

Legal methods in international law

Kjetil Mujezinovic Larsen

POLICY-ORIENTED JURISPRUDENCE (the New Haven School)

Key characteristics

FEMINIST JURISPRUDENCE

Key characteristics

CRITICAL LEGAL STUDIES

A movement, more than a method

Key characteristics

LAW AND ECONOMICS

Key characteristics

INTERNATIONAL LEGAL PROCESS

Key characteristics

INTERNATIONAL LEGAL POSITIVISM

Key characteristics

Methods (subsequent practice)

INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

Key characteristics

Purpose of this lecture

- Course learning outcome: This course has a dual objective: (a) assisting you in further refining your own thesis project, (b) provide good understanding of methodological issues
- Introduce available methods for analyzing questions under international human rights law

"There is a human right to the internet. Discuss the arguments for and against and any issues and obligations in formulating such a right."

Consider how this question could be addressed using the international law method that you have been assigned with.

- The methods are:
- international legal positivism
 - New Haven School (policy-oriented jurisprudence)
 - international legal process
 - critical legal studies
 - international law and international relations
 - feminist jurisprudence
 - law and economics

An idea table: The varying meanings of 'the word' method

- Legal 'method' as a descriptive/empirical concept or approach
- 'Method' as a normative tool which seeks to engage in the development of their international legal thought in the global international legal community. The way the problem is 'solved' in the international community.
- 'Method' as a 'technique' of analysis

- Five issues for comparison:
- The nature of international law
 - Who are the decision-makers?
 - Law like vs. law for ends
 - Prescriptive processes
 - Comparative advantages

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An interlude: The many meanings of the word "method"

- Legal "method" as doctrinal/empirical/comparative methods
- "Method" in international law often refers simply to rules and principles of treaty interpretation
- Now: "Method" as the application of an abstract legal theory to the concrete problems faced in the international community
- Should we call it a "framework of analysis"?

INTERNATIONAL LEGAL POSITIVISM

Key characteristics

- Law as it is, backed up by effective sanctions, with reference to formal criteria independently of moral or ethical considerations
- Focus on state voluntarism (the will of states)
- Separation of the law in force from non-legal factors
- Clear distinction between *lex lata* and *lex ferenda*

Modern ("enlightened") positivism

- Still a distinction between the "ought" and the "is", but moral considerations form a part of the "is"
- Greater place for custom

