely on indirect means. This is not unusual or, in itself, problematic. Most electronic multimeters cannot measure large electrical currents in conductors directly; we normally use a secondary measurement of the magnetic field produced by them. In this case, however, Helmersen must rely on two tiers of proxy. First, in order to measure the influence of teachings, he uses a weighted citation analysis. Citations, in other words, are taken to indicate impact. Second, even this is not enough because the Court’s judgments, for all intents and purposes, do not cite teachings.

As a result, as noted above, Helmersen relies on the individual opinions of judges (which do cite teachings): he has to combine the ‘citation proxy’ with the ‘individual opinion proxy’. In effect, the number and quality of citations to scholarly literature

in declarations and concurring and dissenting opinions are used to measure the influence of scholarship on the Court's decision-making. While Helmersen admits that '[c]itations are only a reasonably accurate and necessarily imperfect proxy of weight, in a study where a proxy must necessarily be used', he clarifies that the book aims to 'reveal one thing (how judges argue), but not something else (what judges think)' and argues that '[t]his is inevitable no matter what methodology is used in a scholarly work. The results that the book does give are important enough in themselves' (at 14).

An empirical analysis of the structure of texts (how judges argue), however, cannot succeed in finding out how much influence teachings have on 'the Court'. The rather unsurprising result of such an analysis of the public face of the Court's argument – the textual references to writings in its judgments – is that the Court has cited writings only a handful of times. Having said that, Helmersen does delve deeply into the argumentative structure of individual opinions with respect to teachings (at 43–156), which is another highlight of this book. It is an engaging study of the culture of individual decisions at the Court, providing insight into what its judges believe to be authoritative (about) scholarship and indirectly helps to show the limits of the concept described by that much-beloved buzzword, 'epistemic authority'. It aids in our understanding of the construction of international legal argument in the no-man's land between the judgment's legal authority (no matter the truth), on the one hand, and the epistemically privileged position of scholarly knowledge production, on the other.

The problem of the two proxies is that both of them are unreliable and that their problems multiply because they are placed in series. The citation proxy is problematic for two reasons. First, even if Court judgments were to cite scholarship, finding out how much weight 'the Court' (the group of people writing a judgment or the collegium of judges voting on it) accords to teachings – that is, how much influence writings have – is not really an exercise in empirical sociology. The only method that might increase our knowledge would probably be a form of experimental group psychology. This is admittedly rather unrealistic for a number of reasons, including the fact that, in contrast to the vast majority of respondents of the type 'man or woman on the street', our subjects are aware, know exactly what effect their response will have, are likely to give a strategic answer or will refuse to cooperate. Imagine conducting the Milgram experiment with subjects who all know its secret.

The second reason why the citation proxy is problematic is a high likelihood of significant under-reporting of influence caused by the counting of citations as opposed to other possible means of measuring the influence of teachings – this is too formalistic an approach. Take, for example, a point that Helmersen mentions briefly: the indirect influence of teachings because they have formed part of a judge's education. It is difficult to overstate just how decisive processes of socialization are for human thinking. My legal training in Vienna, for example, has created almost ineradicable

prejudices when it comes to how I feel all customary law ought to work: *opinio* plus practice makes law, no matter that there are vast disagreements about both elements and about the formula and no matter that legal-theoretical and legal-historical research does not bear it out. This is a feeling that I consciously and continuously have to work against in my scholarship – judges will simply not have the time to do so. A bias of this type is unlikely to be reflected in citations, but background knowledge and legal socialization are foundational for most arguments in the Court, more so than most scholarship that happens to be cited.

The individual opinion proxy is problematic too and for a rather more obvious reason: opinions are not the judgment, they are something categorically different; they have no legal value and they are therefore not correlated to the judgment. They are not an, albeit imperfect, indirect measurement of the influence of teachings on the Court's decision-making, understood as an exercise in group dynamics. As a layperson in experimental psychology, I would estimate that a whole host of factors would probably invalidate any experiments that we could come up with, such as that we cannot know whether an individual judge's opinion is a reaction to the group's decision and, if so, what kind of reaction it is. Also, the psychological state of the individual judge may or may not be correlated to the group, particularly since judgments are drafted by those judges who are not penning individual opinions. It is equally possible – and certain colourful dissenting opinions over the years do suggest this reading – that an opinion (and any citations therein) may have little to do with the judgment itself.

Like any scholarship, we must take and use empirical studies with care. The late James Crawford's master stroke in holding the State Responsibility project back from a codification – not in order to weaken but, rather, to strengthen it – canonized the Articles' every single sentence, phrase and word. We simply no longer discuss which parts reflect the law and which do not, which is a shame because many questions remain but are simply suppressed in the process of canonization. Helmersen's efforts may similarly be too successful, and an iconoclast might argue that, if this knowledge leads to complacency, the question is whether it may not be better to not measure it at all. This problem and others like it may put a question mark on the whole enterprise – measuring and publishing unreal conclusions may have adverse results because we may nonetheless believe that we have gained more than an answer to a narrow and precisely defined research question. One should not misconstrue this as a criticism – neither the complacency nor the abuse mentioned is Helmersen's, who is aware of the limits of the knowledge he has created. But all of us have a responsibility to communicate not just the results of our scholarship but also the limits of that knowledge: we have to tell our audience what we did not say or mean and how our research cannot be used.

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