Research Methods in Law

Second Edition

Edited by
Dawn Watkins and
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Explaining in clear terms some of the main methodological approaches to legal research, the chapters in this edited collection are written by specialists in their fields, researching in a variety of jurisdictions.

Covering a range of topics from Feminist Approaches to Law and Economics, each contributor addresses the topic of 'lay decision-makers in the legal system' from their particular methodological perspective, explaining how they would approach the issue and discussing the suitability of their particular method. This focus on one main topic allows the reader to draw comparisons between methods with relative ease.

The broad range of contributors makes *Research Methods in Law* well suited to an international audience, and it is ideal reading for PhD students in law, undergraduate dissertation students in law, LL.M research students and early year researchers.

Dawn Watkins is an Associate Professor of Law at the University of Leicester.

Mandy Burton is Professor of Socio-Legal Studies at the University of Leicester.

Notes on contributors

Anthony Bradney is Professor of Law at Keele University. His research ranges over a wide area, including law and popular culture, the legal profession, university legal education and religion and law. He has published extensively, including *Conversations, Choices and Chances: The Liberal Law School in the Twenty First Century* (Hart, 2003) and *Law and Faith in a Sceptical Age* (Routledge/GlassHouse Press, 2009). He is a Fellow of the Academy of Social Sciences and of the Royal Society of Arts, a former Vice Chair of the Socio-Legal Studies Association and a member of the Advisory Editorial Board of the *Journal of Law and Society*.

Mandy Burton is a Professor of Socio-Legal Studies at the University of Leicester. Her research interests are in criminal justice, family law and socio-legal studies, with a particular focus on legal responses to domestic violence. She has carried out numerous empirical research projects, many of them commissioned by UK Government departments. She teaches criminal law and justice to undergraduates and socio-legal research methods to postgraduate students.

Steven Cammiss is a Senior Lecturer in Law at the University of Leicester. He has a long-standing interest in law and language, with a particular focus on language use in interaction in legal settings. His PhD utilised narrative analysis to examine narrative production in the courtroom within the mode of trial hearing. A recent project (with Colin Manchester of the University of Warwick) adopted a socio-linguistic and ethnomethodological approach to explore the language of complaining in a legal setting (objecting to a licensing application).

Fiona Cownie is Professor of Law and Pro Vice Chancellor (Education & Student Experience) at Keele University. A former Vice Chair of the Socio-Legal Studies Association, she is a Fellow of the Academy of Social Sciences and of the Royal Society of Arts. She has published widely in her specialist field of legal education, including *Legal Academics: Culture and Identities*

(Hart, 2004) and (with Ray Cocks), *'A Great and Noble Occupation!' The History of the Society of Legal Scholars* (Hart, 2009).

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Dawn Watkins is an Associate Professor at the University of Leicester. Her research interests are in law and humanities and legal education; particularly public legal education. She has recently completed an ESRC-funded research project using digital gaming as a research tool to assess children's legal understanding (see http://www.le.ac.uk/licl). She teaches on undergraduate law courses and has been involved in the design and delivery of training programmes for postgraduate research students, as well as supervising students through to the successful completion of their PhDs. She was awarded a university distinguished teaching fellowship in 2012 and was shortlisted for the Law Teacher of the Year Award 2013.

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Contents

Introduction

Dawn Watkins and Mandy Burton

Our motivation for publishing the first edition of this book came primarily from our experiences of supervising PhD candidates and from being involved in the design and delivery of training sessions for postgraduate research students. Our aim was to provide an overview of some of the many methods that constitute legal research; so as to assist postgraduate research students and early career researchers in gaining not only an understanding of each of the methods discussed, but, more importantly, to gain an understanding of the inter-relationship between these methods and the advantages and disadvantages of relying on one method in preference to another, or on a particular combination of methods, in the pursuit of any given research question. In short, our intention has been to give readers an idea of the vast array of possibilities that are open to them in the planning, development and pursuit of any research project in law. We are therefore delighted to have extended this edition to include three further chapters covering law and anthropology, law and economics and feminist approaches to legal research.