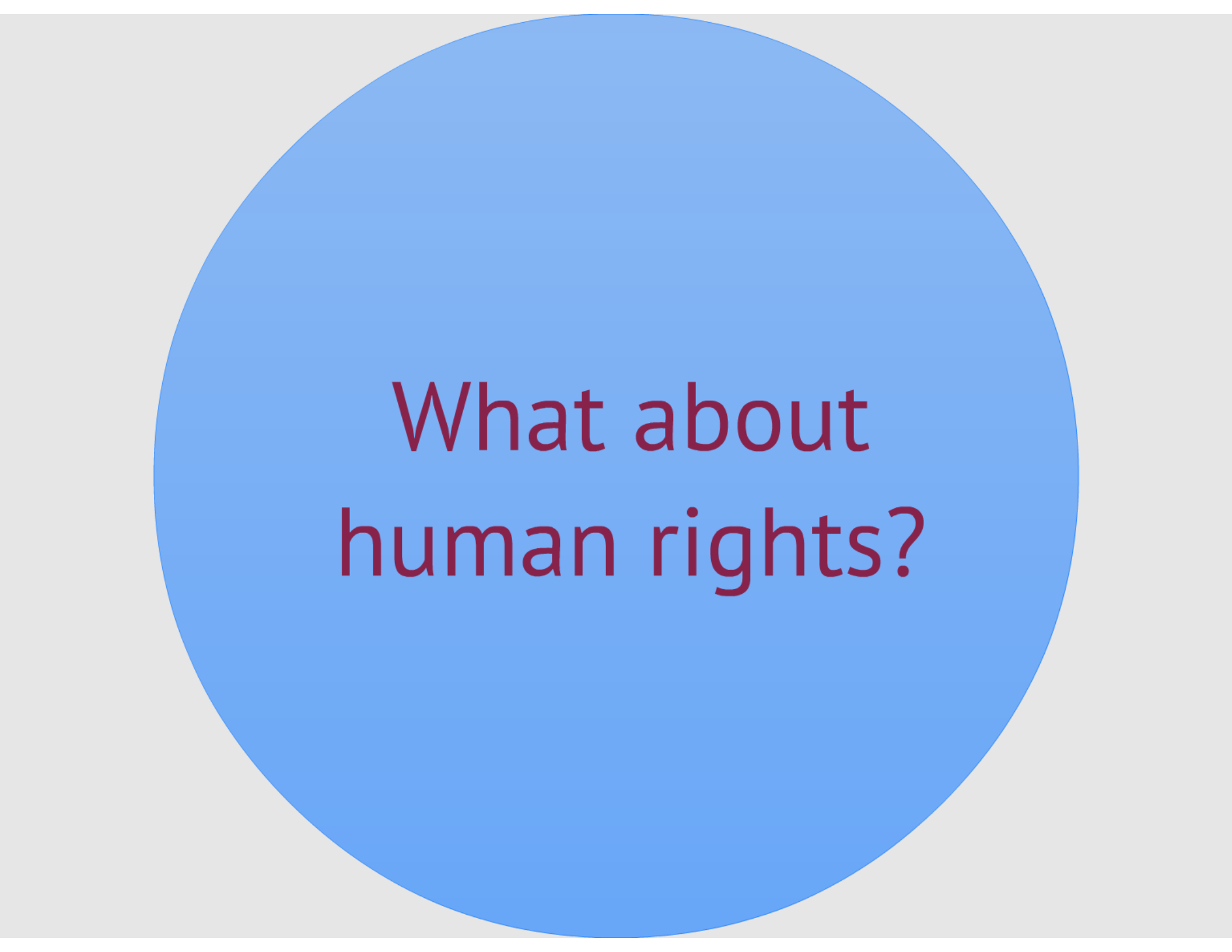
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Inadequate, old-fashioned,
inaccurate, does not reflect
the reality of how law is
made, applied and changed,
fixated on the past...

Modern ("enlightened") positivism

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What about
human rights?

Access to internet
as a human right

POLICY-ORIENTED JURISPRUDENCE (the New Haven School)

Key characteristics

- International law is a process of decision-making by which members of the world community seek to clarify and secure their common interests
- Emphasis on what actors do and on what they say
- Law is an ongoing process - rules require human behaviour in order to be implemented
- The correct answer to a legal question cannot be objectively identified from the existing rules; a range of policy factors must be taken into consideration

Interests = values

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Interests = values

- Eight categories of values:
- power
 - enlightenment
 - wealth
 - well-being
 - skill
 - affection
 - respect
 - rectitude

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INTERNATIONAL LEGAL PROCESS

Key characteristics

- The key issue in international law is how law is used to constrain decision-makers and affect the course of international affairs
- A response to realism in international relations
- How are international rules actually used by the makers of foreign policy?

