Methodologies of Legal Research

Which Kind of Method for What Kind of Discipline?

Edited by Mark Van Hoecke

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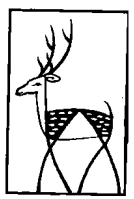

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METHODOLOGIES OF LEGAL RESEARCH

Until quite recently questions about methodology in legal research have been largely confined to understanding the role of doctrinal research as a scholarly discipline. In turn this has involved asking questions not only about coverage but, fundamentally, questions about the identity of the discipline. Is it (mainly) descriptive, hermeneutical, or normative? Should it also be explanatory? Legal scholarship has been torn between, on the one hand, grasping the expanding reality of law and its context, and, on the other, reducing this complex whole to manageable proportions. The purely internal analysis of a legal system, isolated from any societal context, remains an option, and is still seen in the approach of the French academy, but as law aims at ordering society and influencing human behaviour, this approach is felt by many scholars to be insufficient.

Consequently many attempts have been made to conceive legal research differently. Social scientific and comparative approaches have proven fruitful. However, does the introduction of other approaches leave merely a residue of 'legal doctrine', to which pockets of social sciences can be added, or should legal doctrine be merged with the social sciences? What would such a broad interdisciplinary field look like and what would its methods be? This book is an attempt to answer some of these questions.

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Preface

In order to develop a suitable methodology of comparative law, one needs a better view on the methodology of legal scholarship within domestic legal systems. Also, within the context of the current debate on the scientific status of legal scholarship, the question arises as to what kind of discipline legal doctrine is (or should be) and which kind of scientific methodology is most appropriate for what kind of legal research. Here, we are faced with diverging traditions of legal scholarship (eg United Kingdom versus Continental Europe) and diverging underlying theories of 'legal science' in the course of history: a 'positive moral science' (natural law tradition), a discipline aiming at discovering the will of the (historical) legislator (exegetic school), an interdisciplinary discipline (law in context), a social science (legal scholarship as an empirical discipline), a conceptual structure (Begriffsjurisprudenz), a normative 'imputation discipline', clearly distinguishing 'is' and 'ought' (Kelsen), etc. All this could lead to the following questions:

In general:

(a) linking specific approaches and specific methods, on the basis of the various types of research and other distinctions mentioned hereafter;
(b) or scrutinising more deeply one of these approaches or methods, as applied to legal research in a domestic or comparative context.

(1) Types of research

- explanatory (explaining the law, for instance by diverging historical backgrounds in comparative research);
- empirical (identification of the valid law; determining the best legal means for reaching a certain goal – the 'best solution' in comparative law);
- hermeneutic (interpretation, argumentation);
- exploring (looking for new, possibly fruitful paths in legal research);
- logical (coherence, structuring concepts, rules, principles, etc – eg the use of the Hohfeldian analysis of the concept of right in domestic legal doctrine or for the purpose of comparing legal systems);
- instrumental (concept-building);
- evaluative (testing whether rules work in practice, or whether they are in accordance with desirable moral, political, economical aims, or, in comparative law, whether a certain harmonisation proposal could work, taking into account other important divergences in the legal systems concerned).

(2) Use of supporting disciplines

- legal history;
- legal sociology;
- legal anthropology;
- legal psychology;
- law and biology; and
- law and economics.

(3) Levels of comparison

- conceptual framework of legal doctrine;
- principles;
- rules; and
- cases.

(4) Levels of research

- description (interpretation); and
- systematisation (theory building).

(5) Schemes of intelligibility[1]

- causal;
- functional;
- structural;
- hermeneutical;
- actional; and
- dialectical.

(6) Ideological perspectives

- individualistic versus communitarian;
- nationalistic versus international;
- positivist versus morally, politically oriented;
- monistic (order) versus multi-layered (pluralistic, disorder); and
- nature versus culture.

Doctrinal legal research ranges between straightforward descriptions of (new) laws, with some incidental interpretative comments, on the one hand, and innovative theory building (systematisation), on the other. The more 'simple' versions of that research are necessary building blocks for the more sophisticated ones. Inevitably, the more descriptive types of research will be, by far, more numerous. Comparative law usually remains at the level of description, combined with some comparison (but mostly at the 'tourist' level). In attempts of (European) harmonisation, however, a clear level of systematisation (theory building) has been established.

[1] See on this J-M Berthelot, L'intelligence du social (Paris, Presses Universitaires de France, 1990) 62–85 and, for an application to legal research, see G Samuel, 'Taking Methods Seriously (Part One)' (2007) 2 Journal of Comparative Law 94, 105ff.