We envisage that readers will benefit most from reading the book as a whole and, in order to facilitate this holistic approach, we have asked all of our contributors to focus on just one research topic.[1] There were, of course, a host of possible topics, but we opted for 'lay decision-making in the legal system' as it offered sufficient opportunity for consideration across a variety of disciplines and jurisdictions. Contributors have drawn on their own work and upon the work of others in order to provide examples of research carried out via a particular method, or combination of methods, within this single topic.

On method and methodology

The terms 'method' and 'methodology' are used frequently in the context of legal research. They are sometimes used interchangeably to mean the same

1 As stated in our Acknowledgements, credit must be given to Tracey Varnava for this 'one topic' idea, which is a distinguishing feature of this book.

thing, but they are often used also to mean slightly different things. In the current context, we are concerned with method as an approach to the practice of legal research: 'what you *actually do* to enhance your knowledge, test your thesis, or answer your research question'.[2] The term 'methodology' can also be used in this way; most commonly to refer collectively to a group of chosen methods. By contrast, however, the term 'methodology' can also be employed to refer more critically to 'the study of the direction and implications of empirical research, or of the suitability of the techniques employed in it'.[3] In this sense, it refers to the thinking that takes place *about* methods; or the thinking that takes place *outside* of the practical aspects of a research project and which determines its design. Cryer et al. explain this as follows:

> Every legal research project begins from a theoretical basis or bases, whether such bases are articulated or not. The theoretical basis of a project will inform how law is conceptualised in the project, which in turn will determine what kinds of research questions are deemed meaningful or useful, what data is examined and how it is analysed (the method). Often these are arrived at unconsciously . . . We believe, however, that it is better to be open about the bases of research and to think about them than to leave them unaddressed and uncritically accepted . . . For us, methodology has theoretical connotations. Moreover, methodology is closely related to what we understand the field of enquiry . . . to be. Methodology guides our thinking or questioning of, or within, that field or both.[4]

For this reason, readers of this text will discover that an appreciation and understanding of methodology, as it is defined here, is an essential precursor to the pursuit of legal research of any kind. Whether or not the researcher is aware of it, her 'world view' will influence every aspect of her research, not least her choice of method.

Readers will discover that the approaches of our contributors tend to vary in their use of the terms 'method' and 'methodology'. Nevertheless, all of them agree that establishing an appropriate theoretical basis for a research project is as important as determining the appropriate method(s) for carrying out the research. Handler, for example, warns against projecting our modern conceptions of law onto the past when carrying out research in legal history. Instead, he argues, 'the task is to understand and perceive the limitations on

2 Cryer, R., T. Hervey and B. Sokhi-Bulley, *Research Methodologies in EU and International Law*, Oxford: Hart, 2011, 5 (emphasis in the original).

3 This is a standard *Oxford English Dictionary* definition.

4 Cryer et al., *Research Methodologies in EU and International Law*, 5.

what could be asked then in order to grasp the questions that can be asked now'.[5] Cownie and Bradney note that socio-legal empirical scholars have been accused of producing poorly theorised or methodologically weak work and they remind us that 'choosing the appropriate theoretical approach and the method of investigation is just as important for the socio-legal researcher as all the other aspects of socio-legal research'.[6] This is a theme which is taken up by Burton in her chapter on empirical studies, where she states that 'developing and testing research theory is a significant part of the empirical research process . . . The kind of research done will depend to an extent on the theory underpinning it.'[7] Taking this one stage further, Samuel seeks to demonstrate that it is neither possible nor appropriate to draw a distinction between 'method' and 'perspective' in the field of comparative law. He states: 'method is in fact central to comparative law but . . . in understanding what is meant by "method" in this domain one must have a commitment both to theory and to interdisciplinarity'.[8] He then goes on to demonstrate this with considerable expertise in his comparison of the institution of the jury in English and French law. In our experience, it is not uncommon to read a proposal from a prospective PhD student that states an intention to compare the law or practice of one country with the 'equivalent' law or practice of another. Comparing the law or legal systems of two different countries is not, in itself, a method of legal research. As Samuel explains, the researcher must avoid 'the great danger of legal imperialism' that assumes that the 'other' shares the same understanding of a given term; even 'law' itself. There is a great deal more expected of the comparative lawyer than an abstract analysis of the respective functions of two similar laws in two different countries. The researcher must appreciate that the law operates within the distinctive legal culture of each jurisdiction, a culture that the researcher will need to fully engage with in the course of her project. The researcher must ask herself not only *what* she wishes to compare, but *how* and *why* she wishes to draw comparisons.

