Legal Methodology : Law & Science

Lectures on the method of legal research

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The characteristics of the object of research determine the method of inquiry. In other words, the nature of this 'thing' called law determines how we should proceed to achieve scientific objectivity, that is, how we construe or discover objective, in the sense of reliable, scientific theories that help us explain *this object of inquiry. But we do not only aim at objective theories, we also aim for* understanding *the law and if this is the goal of legal inquiry we conceive of our subject differently. We will discuss the nature of legal sources, empirical legal science and doctrinal (or dogmatic) research in the first three lectures. In the following three lectures we will consider, first, rationality and argumentation in law, second interpretation and construction, and, third, critical theory as this may also be relevant for legal research. The final lecture will discuss reflexivity of law and legal science and scientific integrity.*

Lecture 1 Legal sources

In the first lecture we we will discuss the principle object of legal research: legal statutes, international treaties, case law and customary law. In short, the formal sources of law. We will estimate whether these sources are an object of research on par with those in the natural and the social sciences. If so, the method of the natural sciences is applicable to the study of law as well. How can we conceive of the object and method of inquiry with regard to law in order to be able to think of legal research as a truly scientific endeavor? An influential approach proceeds from David Hume's distinction between facts and norms and considers legal norms (although they are of a normative nature) as *fact*, as somehow *given* in a political community. That is, given in the formal legal sources.

In the this lecture we will present a second important distinction introduced by David Hume and consider the implications for legal scientific method sometimes referred to as 'Hume's fork'. What kind of science of law is implied if we honor the distinction between *facts* on the one hand and *ideas* (or concepts) on the other? The kind of legal inquiry that focusses on *facts* as opposed to legal concepts and ideas is (a form of) Empirical Legal Science (ELS). Legal inquiry that focusses on legal *ideas* will by contrast proceed by means of some form of conceptual analysis or some version of doctrinal research. Conceptual analysis and doctrinal legal research will be the subject of the first and the third meeting, empirical legal studies will be discussed in the second lecture.

Lecture 2 Empirical Legal Studies

In the second lecture we will further consider the implications for legal scientific method of David Hume's two distinctions. His analysis suggests three categorically distinct kinds of inquiry: empirical, conceptual and normative research. Normative legal research addresses the question how the law *should* be. Conceptual or 'formalist' legal research focusses on the analysis and meaning of legal rules, principles and concepts. We will discuss normative and conceptual research in the coming lectures, in the present lecture we will discuss the methods and techniques to help and answer the empirical questions we may ask about the law.

If we think of the science of law in terms of the methods and techniques of the empirical sciences, what will legal research look like? Empirical legal research (ELS) focusses on 'matters of fact', that is, such research aims to describe and explain legal phenomena by means of surveys, interviews and panel discussions (qualitative empirical research) or data analysis (quantitative empirical research). In this context we will discuss the (implicit) assumptions not only of ELS but also of criminology, the sociology of law and law & economics. We will argue that these disciplines (often unconsciously and uncritically) presuppose a positivist philosophy of law and take a, so-called 'external perspective' with regard to law.

We will finally discuss some important questions with regard to this approach. For instance, how does the legal empirical scientist keep theory (legal concepts) and facts, and facts and norms distinct? In other words, how does the empirical legal scientist make sure that he honors Hume's distinctions? And, most importantly, what kind of research questions are answerable by means of empirical research to 'matters of fact'?

Lecture 3 Classical Legal Doctrine

Most legal research is doctrinal research; indeed, doctrinal research has a very long tradition that goes back to at least the middle ages. Basically, this kind of inquiry is 'formalist' in the sense that the scholar analyses a corpus of legal rules and principles (e.g. Roman law or canon law) and/or case law (e.g. common law), in an effort to find purpose and structure in the materials. If we find purpose and structure we are able to describe and explain this corpus on a more abstract level, that is in terms of a coherent 'doctrine'. A doctrine can be compared to what in science is often called a 'theory'. Sometimes such doctrines are also called 'dogma's', in de sense of legal axiomata, and legal research is therefore sometimes called 'dogmatic research' as well. Traditionally, the doctrines were devised by *doctores*: law teachers, and such doctrines were literally 'teachings' to make the corpus of law more accessible for their students.