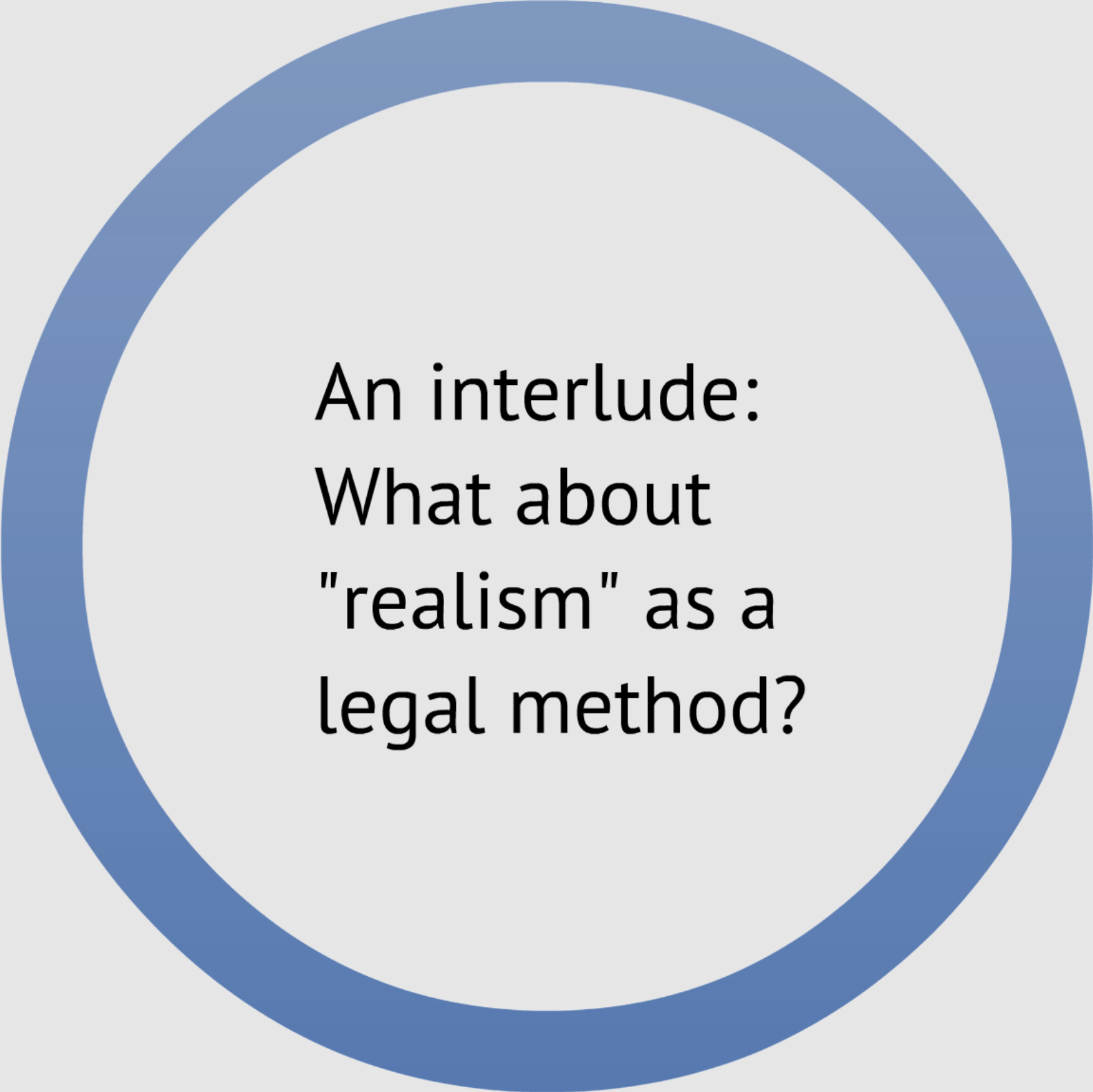
Four key questions



Learn more about the structure of the international legal system, how it is created, and how it is used.

Key characteristics

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An interlude:
What about
"realism" as a
legal method?

