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A TYPOLOGY OF RESEARCH OBJECTIVES IN LEGAL SCHOLARSHIP

In the past legal scholarship has been struggling to authorize its position as a scientific discipline. One crucial aspect of this debate involves methodology. An explicit research methodology is essential to sciences, allowing scholars to perform and describe their research in an unambiguous, objective and repeatable manner. Legal scholars evidently use certain research techniques but these generally lack a detailed description and justification. Therefore legal scholarship is lacking an explicit methodological framework. Legal scholars have become increasingly aware of the importance of an explicit methodology and today there is a strong call for in-depth research into methods for legal research. This article aims to answer this call and take a first step towards the creation of an explicit methodological framework for legal scholarship by providing an overview of the different types of research objectives in legal research. This overview is part of a more extensive typology on "Research Objectives and Research Methods for Traditional Legal Scholarship" created within the framework of the author's PhD project.

Key words: legal research, research objectives, methods

В прошлом правовая наука боролась за то, чтобы считаться научной дисциплиной. Важнейший признак научной дисциплины — методология, позволяющая ученым представлять результаты исследований непротиворечиво, объективно и единообразно. Правоведы, несомненно, используют те или иные технологии исследования, однако в целом эти технологии недостаточно подробно описаны и обоснованы. Таким образом, правовой науке не хватает методологической основы, что вызывает немало опасений ученых, поэтому сегодня необходимо углубленное изучение методов правовой науки. Данная статья — первый шаг на пути решения этой задачи, поскольку содержит обзор различных целей правоведческого исследования. Их расширенная типология представлена в работе «Цели и методы традиционного правоведения», созданной на основе докторской диссертации автора.

Ключевые слова: правоведческое исследование, цели исследования, методы правоведения

1. Introduction

Legal scholarship is one of the oldest academic disciplines and the way law has to be studied and dealt with has been passed on from generation to generation like an implicit *savoir faire*[1]. The latter refers to the fact that during their education law students learn how to find, read, analyse and apply the law in an intuitive way without having to explicitly describe how they operate during this process. Consequently legal scholarship has never really felt the need to linger over the methodological steps and choices made during a legal research. Legal scholars evidently use specific research techniques but these generally lack a detailed description and justification[2]. Because of this, up until today legal scholarship

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[1] S. PIMONT, "À propos de l'activité doctrinale civiliste", *RTD Civ.* 2006, 707.

[2] T. HUTCHINSON & N. DUNCAN, "Defining and Describing What We Do: Doctrinal Legal Research", *Deakin Law Review* 2012, 100; C. MCCRUDDEN, "Legal Research and the Social Sciences", *LQR* 2006, 646; J. M. SMITS, *The Mind and Method of the Legal Academic*, Cheltenham, Edward Elgar, 2012, 109; S. TAEKEMA & B. VAN KLINK, "Legal Methods under Discussion", *Recht en Methode* 2011 (1), 11-12; H. TIJSSEN, *De juridische*

is lacking an explicit methodological framework. Such a framework *"contains an inventory and selection of methods that are important to legal scholars. The framework will label each method, will relate the method to research questions, to other methods, to sources, to conditions for use, to quality assurance, to the type of result and to the advantages and disadvantages of using the particular method"*[1].

An explicit methodology is more and more considered to be a conditio sine qua non for every kind of scientific research. After all, it does not only force scholars to acknowledge their preconceptions and to justify the choices they make[2], but it also reduces the risk of scientific deficits, such as incompleteness or bias[3]. Legal scholars have become increasingly aware of the importance of an explicit methodology and today there is a strong call for in-depth research into methods for legal research[4]. This awareness is closely linked to the fact that legal scholarship is nowadays increasingly dependent on external funding. However, as project proposals in the field of law are often characterized by a lack of methodological explicitness — especially in comparison with other scientific disciplines — they often receive an unfavourable evaluation and are rejected[5]. The creation of an explicit methodological framework for legal research will undoubtedly allow for project proposals in the field of law to acquire a more defendable position in competitive funding.

The first step towards such an explicit methodological framework consists of determining the possible research objectives of legal scholarship. Indeed, there is an indispensable link between the type of research objective (often rephrased into a research question) and the research method applied in order to attain this objective[6]. In this respect,

dissertatie onder de loep, The Hague, Boom juridische uitgevers, 2009, 143; R.A.J. VAN GESTEL & J.B.M. VRANKEN, "Rechtswetenschappelijke artikelen", *NJB* 2007, 1460; M. HERWEIJER, "Juridisch onderzoek" in J.W.L. BROEKSTEEG & E.F. STAMHUIS (eds.), *Rechtswetenschappelijk onderzoek. Over object en methode*, The Hague, Boom Juridische Uitgevers, 2003, 28 ; N. VAN MANEN, "Wat de rechtswetenschap (niet) zo bijzonder maakt…", *NJB* 2008, 1929.