However, such legal doctrines were often regarded as *part* of the law as they were the result of (a kind of) 'induction' and could be thought of as the expression of the 'ratio' and the 'deep structure' of law. We should note that many sciences think of their object of research as a 'system': biology sees organisms as systems, ecology thinks of biotopes as a system, psychology tends to think of consciousness as a system and there is an influential school in sociology that sees human societies as (a complex whole of) social systems. Indeed, law is often described as a system as well, finding the deep structure of law is then thought of as the discovery of the legal system immanent in the sources of law.

Moreover, as the law is supposed to be a consistent, that is: a *systematic* whole, such doctrines can be used as a tool to *criticize* particular cases, or even particular rules found in the legal sources. 'Induction' and conceptual analysis make way for *evaluation*, legal science turns into a normative discipline. That is a discipline that asks not what the law *is*, but what the law *should be*. Indeed, historically doctrine became an important source of law itself. In this lecture we will discuss the method of the late medieval 'Spanish school' of doctrinal legal scholarship, the 'historical school' of Friedrich Carl von Savigny and 'Langdellism', the influential method propagated by the Harvard law professor Christopher Columbus Langdell, a nineteenth century American variant of doctrinal legal research.

We will also discuss the disadvantages of the 'formalism' involved. We may ask for instance whether doctrines are the result of passive 'discovery' (that is, 'induction'); or of active 'rationalization' (that is, 'invention'). How the the doctor influence the object of research? How do we distinguish formalism from activism and the doctrine from ideology? In other words, how do we keep the 'object' or research and the personal (subjective) norms and values distinct?

Lecture 4 Rationality & Construction

When we are dealing with law we are dealing with a system of *norms*. The discipline of legal science can be thought of as a *normative* science. One consequence is that legal science should be *holistic,* a normative order must be consistent to be effective, it should be a systematic whole because from "from contradiction anything follows." (Pinker 2021, 81) Whereas the doctrinal research works *bottom up* ('induction') we may also consider working *top down* from basic legal 'axioma'. When we are dealing with law we are also dealing with a corpus of rules and principles that serves a particular *purpose*; that is, the law has a *ratio* or a *telos* that is often not explicitly mentioned in the rules but presupposed.

The (neo-) Kantian scientist is 'rationalist' in the sense that he looks for both purpose and structure in the sources and construes a coherent whole of abstract legal principles as 'axioma', legal rights and obligations that can be deduced from such principles and more or

less concrete legal rules that seem to be implied. What is the purpose of law? In a very general sense we can say that law aims for *justice*. What we are looking for is a legal system that satisfies our deepest intuitions of justice, and we look for a theory of justice that can be used to both criticize the law and help to make it into a more consistent and just whole.

Such a Kantian constructivist inquiry tries to lift the practice of classical legal doctrine research to a higher, more philosophical level by employing philosophical methods and techniques such as 'social contract theory', the 'reflective equilibrium' and the 'overlapping consensus'. Just like legal doctrines the resulting theory of justice can be used as a touchstone or benchmark to evaluate and criticize legal sources and judicial decisions. In this fourth lecture we will in particular discuss the Kantian constructivism of both John Rawls and Ronald Dworkin. A question we may ask is whether such a theory of justice is not a rationalization of the present 'bourgeois' society? Is such a liberal moral theory truly as 'neutral' as it is sometimes presented? Is the 'theory of justice' not just another political ideology?

In this tradition the law is regarded 'synchronically'; that is, we think of it abstracted from its historic dimension. One may argue that this is unfortunate, we should consider law as an historical phenomenon and study its development over time; that is, we should study it as a 'diachronic' phenomenon. The law should not only be seen as a social phenomenon which has a distinctive social and political 'ratio' or 'telos' that can only serve its purpose when it is a coherent whole of principles, rights and rules, but also as a particularly *cultural* and *historical* phenomenon that changes and develops through time. In this context we will discuss the method of 'historical interpretation', and we will also inquiry into the idea of 'living constitutionalism' and the European Convention on Human Rights as a 'living instrument'.

Lecture 5 Argumentation & Interpretation

Doctrinal or dogmatic legal research is primarily a matter of argumentation and interpretation. Legal scholars offer interpretations of rules and standards as they are found in the legal sources, and they argue for particular doctrines and solutions to legal questions and problems. More precisely, legal scholars aim to find the precise *meaning* of legal rules and principles in the legal sources and if others disagree they argue why their interpretation is better than other interpretations. Legal scholars also argue about the meaning, and the correctness or incorrectness of judicial decisions and case law, or of upcoming legislation. In law school students are therefore generally introduced to methods of interpretation and argumentation theory.