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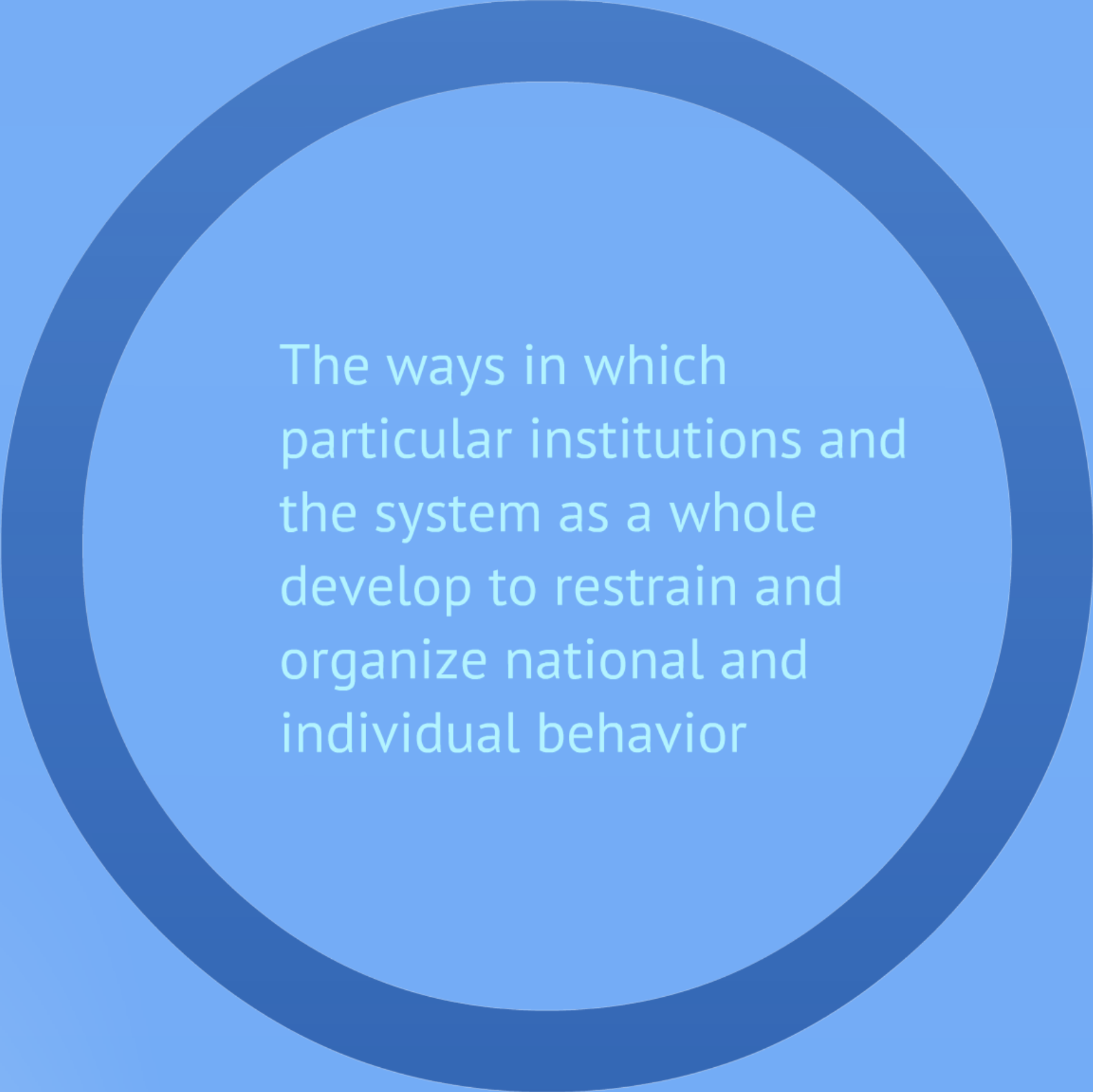