Knowing your field and justifying your approach

As well as providing discrete examples of research on the topic of lay decision-making in the legal system, all of our contributors have provided readers with

5 See Chapter 5, p. 106

6 See Chapter 2, p. 46 Cownie and Bradney provide two interesting examples of the development of theory in socio-legal research: Layard's study of planning and the social production of space, and Bradney's study of the *Buffy the Vampire Slayer* series.

7 See Chapter 3, p. 68.

8 See Chapter 6, p. 123.

an overview of their particular method or approach to legal research, and it is our hope that readers who are in the early stages of planning a research project can draw on this more general information to 'situate' their research within an appropriate field.[9] This is not to say that an academic discussion must take place within any pre-established confines; indeed, Cammiss and Watkins argue that (in the field of law and humanities at least) 'the possibilities for research are not only endless, but boundless'.[10] Readers will also observe that although our contributors' discussions of the various research methods are presented in discrete chapters, these methods are not always clearly defined and they are seldom exclusive. Cownie and Bradney, for example, highlight the lack of consensus as to what constitutes 'socio-legal' research. The term is used to cover a variety of different approaches, including critical legal studies and empirical research, both of which have distinct chapters in this book. As Cownie's research has shown, 'socio-legal' is an inclusive label that many academics working in law schools would now apply to themselves, yet they might also fall easily into a number of other descriptive categories. One example of research that Cownie and Bradney refer to is Cane's non-empirical, historical/comparative approach to studying tribunals. This research identified different models of administrative adjudication in different jurisdictions and across different times, revealing, inter alia, the changing attitudes to lay participation in the United Kingdom. In this book, we have separate chapters on legal history and comparative approaches. Nevertheless, scholars adopting these methodological approaches might claim the label 'socio-legal' just as easily as their empiricist colleagues. So when we speak of 'situating' research, we refer primarily to the view that in the early stages of any research project, the researcher must seek to ensure that she familiarises herself with the relevant literature, so as to enter into an academic debate on level terms. In other words, as Minkkinen states, in order to argue successfully for a departure from tradition, the researcher must first engage with a critical dialogue within that tradition.

9 Allied to this is the need to recognise the distinction between 'curiosity-driven' research and policy-driven, government-funded research, where the agenda is at least partly set by the funder and with possible limitations on publication. There are particular lessons to be learnt from this – for example, relating to the potential limitations on academic freedom, although as Cownie and Bradney observe, this was not particularly evident in the study of tribunals which they include in their chapter. Nevertheless, it is a theme returned to by Burton in her chapter and one of which early career researchers embarking down a path of government-funded research should be mindful.