[1] Translated: H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische uitgevers, 2009, 30 footnote 17.

[2] R. VAN GESTEL & H.-W. MICKLITZ, "Revitalising Doctrinal Legal Research in Europe: What About Methodology?" in U. NEERGAARD, R. NIELSEN & L. ROSEBERRY (eds.), *European Legal Method — Paradoxes and Revitalisation*, Kopenhagen, DJØF Publishing, 2011, 36.

[3] R.A.J. VAN GESTEL & J.B.M. VRANKEN, "Rechtswetenschappelijke artikelen", *NJB* 2007, 1448—1449.

[4] J.M. SMITS, *The Mind and Method of the Legal Academic*, Cheltenham, Edward Elgar, 2012, 1—7; T. HUTCHINSON & N. DUNCAN, "Defining and Describing What We Do: Doctrinal Legal Research", *Deakin Law Review* 2012, 83; M. VAN HOECKE, "Preface" in M. VAN HOECKE (ed.), *Methodologies of Legal Research*, Oxford, Hart Publishing, 2011, v-ix; M. ADAMS & D. HEIRBOUT, "Preface" in M. ADAMS & D. HEIRBOUT (eds.), *The method and culture of comparative law. Essays in Honour of Mark Van Hoecke*, Oxford, Hart Publishing, 2014, V; A.J. MUNTJEWERFF, "Methoden in rechtswetenschap en rechtspraktijk", *International Scientific Journal of methods and Models of Complexity* 2010, http://dare.uva.nl/document/444423, 2; H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische uitgevers, 2009, 193 ; M. BARENDRECHT, J. VRANKEN, I. GIESEN, *et al*, "Methoden van rechtswetenschap: komen we verder?", *NJB* 2004, 1427.

[5] T. HUTCHINSON & N. DUNCAN, "Defining and Describing What We Do: Doctrinal Legal Research", *Deakin Law Review* 2012, 83, R. VAN GESTEL & J. VRANKEN, "Assessing Legal Research: Sense and Nonsense of Peer Review versus Bibliometrics and the Need for a European Approach", *German Law Journal* 2011, 906; J. M. SMITS, *The Mind and Method of the Legal Academic*, Cheltenham, Edward Elgar, 2012, 109; M. VAN HOECKE, "Legal Doctrine: Which method(s) for What Kind of Discipline?" in M. VAN HOECKE (ed.), *Methodologies of Legal Research*, Oxford, Hart Publishing, 2011, 1—2.

[6] The indispensable link between research objective and research method has been acknowledged (both implicitly and explicitly) by many authors: H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische uitgevers, 2009, 173; D. FELDMAN, "The Nature of Legal Scholarship", *The Modern Law Review* 1989, 503; E. FISHER, B. LANGE, E. SCOTFORD & C. CARLARNE, "Maturity and Methodology: Starting a Debate about Environmental Law Scholarship", *Journal of Environmental Law* 2009, 244; N. HOEKX, K. VANHOVE & A. VERBEKE, "Yes we care! Bedenkingen over de (methode der) rechtswetenschap", *RW* 2008-09, 1787; J.M. SMITS, *The Mind and Method of the Legal Academic*, Cheltenham, Edward Elgar, 2012, 34 en 119; M. HERWEIJER, "Juridisch onderzoek" in J.W.L. BROEKSTEEG & E.F. STAMHUIS (eds.), *Rechtswetenschappelijk onderzoek. Over object en methode*, The Hague, Boom Juridische Uitgevers, 2003, 28; M. SALTER & J. MASON, *Writing Law Dissertations*, Essex, Pearson, 2007, 109; M. ADAMS, "Doing What Doesn't Come Natu-

the research method for attaining a descriptive research objective will differ considerably from the one necessary to attain an evaluative research objective. A legal researcher unaware of this restraint between research objective and method, or unable to make a clear demarcation between the different types of research objectives, will suffer the risk of adopting inappropriate methods[1]. Or, as ADAMS and GRIFFITHS aptly clarify: *"Questions go before methods, and until one has specified what the question is, no sensible discussion of methodology is possible"*[2].

This article provides a short overview of the different types of research objectives for legal scholarship. This overview is part of a more extensive typology on *"Research Objectives and Research Methods for Traditional Legal Scholarship"*, created within the framework of my PhD-project[3]. The typology on research objectives is the result of both a descriptive and defining research aiming to find out what legal literature itself indicates as being the research objectives of legal scholarship and trying to group and label each of these objectives. Consequently, a profound literature study was carried out. The starting point were the publications written in the light of the Dutch 'debate on methodology', set off (again) in 2002[4]. Based on references made in these publications (cf. snowball method) together with a personal search and consultation of sources, the Dutch literature was completed with international publications.