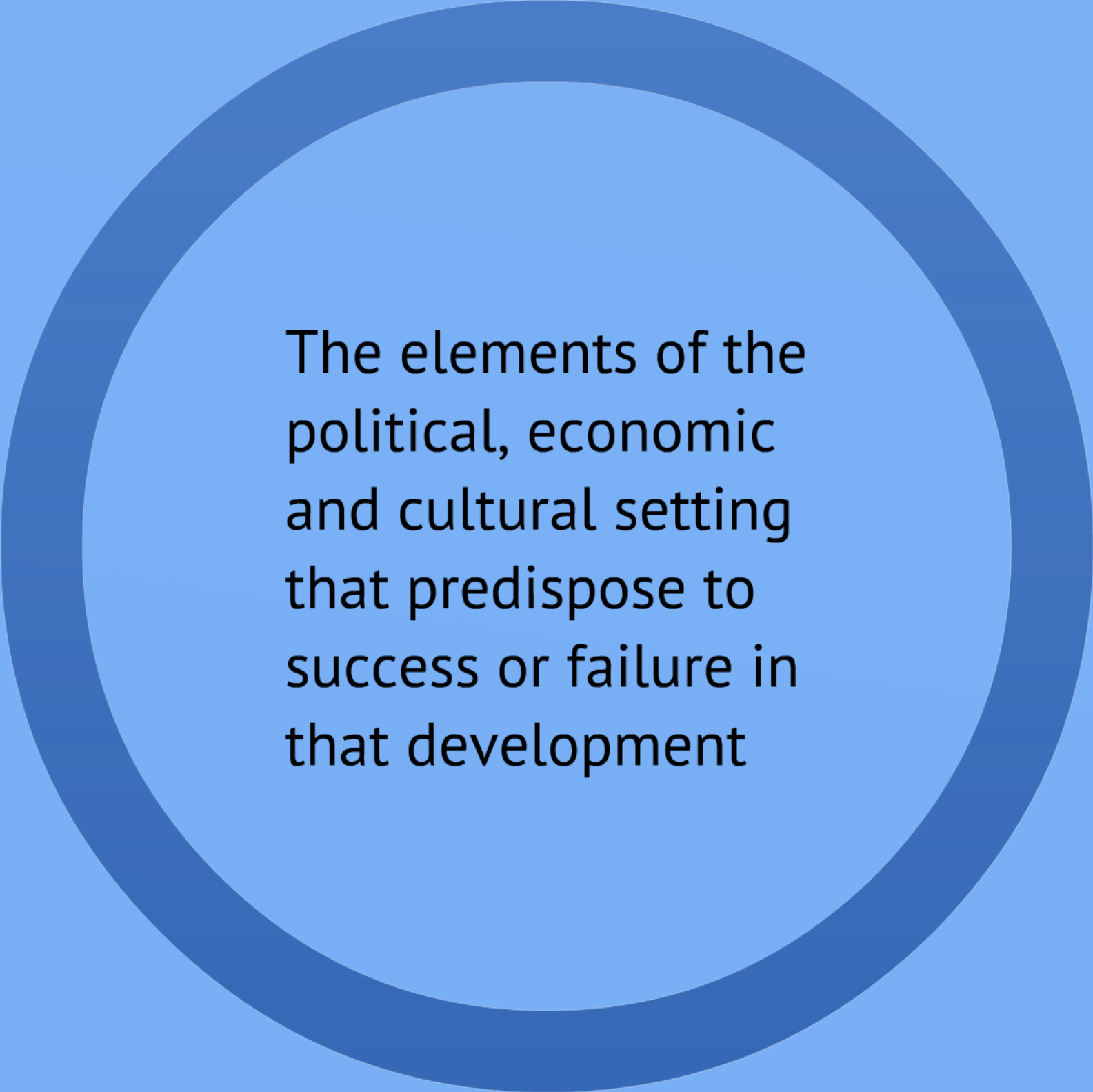
The allocation of
decision-making
competence in
international affairs



The reasons why a particular regulatory arrangement is adopted for a particular subject-matter area



The ways in which
particular institutions and
the system as a whole
develop to restrain and
organize national and
individual behavior



The elements of the
political, economic
and cultural setting
that predispose to
success or failure in
that development

Law may not be decisive in international relations, but it is usually important

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CRITICAL LEGAL STUDIES

Key characteristics

- Not a focus on what law is, or to what extent law is relevant to policy
- Focus on the contradictions, hypocrisies and failings of the international legal discourse
- Language is important
- Law is indeterminate
- Close relationship with the deconstruction movement
- Questions law's central assumptions

A movement, more than a method

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INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

Key characteristics

- Applying international relations theory to international norms, procedures and institutions
- IR seeks to explain political behavior, and law is politics
- Legal rules and institutions are phenomena that need to be explained
- But may not offer solutions to specific legal questions?

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FEMINIST JURISPRUDENCE

Women in international law are ordinary victims - often mothers in need of protection

Key characteristics

- Seeks to examine how legal norms and processes reflect the domination of men, and to reexamine and reform these norms and processes so as to take account of women
- A focus on women's rights, but a method generally applicable to international law
- An advocacy method?