All scientific research, including legal research, starts from assumptions. Most of these assumptions are paradigmatic. This means that they are the generally recognised assumptions ('truths') of legal scholarship within that legal system, or the common assumptions of all the compared legal systems in comparative research. They constitute the paradigmatic framework, which tends not to be debated as such within the discipline itself. Apart from this, researchers may also start from assumptions which are less obvious. In those cases, they have to be made explicit, but not necessarily justified. In some of these cases, the outcome of the research will only be useful to the extent that one accepts its underlying assumptions. Alternatively, a given approach may prove to be more fruitful than research, which (partly) starts from other assumptions. A typical example is the recognised 'legal sources', which are not a matter of discussion within a given legal system (legal scholarship). Sometimes new legal sources (eg 'unwritten general principles of law') or principles (eg priority of European law over domestic law) are accepted as assumptions, as they seem to be more fruitful, eg for keeping law more coherent. A study on such assumptions (and their limits) in domestic legal doctrine and/or in comparative research is another possible topic for research.

The questions and suggestions above were proposed to a number of scholars when inviting them to lecture at a workshop organised, in October 2009, by the Research Group for Methodology of Law and Legal Research at Tilburg University. The current book contains the revised papers presented at that workshop, together with two papers by members of the Tilburg Methodology research group, which are partly a result of the discussions during the workshop and a comment on one or more papers presented there. Other members of the Tilburg Methodology research group who commented during the Conference have been Jan Smits and Koen Van Aeken.

As an introduction to the contributions in this book, some conclusions of the workshop are to be found hereafter.

Legal scholarship is torn between grasping as much as possible the expanding reality of law and its context, on the one hand, and reducing this complex whole to manageable proportions, on the other. In the latter case, a purely internal analysis of the legal system involved, isolated from any societal context, is an option, most notably visible in French legal doctrine.[2] In such an approach, law is largely cut loose from its context, and societal problems are exclusively worded as 'legal' problems, that should be 'solved' without taking into account anything that is not 'law'. Moreover, law in this view means only, for instance, *French state law*, or even more narrowly *French official private law*. Here, 'legal reality' is confined to legislation and case law. There seems to be no other relevant reality for lawyers. In this way, an artificial world is created, in which (sometimes artificial) problems are worded and solved, without any necessary connection to some societal reality. As law aims at ordering society, at influencing human

[2] See Horatia Muir-Watt's chapter, 'The Epistemological Function of "la Doctrine"' (ch seven).

behaviour,[3] such an approach is felt to be largely insufficient by many scholars. More specifically, the failure of doctrinal legal research to build, to structure, to interpret and to apply the law in such a way that it fulfils its obvious function in society, together with a complete lack of any methodology, has led an increasing number of scholars to question its scientific status. In chapter four, Mathias Siems argues that teaching and a low profile 'legal doctrine' may very well be carried out by legal practitioners (as was actually the case in England until about half a century ago). So, 'a world without law professors' would indeed be possible in practice.

As a reaction, many attempts have been made, from the nineteenth century onwards, to broaden legal doctrine, or to conceive it differently. Adding a social science dimension[4] or a comparative dimension[5] has proven fruitful. However, the question then becomes one of demarcating the borders of legal science: is there still some kind of 'legal doctrine' left, to which pockets of social sciences have been added? Or will legal doctrine have to be merged with social sciences? If so, which disciplines should be favoured: just traditional legal sociology, or also law and economics and/or legal history and/or legal psychology and/or legal anthropology, or even more exotic disciplines such as 'behavioural economics'[6] and/or 'evolutionary analysis in law'.[7] How would such a broad interdisciplinary discipline look like? Which methods should it use? How can we educate competent scholars who will be able to carry out such a broad research programme or even parts of it?

The demarcation of 'legal doctrine' is not only a matter of fields to be covered, it is also, and even in the first place, a question of the identity of the discipline. Is it (mainly) descriptive? Or rather hermeneutical? Or perhaps normative? Or should it be explanatory? This question is discussed at length in several papers.[8] The main conclusion to be drawn is that several approaches fit with legal doctrine and that all those approaches can be defended to some extent, as long as one keeps a pluralist approach. Under the heading of 'legal doctrine' or, if one prefers, 'legal science', many types of research may be carried out: descriptive, exploratory, explanatory, wording and/or testing hypotheses and/or theories, or just supporting legal practice (and, in that sense, it becomes normative).

Each of those types of research will involve its own methods and each research question will imply the use of the appropriate method(s) for that kind of research.[9] Maybe this variety of possible approaches and methods explains the confusion in the terminology used. Although Jaap Hage ('Truly normative legal

[3] See Julie De Coninck's chapter, 'Behavioural Economics and Legal Research' (ch 14).