2. Different research objectives in legal scholarship

A legal research can pursue different research objectives. In this article we distinguish: descriptive, exploratory, comparative, defining, explanatory, evaluating and recommendatory objectives. The number of different research objectives in one legal research will always depend on the complexity of the topic, the available time, the type of the research (e.g. dissertation, paper, article) and the hierarchy between the different research objectives[5]. The latter can be illustrated as followed: A legal phenomenon can only be explained when it first has been described, it can only be evaluated after its reason for existence is clear, and finally, a researcher can only determine how the legal phenomenon should be, when it has first been described, explained and evaluated[6].

The distinction between these various research objectives is perfectly clear in theory, however in practice the demarcation can sometimes be more blurred as some of the research objectives are closely connected. These objectives will often appear together resulting in a less clear delineation of their various methodological characteristics[7].

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rally. On the Distinctiveness of Comparative Law," in M. VAN HOECKE (ed.), *Methodologies of Legal Research*, Oxford, Hart Publishing, 2011, 236; R. CRYER, T. HERVEY & B. SOKHI-BULLEY, *Research Methodologies in EU and International Law*, Oxford, Hart Publishing, 2011, 8; B. VANGEEBERGEN & D. VAN DAELE, "Is de studie van het recht een wetenschap en wie kan het wat schelen?, *RW* 2009, 992-993; M.H. WISSINK, "Op weg naar een nieuwe ronde", *NJB* 2006, 1365; M. VAN HOECKE, "Preface" in M. VAN HOECKE (ed.), *Methodologies of Legal Research*, Oxford, Hart Publishing, 2011, viii; J. HAGE, "The Method of a Truly Normative Legal Science" in M. VAN HOECKE (ed.), *Methodologies of Legal Research*, Oxford, Hart Publishing, 2011, 23.

[1] G. DE GEEST, "Hoe maken we van de rechtswetenschap een volwaardige wetenschap?", *NJB* 2004, 58.

[2] M. ADAMS & J. GRIFFITHS, "Against 'comparative method': explaining similarities and differences" in M. ADAMS & J. BOMHOFF, (eds.), *Practice and Theory in Comparative Law,* Cambridge, Cambridge University Press, 2012, 279.

[3] Title: *"Towards a legal methodology: an explicit methodological framework for academic legal research in social security law."* Supervisor: Prof. dr. P. Schoukens. Co-supervisor: Prof. dr. D. Pieters.

[4] C.J.J.M. STOLKER, "Ja, geléérd zijn jullie wel!", https://openaccess.leidenuniv.nl/handle/1887/3727, 2002, 9.

[5] G.A.F.M. VAN SCHAAIJK, *Praktijkgericht juridisch onderzoek*, The Hague, Boom Juridische Uitgevers, 2011, 34; G. VAN SCHAAIJK, "Praktijkgericht juridisch onderzoek", *Recht en Methode* 2011 (1), 90.TRANSCRIPT (ed. H. PANDER MAAT), *Een onderzoeksplan schrijven*, Bussum, Coutinho, 1993, 41.

[6] R.A.J. VAN GESTEL & J.B.M. VRANKEN, "Rechtswetenschappelijke artikelen", *NJB* 2007, 1454. TIJSSEN states: (translation) "A design relies on the evaluation of a situation and an explanation of the problems found." See H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische uitgevers, 2009, 59.

[7] See also: F. KUNNEMAN, *Rechtswetenschap*, Nijmegen, Ars Aequi Libri, 1991, 4.

2.1. Descriptive research objective

A descriptive research objective aims to systematically analyze legal phenomena or arrangements in all their components[1]. This results in a presentation of the phenomena in an accurate, significant and neatly arranged way[2]. The descriptive research objective therefore lies at the heart of every legal research[3]:*"it is not about a subordinate activity of the researcher, but it concerns an essential constituent of his work: it is impossible to work on law without its assembling, ordering and description"*[4].

Although a descriptive research objective necessarily precedes other research objectives, it may itself constitute the main research objective of a legal study. In this case the study will solely focus on the concrete meaning and scope of a legal phenomenon[5]. As law is not static but is constantly changing, this kind of descriptive legal research is indispensable for legal scholarship[6]. Legal scholars need to work out the meaning and scope of the law after every modification.

However, the mere display and summary of legal rules, legal decisions and legal customs cannot be considered as scientific research[7]. Despite the practical importance of reproducing and summarizing valid law and existing legal doctrines, this will not deliver new knowledge or insights and it, moreover, indicates a lack of creativity[8]. Consequently, legal research having as main research objective a descriptive one, cannot simply resume existing legislation, doctrine and case law, but necessarily needs to demonstrate in what way the description will contribute to the existing body of knowledge[9].

