# The Character of Scholarly Legal Research:
paradigms, problems, questions, hypotheses, sources, methods

a menu

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Science is about increasing the body of knowledge. Unanswered questions get answers; and answers get falsified or not. Legal science should not be an exception. Scholarly legal research should aim and succeed at yielding *new knowledge*.

The *character* of scholarly legal research depends on the type of question posed, and on the type of answer looked for. This can be represented in a matrix that (somewhat simplistically) suggests that there are at least nine different types of character that scholarly legal research can have.

In the matrix below each possible character is accompanied by a typical example of a corresponding *research question*.

*Nine possible characters of scholarly legal research*

| | | Three types of questions posed | | |
|---|---|---|---|---|
| | | 1. *De lege lata*<br>What does the law hold? | 2.<br>How does law work? | 3. *De lege ferenda*<br>What law would be desirable? |
| Three types of answers looked for | a. Factual | **Descriptive**<br>What do recognised sources of law hold about a particular topic? | **Empirical**<br>How does a given law operate in practice? | **Instrumental**<br>What should the law say to contribute to achieving a given goal? |
| | b. Theoretical | **Conceptual**<br>To what more general concept can certain legal rules be reduced? | **Explanatory**<br>What causes can be found to explain a given law or its practical operation? | **Fundamental**<br>What should the law say to be (more) compatible with a certain legal principle? |
| | c. Normative | **Supervisory**<br>Is a certain legal rule compatible with higher law? | **Evaluative**<br>Does a given law contribute to achieving its goals? | **Political**<br>What should the law say to contribute to the realisation of a given political ideal? |

There is a third dimension to this matrix: Scholarly legal research of any of the nine characters can be done with respect to one area of law in one jurisdiction for a particular period; in that case we could speak of *singular* research. However, research of all these types can also be done comparatively. *Comparative* research can either be done between *jurisdictions*, or between *areas* of law, or between different *periods* in history. The output of some comparative research may also be used as the input for some singular research (for example, output of comparative evaluative research could be used in singular instrumental research, and output of comparative descriptive research in singular supervisory, fundamental or political research).

*Professional* legal research (by judges, advocates, legal advisers, legislative draftsmen, etc.) can also have any of the possible characters distinguished above (especially the descriptive, the supervisory, or the political, or a combination of several characters). That, however, is not the topic of this paper. Suffice it to say that professional legal research is largely governed by the demands of professional ethics and expediency, whereas scholarly legal research should conform to academic scientific ethical standards.

Often (arguably too often) scholarly legal research simultaneously has two of more of the characters distinguished above. One reason why legal research methodology is often criticised as not being scientific enough, seems to be this mixing of descriptive, supervisory and political research. In particular many PhD dissertations have a combination of characters. For the sake of clarity and scientific propriety it would be good if each chapter or journal article would contain research of one character only. That would normally mean only *one research question per chapter or article*, or, if there were more research questions in a chapter or article, that they would be similar in character.

A research question is the organising principle of any research. Obviously, in any academic research project the research question needs to be a question to which the answer is as yet unknown. In other disciplines than law, but sometimes also in legal science, the research question is formulated as a *hypothesis*, which must be open to falsification. In scholarly legal research, the use of an hypothesis is still rare. However, using a hypothesis might well help to give more methodological focus to legal research. One advantage of an hypothesis is that the outcome of the research can only be that it has been or has not been falsified. Research questions in law are often phrased in a much more open manner, but of course it is also possible (or even desirable) to formulate a research question that can only be answered with yes or no.

Many (Dutch?) legal scholars refer to their research question (*vraagstelling*) as if it were the same as the problem definition (*probleemstelling*). This is a mistake. It is true that all relevant scholarly research finds its origin in a problem. And at the beginning of each research project and of each publication about a completed research project that problem should be defined and spelt out in clear words, just like the research question. The *problem definition* of the problem, however, does not end with a question mark. It ends with an exclamation mark. The problem definition in a research project stipulates what social or scientific or legal problem makes the research project (socially, scientifically and/or legally) relevant. The problem definition expresses the expectation that the testing of the hypothesis or the answering of the research question will make it easier to solve the defined social, scientific or legal problem. Legal research can start with all kinds of problems: a new social development or technical invention that does not fit into existing laws, an inconsistency in a doctrinal theory, the non-application of a certain rule, incompatibility between the case law of two courts, etc. The problem definition is the answer to the fundamental question: Why is this research (question) relevant?

The problem definition is an important criterion for how to structure a research project: how to formulate and sub-divide the research question(s), how to select the sources that need to be studied, how to select the methods that need to be applied with respect to these sources, how to plan and carry out the actual research, and how to structure the resulting publication(s). Often a project will have one or two main research questions, divided into several *sub-questions*. The answers to the sub-questions should more or less automatically yield the answer to the main question(s). Both the problem definition and the research questions operate as a 'contract' between the researcher and his or her supervisor, and between the researcher-writer and his or her readers: they indicate very precisely what the subject matter of the study is. They will encourage the researcher-writer not to write about other things.