[4] See the chapters by Julie De Coninck (ch 14) and by Bart Du Laing (ch 13).

[5] See the chapters by John Bell (ch nine), by Geoffrey Samuel (ch 10) and by Jaakko Husa (ch 11), and Maurice Adams' comments (ch 12).

[6] See Julie De Coninck's chapter 14.

[7] See Bart Du Laing's chapter 13.

[8] See the chapters by Mark Van Hoecke (ch one), Jaap Hage (ch two), Anne Ruth Mackor (ch three), Pauline Westerman (ch five), Jan Vranken (ch six) and Bert van Roermund (ch 15).

[9] See Jaap Hage's chapter two.

science') and Anne Ruth Mackor ('Explanatory non-normative legal doctrine') use seemingly contradictory titles, they nevertheless appear to largely agree in their view on legal doctrine. Roger Brownsword also points to this implicitly, when asking himself 'what am I doing as a legal scholar in contract law?'

Should we try to implement some ideal type of 'legal science', bearing the risk of being cut loose not only from legal practice but from the large majority of legal academics as well? Or should we rather, pragmatically, aim at adjusting legal doctrine's centuries-old research tradition? In the latter case, legal doctrine could develop as 'law in context', while still emphasising the internal perspective on law. Elements of social sciences could be used more systematically for underpinning doctrinal research, instead of trying to realise the ambition of developing an interdisciplinary super-science, which would integrate everything there is to know about law. Legal doctrine should use those disciplines, but not try to integrate them. Such integration raises problems of epistemology, of methodology and of research skills. It would be very difficult, if not impossible, to demarcate a common epistemological framework, within which common methodologies could be worked out for quite diverging research purposes. Moreover, such methods should be so diverse that it would be extremely difficult to combine all the research skills needed, even in a coherent research team. In practice, the adequate research activities will rather be multi-layered, such as legal doctrine using elements of behavioural economics which, in turn, uses elements of evolutionary analysis in law (see the chapters by De Coninck and by Du Laing).

Four papers in this book have focused on comparative law (Samuel, Husa, Bell and Adams), but with a clear connection to legal doctrine. Indeed, Geoffrey Samuel argues that developing methods in comparative law could be a road to developing the methodology of domestic legal doctrine. Bart Du Laing for his part shows how the evolutionary analysis of law could be helpful in developing the methodology of comparative law: varying adaptation of cultures to local conditions as an element for developing a theory of 'legal families'.

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11 January 2010

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Contents

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Legal Doctrine: Which Method(s) for What Kind of Discipline?

MARK VAN HOECKE

I. HISTORICAL DEVELOPMENTS

ROMAN LEGAL DOCTRINE developed since the second century before Christ, and reached a very high level as from the third century after Christ. Its rediscovery and renewed study in Bologna in the eleventh century was the start for the creation of universities. During the whole of the Middle-Ages, legal doctrine was highly thought of and considered as a 'scientific discipline', as in those times 'authoritative interpretation', not 'empirical research', was the main criterion for the scientific status of a discipline. Slowly as from the seventeenth century, but mainly as from the nineteenth century, this changed dramatically. The success of the positive sciences altered the conception of 'science' in western societies. Physics became the model. Hence, a combination of empirical data, mathematics, testing of hypotheses, developing theories with a general validity and without geographical limitations, became the ideal for any 'scholarly discipline'. However, where in legal scholarship do we study 'empirical data', handle them with mathematical models, check 'hypotheses' or construe 'theories'? For sure, law and legal doctrine clearly have their geographical limitations, so that there is no claim to 'general validity' outside the geographical borders of the legal system concerned.

As from the mid-nineteenth century, those conclusions have repeatedly led to the statement that 'legal doctrine' misses basic characteristics in order to be considered a 'legal science', whereas until then legal doctrine had largely been seen to be the model 'science'.[1] More recently, it is particularly the research assessment

[1] In 1859, the American legal scholar David Dudley Finn wrote about legal doctrine: 'Compare this science with any of the other sciences; with those which are esteemed the greatest in extent, and the most exalted in subject. Take even astronomy, that noble science which weighs the sun and the planets, measures their distances, traces their orbits, and penetrates the secrets of that great law which governs their motions. Sublime as this science is, it is but the science of inanimate matter, and a few natural laws; while the science which is the subject of our discourse governs the action of human beings, intelligent and immortal, penetrates into the secrets of their souls, subdues their wills, and adapts itself to the endless variety of their wants, motives and conditions.' See DD Finn