When a legal scholar has chosen to pursue a descriptive research objective, the following research questions often appear: What is x? Which types of x do exist? What are the characteristics of x? What are the modalities of x? What are the exceptions to x[10]?

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[1] H. OOST, *Circling Around a Question: Defining Your Research Problem*, IVLOS, Utrecht 2003; H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische uitgevers, 2009, 58; G.A.F.M. VAN SCHAIJK, *Praktijkgericht juridisch onderzoek*, The Hague, Boom Juridische Uitgevers, 2011, 71.

[2] F. KUNNEMAN, *Rechtswetenschap*, Nijmegen, Ars Aequi Libri, 1991, 5; A.M. HOL, "Pleidooi voor een jurisprudentia. Over recht en rechtswetenschap" in J.W.L. BROEKSTEEG & E.F. STAMHUIS (eds.), *Rechtswetenschappelijk onderzoek. Over object en methode*, The Hague, Boom Juridische Uitgevers, 2003, 10.

[3] M. VAN HOECKE, *Is de rechtswetenschap een empirische wetenschap?*, The Hague, Boom Juridische uitgevers, 2010, 38; M. VAN HOECKE, "Aard en methode van de rechtsdogmatiek", *R&R* 1984, 191.

[4] Translated: A.R. BLOEMBERGEN, "Iets over object en methode van wetenschap en rechtspraak in het privaatrecht" in O.W.M. KAMSTRA, F.B.M. KUNNEMAN & C.W. MARIS (eds.), *Nederlandse rechtswetenschap. Tussen distantie en betrokkenheid: paradigma's in de twingtigste eeuw*, Zwolle, W.E.J. Tjeenk Willink, 1988, 74. See also: E.L. RUBIN, "The Practice and Discourse of Legal Scholarship", *Michigan Law Review* 1987-88, 1849; R.A.J. VAN GESTEL & J.B.M. VRANKEN, "Rechtswetenschappelijke artikelen", *NJB* 2007, 1454.

[5] M. VAN HOECKE, *Is de rechtswetenschap een empirische wetenschap?*, The Hague, Boom Juridische uitgevers, 2010, 19.

[6] M. VAN HOECKE, *Is de rechtswetenschap een empirische wetenschap?*, The Hague, Boom Juridische uitgevers, 2010, 38.

[7] J.M. BARENDRECHT, "Rechtswetenschap: stoffig of inventief", *NJB* 1996, 707—708; P. SCHOLTEN, "De structuur der rechtswetenschap" in *Verzamelde Geschriften van wijlen Prof. Mr. Paul Scholten*, Zwolle, Tjeenk Willink, 1949, 456; N. HOEKX, K. VANHOVE & A. VERBEKE, "Yes we care! Bedenkingen over de (methode der) rechtswetenschap", *RW* 2008-09, 1787; E.L. RUBIN, "Law and the Methodology of Law", *Wisconsin Law Review* 1997, 523; M. VAN HOECKE, *Is de rechtswetenschap een empirische wetenschap?*, The Hague, Boom Juridische uitgevers, 2010, 39; B. VANGEEBERGEN & D. VAN DAELE, "Is de studie van het recht een wetenschap en wie kan het wat schelen?, *RW* 2009, 991.

[8] J.M. BARENDRECHT, "Rechtswetenschap: stoffig of inventief", *NJB* 1996, 707; VLIR Kwaliteitszorg Onderzoek Rechten, *Model voor Integrale Kwaliteitsevaluatie van het Onderzoek in de Rechtswetenschappen*, version 22 september 2004, http://www.vlir.be/media/docs/Onderzoeksbeleid/notitie_KZR_22sept2004.pdf, 14; J.M. SMITS, *The Mind and Method of the Legal Academic*, Cheltenham, Edward Elgar, 2012, 103.

[9] N. HOEKX, K. VANHOVE & A. VERBEKE, "Yes we care! Bedenkingen over de (methode der) rechtswetenschap", *RW* 2008-09, 1787; J.M. BARENDRECHT, "Rechtswetenschap: stoffig of inventief", *NJB* 1996, 708; R.A. POSNER, "Legal Scholarship Today", *Harvard Law Review* 2002, 1320.

[10] These questions are derived from H. OOST, *Circling Around a Question: Defining Your Research Problem*, IVLOS, Utrecht 2003; H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische

2.2. Explorative research objective

When a legal scholar aims to explore and map out the frontiers of legal knowledge or *terra incognita*, he/she pursues an explorative research objective[1]. In this respect, the researcher will not depart from a well-defined starting point, but he/she will look at a rather unknown area of law without having a specific end point in mind[2]. Anyone who is conducting an explorative research has to be prepared for unexpected results[3].

The distinction between the descriptive and the explorative research goal seems to be rather thin. However, the explorative research objective is mainly characterized by an intuitive quest based on trial and error[4]. Instead of having a clear-cut research hypothesis, an explorative research use general and broadly formulated research questions[5].