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LAW AND ECONOMICS

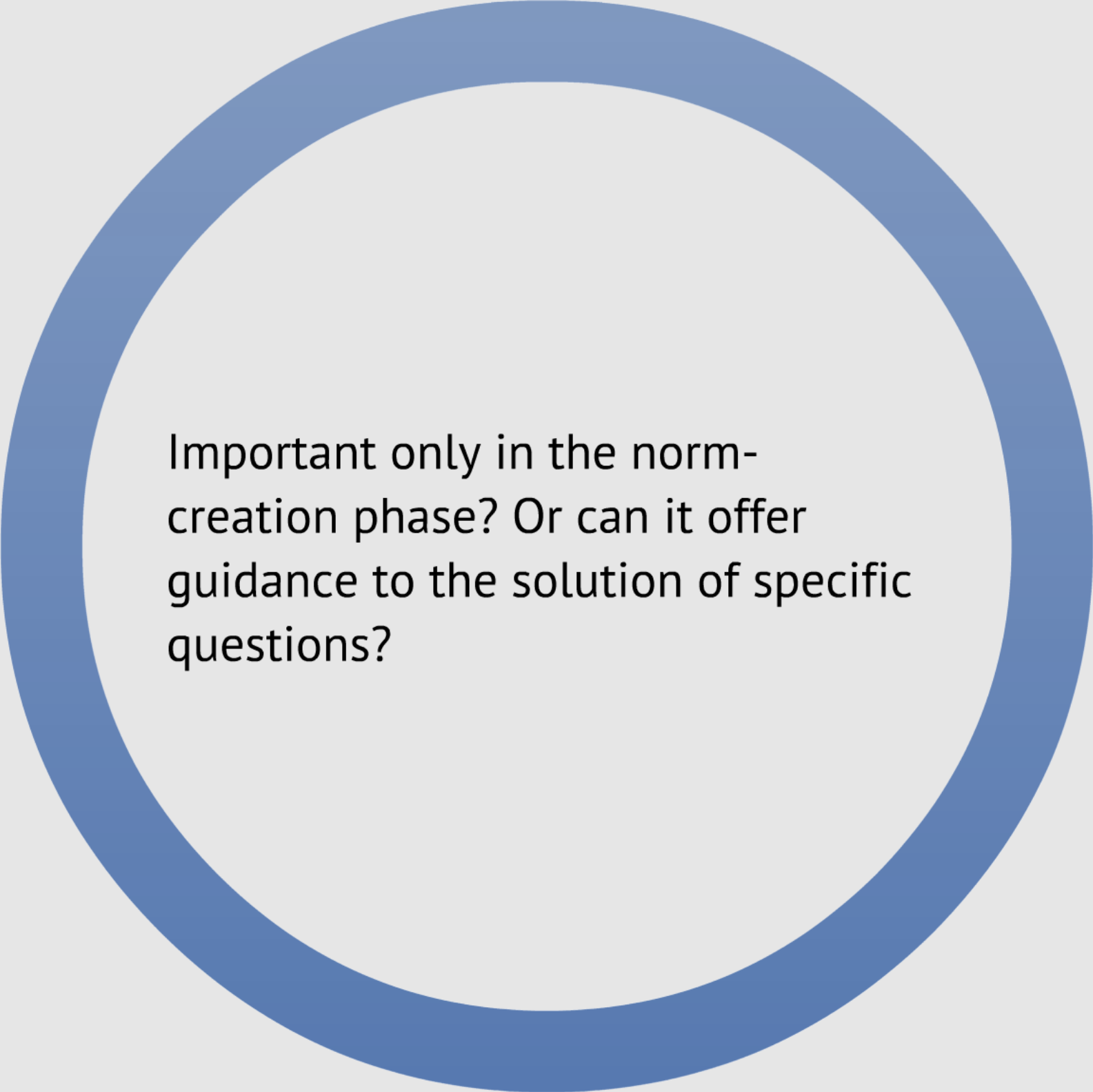
Key characteristics

- A descriptive component: Seeks to explain existing rules as reflecting the most economically efficient outcome
- A normative component: Evaluates proposed changes in the law and urges adoption of those that maximize wealth
- A focus on the *lex ferenda*