Apart from problems and their definitions there is another layer which contributes to the steering of any research project and its choice of questions/hypotheses, of sources and of methods. That is the layer of *paradigms*. Apart from the paradigms that legal scholars may borrow more or less consciously from other disciplines (such as sociology, economics, linguistics, logic, etc.) many legal scholars work within paradigms that specifically relate to law. These they use implicitly or explicitly. It is recommended that legal scholars make these paradigms more explicit to themselves and to their readers. Examples are:

- paradigm of hierarchy
- legal positivism
- paradigm of free interpretation
- existence of unwritten law
- justice as a characteristic of law
- effectiveness as a characteristic of law
- law as a system
- normativity of the system of law
- historic determination of law
- economic determination of law
- cultural determination of law
- political character of law
- academic character of law
- professional character of law
- progress
- convergence

Depending on the combination of paradigms prevalent in the jurisdiction or area concerned (and/or harboured by the researcher), on his or her definition of the problem, and on his or her choice for research questions of a particular character, the actual research activity will largely consist of selecting and studying sources and reporting about this.

Here another curiosity of legal research prevails. Many legal scholars are quite clear about the subject matter (the topic) that they are studying, but seem hardly aware of the actual *objects* of their study. The objects of any research need to be observable things. Like gravity and grammar, equality, criminal responsibility or the competences of the Court of Justice of the EC, are not observable. They can be the subject matter of scholarly research, but not the objects of research. The object of legal research are almost always written texts, but sometimes also figures, spoken text or human behaviour. These are the things that are actually studied. In legal research they are mostly referred to as *sources*. What in the matrix above has been called *descriptive* research, always requires the application of a doctrine of legal sources. Certain legal sources mentioned in such doctrines (for example 'the general principles of law recognized by civilized nations' referred to in article 38 of the Statute of the International Court of Justice) cannot as such be the object of study.

Only very rarely a legal scholar will be in a position to study *all* sources on a particular topic. Yet, a conscious (let alone explicit) process of selecting sources is still rare in legal scholarship. The unavoidable *selection process* consists of deciding what type of sources to use (see the list below), and then for each type to decide which of all available sources to study. For example for case law, it would often be necessary to limit it to decisions from a certain jurisdiction, in a certain area of law, in a certain period, from a certain court and/or using a particular turn of phrase (etc.). Alternatively, one might follow the selection of cases made by someone else (for example by the author of a major text book). Occasionally, depending on the sort of research question, a

representative sample of cases may be adequate. When doing comparative research covering more than one jurisdiction, area or period, it may well be necessary to limit oneself to studying only (translations) of legislation, or only a few leading cases, or only some recent journal articles or a few leading text books per jurisdiction. The pitfalls of such severe limitation can often be mitigated by consulting one or two legal experts from the jurisdictions involved.

All such decisions on the selection of sources should always be made explicit in the eventual publication. That does not only require an adequate *footnote* for every statement in the researcher's text that is wholy or partly based on any of the sources used (not just for literal quotes), but also a full bibliography, list of cases, and list(s) of other documents at the beginning or end of the publication, plus an explicit discussion somewhere in the text of why certain (types of) sources have been used and other (types of) sources not.

The sources (the objects of study) can be classified in different manners. Such a classification partly depends on the doctrine of sources of law that the researcher feels inclined to follow, and that doctrine will depend on the (national, international, or sub-national) jurisdiction(s) on which the research is focussing. The aim of the list below is not to promote a specific classification (let alone a specific doctrine), but to give an idea of the range of sources that can be used in scholarly legal research.

- primary legal sources
  - written law
  - case law (*jurisprudence*)

- secondary legal sources
  - soft law
  - *travaux préparatoires*
  - professional legal literature
  - scholarly legal literature
  - statements of legal experts

- information about the application of law
  - actions of enforcement bodies (e.g. bankruptcies declared)
  - actions of law enforcers (e.g. arrests made by the police, appeals initiated by advocates)
  - actions of citizens (e.g. testaments made, companies floated)
  - statements of law enforcers (e.g. interviews with judges)
  - statements of citizens (e.g. questionnaires)
  - case files (administrative, judicial, etc.)
  - statistics

- scientific non-legal sources
  - social scientific literature or data
  - economic literature or data
  - historical, philosophical, linguistic literature
  - etc.

- non-scientific non-legal sources
  - political and policy documents
  - mass media reporting
  - etc.

For each of these researchable sources various research *methods* exist. Some methods will derive from another discipline than law, other methods may be directly derived from what courts and other professional lawyers do. The following is very far from being an exhaustive list:

- Written law can be analysed by employing any of the interpretation methods used by (certain) courts. However, it is also possible to use linguistic methods. When doing multi-jurisdiction comparative research of written law it may be useful to develop a typology which allows different rules to be given a certain label. This makes it possible to produce comparative charts and even quantitative analysis.

- Judicial rulings can be studied as sources of law, but also as information about how the law is being applied. One method to analyse case law is to attempt a rational reconstruction of the court's (or a judge's) reasoning. Linguistic methods are possible, too.

- *Travaux préparatoires* can be studied as a guide to the originally intended meaning of a term or rule, or as a guide to the goal which the law-makers hoped to achieve by adopting the law. A researcher can also use the *travaux* to attempt to make a rational reconstruction of the reasons behind a particular rule.

- Legal literature can be used to find dominant or alternative interpretations of a legal rule, but also to find criticism, or explanatory theories, or perhaps only references to other sources.

- Statistical data (for example about the frequency of the application of a particular rule) may reveal trends, but can also be used as a help in finding correlations and explanations.

- Experts, law enforcers and citizens can be approached through interviews or questionnaires. Sometimes they can be persuaded to solve fictional cases, or to take part in any other form of simulation. Their behaviour can sometimes be observed (for example through participant observation), and occasionally memoirs or biographies can be used.