2.3. Comparative research objective

Pursuing a comparative research objective in legal scholarship means that two or more legal phenomena or arrangements are compared with each other in order to detect similarities and differences. Although this comparison can be the ultimate objective of a legal research, it often is a preliminary step in a defining, explanatory, evaluative or normative research[6]. Legal arrangements can be compared in various ways. In this article we use the following distinction: internal, historical and external comparison.

Internal comparison

Legal phenomena can be compared *internally*, i.e. within the same legal system[7]. An internal comparison can adopt different forms. First of all, it is possible to compare legal phenomena within only one legal discipline. An example is the comparison of the disability allowance for different types of professional categories (e.g. employees, self-employed people and civil servants).

Secondly, an internal comparison can also occur between two different legal disciplines within one legal system[8]. Such comparison is for example interesting when a same legal concept appears in two legal disciplines: e.g. the notion 'employee' is often being used both in the field of labour law and social security law, but it does not necessarily have the same meaning in both disciplines.

Finally, an internal comparison can also address a comparison between different sources of a legal system, such as interstate legislations, regulations of local municipalities, Collective Labour Agreements in different sectors, etc[9].

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uitgevers, 2009, 58; TIJSSEN himself refers to naar H. OOST & A. MARKENHOF, *Een onderzoek voorbereiden,* Baarn, HB-uitgevers, 2007.

[1] M. VAN HOECKE, "Hoe wetenschappelijk is de rechtswetenschap?", *TPR* 2009, 674; M. HERWEIJER, "Juridisch onderzoek" in J.W.L. BROEKSTEEG & E.F. STAMHUIS (eds.), *Rechtswetenschappelijk onderzoek. Over object en methode*, The Hague, Boom Juridische Uitgevers, 2003, 26; R.A.J. VAN GESTEL & J.B.M. VRANKEN, "Rechtswetenschappelijke artikelen", *NJB* 2007, 1454.

[2] F. FELDBRUGGE, as cited by SMITS in J.M. SMITS, *The Mind and Method of the Legal Academic,* Cheltenham, Edward Elgar, 2012, 116.

[3] M. VAN HOECKE, "Hoe wetenschappelijk is de rechtswetenschap?", *TPR* 2009, 674.

[4] M. VAN HOECKE, *Is de rechtswetenschap een empirische wetenschap?*, The Hague, Boom Juridische uitgevers, 2010, 37.

[5] H. TIJSSEN, *De juridische dissertatie onder de loep,* The Hague, Boom juridische uitgevers, 2009, 95.

[6] H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische uitgevers, 2009, 58; W. PINTENS, *Inleiding tot de rechtsvergelijking*, Leuven, Universitaire Pers Leuven, 1998, 16.

[7] W. DEVROE, *Rechtsvergelijking in een context van europeanisering en globalisering*, Leuven, Acco, 2010, 34—35; H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische uitgevers, 2009, 76; M.H. WISSINK, "Op weg naar een nieuwe ronde", *NJB* 2006, 1363; A.E. ODERKERK, *De preliminaire fase van het rechtsvergelijkend onderzoek*, Nijmegen, Ars Aequi Libri, 1999, 5.

[8] M. HERWEIJER, "Juridisch onderzoek" in J.W.L. BROEKSTEEG & E.F. STAMHUIS (eds.), *Rechtswetenschappelijk onderzoek. Over object en methode*, The Hague, Boom Juridische uitgevers, 2003, 31.

[9] D. PIETERS, "Functions of comparative law and practical methodology of comparing" in *Syllabus Research Master in Law*, Leuven-Tilburg, 2009, 10.

Historical comparison

Apart from a comparison between actual legal phenomena, a *historical comparison* between contemporary legal phenomena and the ones dating from a former period in time is also possible. Although this kind of study seems to be closely related to legal history, both differ significantly: while legal history focuses on a dynamic illustration of a specific evolution (diachronically), historical legal comparison concentrates on static and clearly marked out time periods that will be compared (synchronically)[1]. In the latter case, a researcher can try to depart from a defined legal concept or a specific problem. However it is important to keep in mind that some legal concepts or problems had a different meaning during some eras, did simply not exist or have disappeared over time. After all, problems and their (legal) solutions are inextricable connected with social and economic structures. E.g.: legal issues regarding the protection of the shareholder's right will most likely not be present in a society without capital markets[2].

External comparison

Finally legal phenomena or legal systems can be compared *externally*. This is traditionally called 'Comparative Law' and concerns the comparison of (legal phenomena within) two or more legal systems[3]. Both national, supranational and international systems of law can be involved[4]. External legal comparison is rather popular in legal scholarship as it permits to study law across national boundaries. This crossing is interesting for several reasons[5].