When they interpret the law, legal scholars generally take the 'subjective attitude', or the so-called 'intentional stance' toward their object of inquiry; that is, they regards texts, or historical periods, or cultures as a kind of 'person' and proceeds by means of a 'projection' of (human) 'beliefs' and 'desires' behind the text, on the presumption of the rationality of the makers, the authors and the 'carriers' of the culture. More concretely, they argue about what the law 'says' or 'intends' and they personify the legislator as 'the lawgiver' as if it can speak and act as a human being. Indeed, one might say that the 'method' of choice is to change the 'object' of inquiry into a 'subject'.

Understanding the meaning of particular human phenomena requires having the right 'horizon' (foreknowledge, prejudices) with regard to the subject and seeing it as the meaningful expression of certain particularly human beliefs, desires, intentions and goals. In short, legal hermeneutics invites us to think of cultural artifacts such as the law as products of *human* purposes and ideas, and argues that such human purposes are too diverse to be modelled in any abstract theory or scientific model and that, by contrast, the methods of the so-called *Litera Humaniores*, the humanities, are most appropriate for legal inquiry and scholarship. But again, questions can be asked. For instance, what is the criterion of truth at work here? How do we surpass the inherent subjectivity of this 'method'? In other words, in what sense can we consider legal research as *scientific*?

Lecture 6 Critical perspectives

Doctrinal legal research, whether or not with the aid of the methods from philosophy or the humanities, takes the internal point of view and the researcher, and thus takes what is generally considered or presupposed to be the purpose and structure of law for granted. In other words, the legal scholar, often unconsciously and uncritically, serves the 'intrinsic' values of the law and thus continues the project of the realization of a particular social and political philosophy. In short, from a political point of view doctrinal legal research is intrinsically *conservative*. Often doctrinal research aims for problem solving in the nitty-gritty details of the ruling legal system and neglects the big picture. Indeed, the objectifying posture taken in standard doctrinal research helps to give the present social and political order the allure of necessity and objectivity.

Science generally aims for objectivity, and so do legal scholars. The objectivity of the theories provided by legal science and scholarship depend on their completeness ('integrality') and consistency ('integrity') and/or their methodically sound corroboration with empirical data as in Empirical Legal Studies. We sometimes tend to forget however that in dealing with law we are dealing with a social and cultural phenomenon, and any social order and human culture depends on human (political and moral) interests and purposes, interests and purposes that change over time. Indeed, legal scientists have an *interest* in downgrading or

even neglecting this fact as the recognition of the contingent and at least partly political nature of our practice threatens the allure of objectivity of both the object of inquiry and the theories by means of which legal scientists describe and explain the law.

Critical research generally aims at 'opening up' the subject matter of legal scholarship to the possibilities that standard legal research (whether constructivist or empiricist) tends to exclude. Every cultural phenomenon can by means of critical readings lose its allure of necessity and objectivity and thereby such phenomena are exposed for what they really are: contingent and changeable social and cultural phenomena. Critical legal scholarship is activist in the sense that it aims for *structural* change, not in the margins, but in the whole purpose and structure of the law. And thereby both society and the political system may be rendered more just. We will in particular discuss the work of Roberto Unger and Duncan Kennedy, the leading members of the Critical Legal Studies (CLS) school of legal research.

Lecture 7 Reflexivity & Integrity

Apart from our tendency in science to present our object of research and the theories we formulate about it as objective (in the sense that law is a 'given' or '*datum*' like any other natural phenomenon and that our theory offers knowledge that can be relied on to be true) we should also note the interaction between our theories and our object of scientific investigation. Legal science and law stand in a 'reflexive' relation to each other: theories may have normative force in society, or even authority, and the legal scientist has therefore the power to influence or *change* its subject of research in a way that no other scientist has. Indeed, the effect of the products of legal science on the subject matter is unpredictable. Sometimes a theory is a self-fulfilling prophecy, at other times a theory somehow evokes or 'causes' its own falsification.

In this final lecture we will discuss the questions that follow from this particular insight in relation to the aspects of legal scholarship that were discussed in the previous lectures. What does the normativity, authority and reflexivity of legal science imply for scientific professional ethics of legal scholars? We will argue that scientific integrity is of particular importance in legal research and we will, for instance, discuss the integrity of legal research in the context of the 'culture wars' in academia. Is such (ideological) activism compatible with legal research? Is it scientifically *integer*?