10 See Chapter 4, p. 98.

Importantly, we seek to emphasise that a decision to pursue research via a 'traditional' doctrinal research method still requires explanation and justification. In the opening chapter to this book, Hutchinson sets out a comprehensive explanation of this method and while she concedes that the view will be criticised, Hutchinson contends that doctrinal research 'still necessarily forms the basis for most, if not all, legal research projects'.[11] Readers will note that this is a claim that is countered immediately and explicitly by Cownie and Bradney, whose subtitle to the second chapter of this book is 'A challenge to the doctrinal approach'. Later, Cammiss and Watkins explain that a significant feature of research in law and humanities has been its capacity to challenge the traditional approach to legal research that Hutchinson appears to defend. Are Hutchinson's claims for doctrinal supremacy, then, unfounded? Before concluding whether or not this is the case, it is necessary to acknowledge the differences in the perspectives of our contributors. Hutchinson writes from the perspective of researching and teaching law in Australia, and from her experience as a full-time member of the Queensland Law Reform Commission. And when she speaks of legal research, Hutchinson has in mind not only academic legal research, but also the research carried out by legal practitioners. By contrast, the focus of Cownie and Bradney's discussion is upon English legal scholarship, carried out within the academic community. Cammiss and Watkins, too, refer to academic research, but mainly in the context of English and American scholarship. This does not mean that it is impossible to challenge Hutchinson's claims. But it does demonstrate that care must be taken when we seek to engage in any debate about the claims of a fellow researcher.

Sanchez-Graells concedes that doctrinal legal research has a place in ensuring that researchers' analyses 'are technically sound from a legal perspective', yet he calls for legal scholars to broaden their views and to consider such analyses in context. In particular, Sanchez-Graells contends that:

> . . . carrying out legal research without assessing its economic implications and without incorporating the insights of economic theory is ultimately unsatisfactory, just as it is equally faulty not to incorporate the insights derived from political science and other social sciences such as sociology or anthropology, or even beyond, from evolutionary theory and psychology.[12]

Clearly, and as Sanchez-Graells concedes, this is just one view and his firm adherence to economically informed legal research is itself countered by other contributors.

11 See Chapter 1, p. 10.
12 Chapter 8, p. 173.

Interestingly, Minkkinen does not focus his attention on disputing the claims made by his positivist counterparts. Rather, in the most subversive of all our chapters, Minkkinen turns his attention to his own 'tradition', arguing that:

> . . . all legal methods, be they conventional or allegedly 'critical', impose limitations into the ways in which the researcher produces legal knowledge . . . A 'critical legal method', if there is such a thing, would, then, be no different. Textbooks in the area are cluttered with the nomenclature of acceptable frameworks for critical 'methods', and in its insistence on complying with them, critical legal research can often be just as orthodox in its approach as its more conformist cousins.[13]

Consequently, Minkkinen rejects the notion of there being a 'critical legal method' and argues instead that 'a "critical" perspective to law can only be more like an "attitude" than a scientifically motivated methodic approach'.[14]

While she cautions us that 'there is no such thing as a unified feminist jurisprudence, nor a universally shared feminist legal method', Munro explains that attending to law *in context* has been 'a prominent theme' in this field of scholarship. Drawing on case studies on lay decision-making in jury trials and asylum cases, Munro demonstrates that legal decision-makers do not apply legal rules neutrally; and how unequal gender power relations can influence how the law operates in these and other areas. She alerts the researcher, too, to the fact that the way in which empirical work is carried out, the chosen methods and the practicalities of the research, may either enable or inhibit the voices of women being heard. Both the jury and asylum studies described by Munro stem from her own empirical work with others and she demonstrates how a feminist approach can influence both the choice of empirical methods and the interpretation of empirical findings.

Finally, in the closing chapter of the book, Anthony Good's explanation of legal pluralism and 'lay' decision-making (discussed within the broader context of law and anthropology) calls us to take a step even further beyond the discussions of legal research that we have encountered in previous chapters. Through his comprehensive and critical account of legal pluralism, Good requires us to question our hitherto unquestioned assumptions about what constitutes 'the law' and, consequently, to reconsider even the apparently non-controversial distinction between legal and lay decision-making that we make

13 See Chapter 7.
14 *Ibid.*

in this book. And so, for researchers who are planning to conduct legal research from *any* perspective, Good's analysis represents an irresistible invitation to question, interrogate and challenge the assumptions upon which their research is based.

In conclusion, the aim of legal research is to contribute to the body of knowledge in a given field and our hope is that the critical explanation of legal research methods provided by this book, when combined with an appropriate theoretical approach, will equip the reader to do so more effectively.