First of all, comparative law enables a researcher to acquire knowledge of different law systems. Subsequently, law families can be created based on this knowledge. Secondly, external comparison is interesting when a legal scholar is seeking a solution for a national problem. The comparison will allow him/her to find out how other legal systems deal with the same problem. Thirdly, legal comparison is interesting to look at one's own national legal system in a wider perspective by discovering in what way other legal systems are constructed. Lastly, a preceding comparison of different national legal systems could be useful in view of creating harmonization measures.

In order to compare internally, historically or externally legal researchers frequently ask the following research questions: What are the differences between x and y? What are the similarities between x and y? Are x and y the same? In what way do x and y overlap?[6]

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[1] D. PIETERS, "Functions of comparative law and practical methodology of comparing" in *Syllabus Research Master in Law*, Leuven-Tilburg, 2009, 11; W. DEVROE, *Rechtsvergelijking in een context van europeanisering en globalisering*, Leuven, Acco, 2010, 29.

[2] R. MICHAELS, "The Functional Method of Comparative Law" in M. REIMANN & R. ZIMMERMANN (eds.), *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, 368.

[3] W. PINTENS, *Inleiding tot de rechtsvergelijking*, Leuven, Universitaire Pers Leuven, 1998, 16; A.E. ODERKERK, *De preliminaire fase van het rechtsvergelijkend onderzoek*, Nijmegen, Ars Aequi Libri, 1999, 5; W. DEVROE, *Rechtsvergelijking in een context van europeanisering en globalisering*, Leuven, Acco, 2010, 35; M. VAN HOECKE, *Is de rechtswetenschap een empirische wetenschap?*, The Hague, Boom Juridische uitgevers, 2010, 14; F. GORLÉ, G. BOURGEOIS, H. BOCKEN *et al*, *Rechtsvergelijking*, Mechelen, Kluwer, 2007, 1.

[4] D. PIETERS, "Functions of comparative law and practical methodology of comparing" in *Syllabus Research Master in Law*, Leuven-Tilburg, 2009, 10.

[5] This is a compilation of reasons found in several publications: D. PIETERS, "Functions of comparative law and practical methodology of comparing" in *Syllabus Research Master in Law*, Leuven-Tilburg, 2009, 3 ff; G. DANNEMANN, "Comparative Law: Study of Similarities or Differences" in M. REIMANN & R. ZIMMERMANN (eds.), *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, 401-406.; M. VAN HOECKE, "Deep Level Comparative Law" in M. VAN HOECKE (ed.), *Epistemology and Methodology of Comparative Law*, Oxford, Hart, 2004, 172; J. HILL, "Comparative Law, Law Reform and Legal Theory", *Oxford Journal of Legal Studies* 1989, 102; C. MORRIS & C. MURPHY, *Getting a PhD in Law,* Oxford, Hart Publishing, 2011, 37; A. E. ODERKERK, *De preliminaire fase van het rechtsvergelijkend onderzoek*, Nijmegen, Ars Aequi Libri, 1999, 73-88; F. KUNNEMAN, *Rechtswetenschap*, Nijmegen, Ars Aequi Libri, 1991, 48; W. PINTENS, *Inleiding tot de rechtsvergelijking*, Leuven, Universitaire Pers Leuven, 1998, 33 e.v.; W. DEVROE, *Rechtsvergelijking in een context van europeanisering en globalisering*, Leuven, Acco, 2010, 30—32.

[6] These questions are derived from H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische uitgevers, 2009, 58; TIJSSEN himself refers to naar H. OOST & A. MARKENHOF, *Een onderzoek voorbereiden,* Baarn, HB-uitgevers, 2007.

2.4. Defining research objective

A legal scholar with a defining research objective in mind will try to order the existing legal system (or a part of it) by grouping legal phenomena in classes[1]. This way new legal rules, case law or societal developments will meticulously be classified under existing legal doctrines (e.g. the doctrine of the abuse of the law) or existing legal concepts (e.g. aleatoric contracts)[2]. In this respect, tracing and removing internal contradictions within the legal system will play an important role[3].

Due to several reasons, classification ("modular construction"[4]) has been an essential and typical task of legal research for a long time[5]. First of all, law is a system where different legal concepts, -rules and -principles have an own specific place but at the same time are inextricably linked to each other. Therefore, it is up to legal scholars to find out how all these principles and rules relate to each other in order to obtain a transparent, coherent and consistent overview of the legal system[6].

Secondly, structuring legal phenomena is necessary to gain and spread knowledge on a legal system[7]. After all, a thorough structuring and classification of legal phenomena will result in a meaningful, ordered, comprised, accessible, understandable and workable legal system[8]. At this point knowledge about a legal system becomes teachable, transferable, but also applicable[9].

