Devika Hovell


When economists (or social scientists more broadly speaking) build models, it is often with a view to predicting what people will do. Thus, economists may claim that on the basis of a number of presumptions (people are rational beings, out to maximize their profit), a rise in oil prices will lead to X, Y or Z. This can be a useful way of helping to predict what will happen, although problems may occur when it is forgotten that there are presumptions involved or, even worse, when it is forgotten that those presumptions are actually just presumptions and instead come to be seen as God-given truths.

When legal scholars make models, by contrast, it is rarely with a view to predicting things. Indeed, such would be somewhat redundant, as many legal rules themselves are supposed to have the required predictive force: enactment of a new rule saying ‘thou shalt not X’ is expected to lead to a decline of X; otherwise its enactment would have been pointless. Classically trained legal sociologists might beg to differ, and there is room for the argument that some rules serve a political rather than instrumental rationality and are thus never expected to have any real-world effects, but by and large, there is little reason for legal scholars to engage in modeling of the predictive kind.

Hence, when legal scholars build models, it is usually with a view to impose some order on a chaotic field of study, and thereby often cast the behaviour of other scholars rather than subjects into models. Typically, the legal scholar will single out different approaches to a topic, and will aim to flesh out of what differences between the various approaches consist, which authors represent which approach and, sometimes, what the various models entail in terms of real life consequences: what are the background assumptions underlying the various models distinguished, and if consistently applied, will they achieve what they aim for.

If done properly, the resulting analysis can be very powerful. Possibly the best example is the ‘cool structuralism’ of Martti Koskenniemi’s *From Apology to Utopia*: grouping international legal scholarship into two basic categories, mutually exclusive, with further refinement in the form of each basic category being divided into two.¹ The result: a matrix of four distinct approaches to international law, with limited overlap or rather, where overlap occurs between

¹ See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument. Reissue with new Epilogue* (Cambridge University Press, 2005 [1989]). The term ‘cool structuralism’ is Koskenniemi’s, at 617.
classifications, this is itself explicable on theoretical grounds: the need for all legal argument to embrace both apologetics and utopianism, and to do so at the same time.

The point to note, though, is twofold. First, Koskenniemi’s model became so compelling because it reflected an underlying theory rather than the other way around: he did not build a theory on the basis of random observations about the writings of Alvarez or Morgenthau, MacDougal or Schwarzenberger, but created his categories on the basis of an underlying theory. Second, his model acquired such power precisely because the various positions could meaningfully be cast as mutually exclusive and because his model was deemed to be exhaustive on theoretical grounds: he had little problem squeezing Alvarez into one category, and Schwarzenberger into another, without having to worry much about whether Alvarez would not actually also fit properly into the box holding Schwarzenberger. Likewise, he had little problem wondering whether there should be additional categories: his four categories were deemed, on theoretical grounds, to exhaust the universe. And that is not because the scholars he discussed were so consistent in their writings, but precisely because his model reflected a compelling underlying theory: the model served as an illustration of something that could and would have been compelling also without the illustration.

Devika Hovell’s recent study *The Power of Process* also develops a few models, but does so neither in the economist’s sense discussed above, nor quite as the reflection of a strong underlying theory. In her case, the models are supposed to be mostly descriptive, though not innocently so: they also contain, inevitably perhaps, an element of prescription. Hovell, a lecturer at the London School of Economics, observes that discussions among international lawyers on controlling the imposition of targeted sanctions by the Security Council tend to come in three forms. Some people feel that there ought to be an international tribunal to evaluate the lawfulness of sanctions; some feel that domestic courts should play an overseeing role; and some feel that matters are best left to some extra-judicial kind of scrutiny.

It so happens, she suggests in this revised version of her doctoral thesis prepared at Oxford, that these three strands in the international legal literature coincide neatly with three well-established public law models on due process. She refers to these as, respectively, the instrumentalist model, the dignitarian model, and the public interest model, and much of the book is an attempt to make clear that since due process is (and should be) contextual, some models are better geared to some situations than others. With respect to Security Council sanctions, she claims, and justifiably so, that the public interest model is superior to the other two, largely because it is far better equipped to