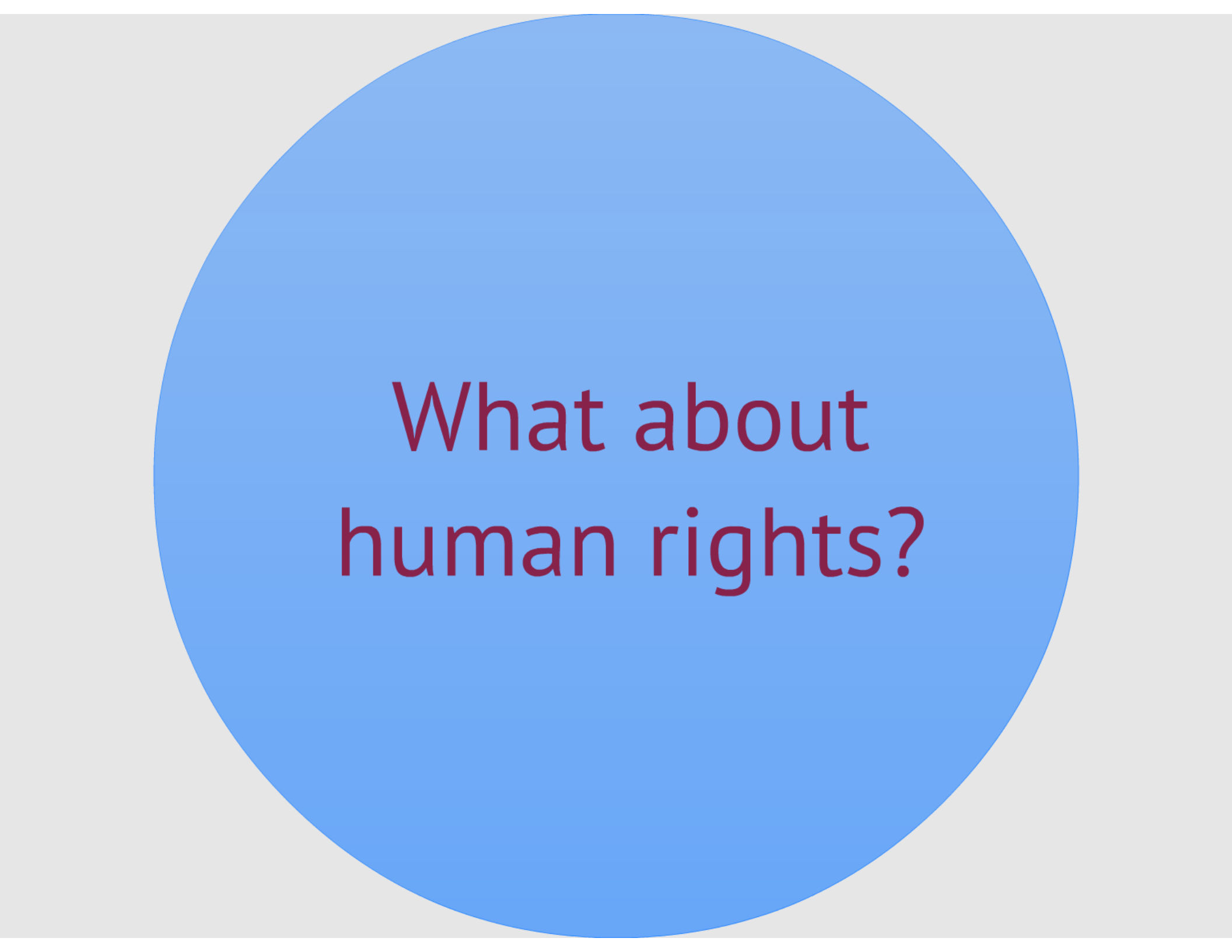
Important only in the norm-creation phase? Or can it offer guidance to the solution of specific questions?

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A large blue triangle is centered on a light gray background. Inside the triangle, the text "The best of luck in developing your thesis projects!" is written in white, sans-serif font, centered both horizontally and vertically.

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