Finally, legal classification contributes to the continuously elaboration and refinement of the original legal system, as created by the legislator[10]. In this respect a lot of legal

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[1] H. OOST, *Circling Around a Question: Defining Your Research Problem*, IVLOS, Utrecht 2003, 35; H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische uitgevers, 2009, 58; J.M. SMITS, *The Mind and Method of the Legal Academic*, Cheltenham, Edward Elgar, 2012, 18.

[2] M. BARENDRECHT, J. VRANKEN, I. GIESEN, *et al*, "Methoden van rechtswetenschap: komen we verder?", *NJB* 2004, 1425; H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische uitgevers, 2009, 58 (refering to H. OOST & A. MARKENHOF, *Een onderzoek voorbereiden*, Baarn, HB-uitgevers, 2007); H. OOST, *Hoe schrijf ik een betere scriptie. Een nieuwe methode voor het schrijven van scripties en andere teksten*, Amsterdam, Contact, 1995, 45; J.M. POLAK, *Theorie en practijk der rechtsvinding*, Zwolle, W.E.J. Tjeenk Willink, 1953, 31—32.

[3] J.M. SMITS, *The Mind and Method of the Legal Academic*, Cheltenham, Edward Elgar, 2012, 15; M. HERWEIJER, "Juridisch onderzoek" in J.W.L. BROEKSTEEG & E.F. STAMHUIS (eds.), *Rechtswetenschappelijk onderzoek. Over object en methode*, The Hague, Boom Juridische Uitgevers, 2003, 30.

[4] Translated: W.H. VAN BOOM, "Empirisch privaatrecht: enige beschouwingen over de rol van empirisch onderzoek in de hedendaagse privaatrechtswetenschap", *Tijdschrift voor Privaatrecht* 2013, 10.

[5] M. VAN HOECKE, *Is de rechtswetenschap een empirische wetenschap?*, The Hague, Boom Juridische uitgevers, 2010, 13; A. AARNIO, *Denkweisen der Rechtswissenschaft*, Vienna, Springer, 1979, 50; J.M. BARENDRECHT, "Rechtswetenschap: stoffig of inventief", *NJB* 1996, 712; A. PECZENIK, "Scientia Juris. Legal Doctrine as knowledge of Law and as a Source of Law" in E. PATTARO (ed.), *A Treatise of Legal Philosopy and General Jurisprudence*, Dordrecht, Springer, 2005, 1; N. MACCORMICK, *Rhetoric and the Rule of Law*, Oxford, Oxford University Press, 2005, 3.

[6] C. MCCRUDDEN, "Legal research and the social sciences", *Law Quarterly Review* 2006, 634; A. PECZENIK, "Scientia Juris. Legal Doctrine as knowledge of Law and as a Source of Law" in E. PATTARO (ed.), *A Treatise of Legal Philosopy and General Jurisprudence*, Dordrecht, Springer, 2005, 6; M. HERWEIJER, "Juridisch onderzoek" in J.W.L. BROEKSTEEG & E.F. STAMHUIS (eds.), *Rechtswetenschappelijk onderzoek. Over object en methode*, The Hague, Boom Juridische Uitgevers, 2003, 25.; J.B.M. VRANKEN, "Nieuwe richtingen in de rechtswetenschap, *WPNR* 2010, 319.

[7] See also: G. SAMUEL, *Epistemology and Method in Law*, Aldershot, Ashgate, 2003, 217; P. SCHOLTEN, *Algemeen Deel* in *Asser's Handleiding tot de beoefening van het Nederlandsch Burgerlijk Recht*, Zwolle, W.E.J. Tjeenk Willink, 1954, 60.

[8] See F. KUNNEMAN, *Rechtswetenschap*, Nijmegen, Ars Aequi Libri, 1991, 7; R. KRANENBURG, *De grondslagen der rechtswetenschap*, Haarlem, Tjeenk Willink, 1952, 23.

[9] S. GUTWIRTH, "Evaluatie rechtswetenschappelijk onderzoek. Vl.I.R.-model voor integrale kwaliteitsevaluatie van het onderzoek in de rechtswetenschappen" *NJW* 2007, 675.

[10] P.B. CLITEUR & A. ELLIAN, *Encyclopedie van de rechtswetenschap*, I, *Grondslagen*, Deventer, Kluwer, 2006, 26—27; P. SCHOLTEN, "De structuur der rechtswetenschap" in *Verzamelde Geschriften van wijlen Prof. Mr. Paul Scholten*, Zwolle, Tjeenk Willink, 1949, 457; P.W. KAMPHUISEN, *Beschouwingen over rechtswetenschap*, Nijmegen, Dekker & Van De Vegt, 1938, 68.

studies try to range new social phenomena or situations (for which no specific judicial framework yet exist) under an already existing class within the legal system[1]. E.g.: in times when hacking was not yet being regulated as a specific crime, hacking a computer was ranged under the crime 'theft' and therefore the rules on theft would be applicable.

