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CRITICAL REVIEW

SHECAIRA, FÁBIO PERIN (2024). LEGAL SCHOLARSHIP AS A SOURCE OF LAW. SPRINGER. SECOND EDITION. HTTPS://DOI.ORG/10.1007/978-3-031-60369-3 978-1-5266-0518-4

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The book presents a conceptual framework for analysing the application of precedent in civil law and common law systems. The suggested paradigm emphasises the differentiation between legal sources (e.g., precedents) and the legal norms that can be extracted from these sources through legal interpretation. Standard arguments from authority possess the subsequent structure: A asserts p; A possesses authority on such matters; hence, p is valid. Legal practitioners employ such arguments when they base their decisions only on the assertions of lawmakers, judges, professors, expert witnesses, and similar authorities. This paper examines arguments that invoke the authority of scholars, namely 'doctrinal' or 'dogmatic' legal scholars. The reliance on doctrinal authority is a perplexing aspect of legal reasoning. The tripartite distinction of 'source-interpretation-norm' (referred to in the title as the 'source-norm' distinction) elucidates the diverse methods by which historical instances can be cited, interpreted, and applied by the courts of various legal systems. The proposed framework aims to elucidate the function of precedent in legal systems with limited international discourse, while also re-examining the practices of legal systems where the doctrine of precedent is ostensibly well-established and comprehended.

The book substantially enhances the comprehension of legal scholarship's significance as a source of law. The author methodically deconstructs the case using theoretical foundations in Part I, thereafter examining practical consequences in Part II. The transition from fundamental legal sources to intricate analyses of scholarly authority and jurisprudence illustrates advanced academic rigour. The examination of formalism and its connection to legal scholarship is especially significant, as it contests conventional beliefs on the function of academic endeavours in legal reasoning.

The framework advances systematically from theoretical underpinnings to practical applications, with each chapter enhancing prior notions while ensuring consistent references throughout. The organisation of the book embodies a comprehensive scholarly analysis of the function of legal scholarship within legal systems.

This introduction examines the theoretical foundations upon which this study of legal scholarship as a legal source is based. The fundamental intellectual apparatus employed in discussing sources of law broadly and legal scholarship specifically is a Hartian conceptual framework. The author does not approve every particular aspect of H. L. A. Hart's jurisprudence but supports the fundamental principles of Hart's legal positivism.

A Hartian perspective, assumed in this book, entails a conceptual link between legal sources and what Hart referred to as "content-independent" grounds for action. Chapters 2 and 3 elaborates on these elliptical statements, clarifying the concept of a criterion of legal validity and its relationship to the notion of a source of law, while also offering a comprehensive explanation of the sometimes misconstrued concept of content-independence.

The judicial application of legal scholarship is among the most complex and ambiguous facets of judicial reasoning. Generating a credible explanation of this phenomena through a Hartian conceptual framework could effectively demonstrate the framework's explanatory capacity. Considering the current impasse in the discourse between Hartians and their non-positivist adversaries, it may be beneficial to use an arguing approach that, while not innovative, has not been employed as frequently or as methodically as warranted. The author contends that the assertion of analogous practices among these many courts may lead the reader to perceive a preference for a simplistic functionalist perspective on comparative law. Nevertheless, the author concedes that the majority of jurists possess differing views regarding the influence of legal scholarship on judicial decision-making. The author expresses concern that an overemphasis on doctrinal distinctions among jurisdictions may hide functional similarities. Decisions from their courts of appeal are often given significant deference by subordinate courts, notwithstanding the formal rejection of stare decisis. The doctrinal distinction is crucial, as precedent frequently serves analogous functions in the thinking of common law and civil law courts.

In a comparative analysis of judicial reliance on legal scholarship undertaken in chapter 4, the author contends that in many jurisdictions, courts regard legal scholarship as a source of content-independent justifications for action. Nonetheless, that chapter has minimal discourse on doctrinal discrepancies, as such variations are likely to cause confusion to the reader. The primary role of legal theorists, which underpins their significant impact on the evolution of law in Continental European nations, has consistently been to offer direction for the administration of justice. In nations within the "common law" sphere, where legal scholarship holds minimal significance, the role of offering guidance for judicial determinations is infrequently realised, and legal authors and academics typically confine themselves to delineating and organising the established statutory and case law. Historically, England distinguished itself from other jurisdictions by adhering to a rule that prohibited the citation of live authors. Even during the convention's enforcement, certain prominent living writers' opinions appeared to

influence court thinking in a manner scarcely dissimilar from the impact of academic opinions in nations where jurists are explicitly acknowledged as sources of law.

Chapter 5 contests the presumption that judges' inclination to utilise legal knowledge varies based on their willingness to limit their discretionary powers. The exact relationship between the absence of judicial reliance on legal scholarship and the desire to eliminate personal judgement necessitates an examination of the complex interrelations among the utilisation of research, substantive argumentation, and discretionary authority.

Chapter 6 examines normative enquiries on the appropriate circumstances and methods for judges to utilise legal literature. The author offers broad observations on errors to be avoided by individuals exploring normative enquiries, specifically advising that judges in democratic nations should engage with legal scholarship transparently. The assertion that they might neglect to do so is exemplified by two rulings rendered by the Supreme Court of Canada.

In conclusion, Chapter 7 encapsulates the content of Chapters 1-6 and responds to criticisms posed against the characterisation of legal research as a source of law. These criticisms are based on a fundamental error: conflating general issues regarding sources of law with specific challenges pertaining to the concept of legal research as a source of law.

Part II comprises five supplementary chapters that enhance and elaborate on the narrative presented in Part I, corresponding to the chapters in Part I. Chapter 8 offers further justification for differentiating between sources of law and legal norms, whilst Chapter 9 elaborates on key concepts by elucidating the circumstances and mechanisms through which legal research serves as a practical authority in judicial reasoning. Chapter 10 ascends the hierarchy of abstraction by examining the interplay between legal theory and conventional legal studies, positing that modern legal theory might gain from a more intimate engagement with traditional legal scholarship. Chapter 11 synthesises and consolidates the principal concepts from Chapters 8-10 for enhanced clarity.

The book's approach for the source-interpretation-norm distinction may overly simplify the complexity and variability of precedent application in practice. Various courts, even within the same jurisdiction, may apply precedents with differing levels of rigidity, a matter that is inadequately addressed. Secondly, the book predominantly embraces a formalist viewpoint on legal reasoning, potentially marginalising critical legal theories or alternative techniques, such feminist legal theory, postcolonial studies, or critical race theory. These viewpoints may enhance the analysis's depth. Third, while the book endeavours to reconcile common law and civil law traditions, its examination of the interplay between two systems is somewhat superficial. An in-depth examination of the cross-pollination of ideas across these traditions could augment their significance for comparative legal studies.

Notwithstanding these constraints, the book is a significant contribution to legal study by offering a systematic framework for comprehending the function of precedents and doctrinal knowledge in legal reasoning. Mitigating these constraints could augment the book's scholarly and practical value.

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