A legal research pursuing a defining research objective is likely to use one of the following research questions: Under which group (of legal phenomena) can x be classified? How can x be characterized? Of what is x an example?[2]

2.5. Theory-developing research objective

The theory-developing research objective tries to deduct a common denominator or a pattern from (a collection of) lawsuits or legal rules in order to formulate a theory[3]. Afterwards, the researcher examines how this theory can be fitted into (the structure of) already existing theories[4]. In legal scholarship, the concept 'theory' is not that prevalent, 'doctrine' is more often used[5]. Examples of doctrines are: the doctrine of the abuse of law, the wrongful act doctrine, etc.[6] VAN HOECKE describes a judicial theory as follows: "*a judicial theory is a system of logical, coherent, in particular not conflicting assertions, views and conceptions concerning a specific legal system, or a subdivision of it, which are formulated as such that is it possible to deduct testable hypotheses in relation with the existence (validity) and the interpretation of legal rules, legal concepts or legal principles*"[7].

Theory development occupies a special place in legal scholarship: by making abstraction of peculiarities and by seeking generalities, it allows to grasp and master law as a system[8]. A theory has also an important predictive function. In this respect, the theory on

[1] P. WESTERMAN & M. WISSINK, "Rechtsgeleerdheid als rechtswetenschap", *NJB* 2008, 504.

[2] These questions are derived from H. OOST, *Circling Around a Question: Defining Your Research Problem*, IVLOS, Utrecht 2003, 35; H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische uitgevers, 2009, 58; TIJSSEN himseld refers to H. OOST & A. MARKENHOF, *Een onderzoek voorbereiden*, Baarn, HB-uitgevers, 2007.

[3] P. SCHOLTEN, "De structuur der rechtswetenschap" in *Verzamelde Geschriften van wijlen Prof. Mr. Paul Scholten*, Zwolle, Tjeenk Willink, 1949, 401; P. SCHLAG, "Spam Jurisprudence, Air Law, and the Rank of Anxiety of Nothing Happening, *Georgetown Law Journal* 2009, 809; J.M. FEINMAN, "The Jurisprudence of Classification", *Stanford Law Review* 1989, 681; L. ALEXANDER, "What We Do, and Why We Do it", *Stanford Law Review* 1993, 1898.

[4] R.A. POSNER, "The Decline of Law as an Autonomous Discipline" *Harvard Law Review* 1987, 773; M. BARENDRECHT, J. VRANKEN, I. GIESEN, *et al*, "Methoden van rechtswetenschap: komen we verder?", *NJB* 2004, 1425; P. SCHLAG, "Spam Jurisprudence, Air Law, and the Rank of Anxiety of Nothing Happening, *Georgetown Law Journal* 2009, 809; R.A. POSNER, "Legal Scholarship Today", *Harvard Law Review* 2002, 1316; F. KUNNEMAN, *Rechtswetenschap*, Nijmegen, Ars Aequi Libri, 1991, 5.

[5] G. DE GEEST, "Hoe maken we van de rechtswetenschap een volwaardige wetenschap?", *NJB* 2004, 59; A.R. BLOEMBERGEN, "Iets over object en methode van wetenschap en rechtspraak in het privaatrecht" in O.W.M. KAMSTRA, F.B.M. KUNNEMAN & C.W. MARIS (eds.), *Nederlandse rechtswetenschap. Tussen distantie en betrokkenheid: paradigma's in de twingtigste eeuw,* Zwolle, W.E.J. Tjeenk Willink, 1988, 73; G. VAN SCHAAIJK, "Praktijkgericht juridisch onderzoek", *Recht en Methode* 2011 (1), 88; M. VAN HOECKE, *Is de rechtswetenschap een empirische wetenschap?*, The Hague, Boom Juridische uitgevers, 2010, 23.

[6] M. VAN HOECKE, "Aard en methode van de rechtsdogmatiek", *R&R* 1984, 197; A. PECZENIK, "Scientia Juris. Legal Doctrine as knowledge of Law and as a Source of Law" in E. PATTARO (ed.), *A Treatise of Legal Philosopy and General Jurisprudence,* Dordrecht, Springer, 2005, 33; M. VAN QUICKENBORNE, "Rechtsstudie als wetenschap" in *Actori incumbit probatio. Opstellen aangeboden ter gelegenheid van de eerst promotie rechten aan de universitaire instelling Antwerpen,* Antwerp, Kluwer, 1975, 230.

[7] M. VAN HOECKE, "Legal Doctrine: Which method(s) for What Kind of Discipline?" in M. VAN HOECKE (ed.), *Methodologies of Legal Research*, Oxford, Hart Publishing, 2011, 14.

[8] P. SCHOLTEN, *Algemeen Deel* in *Asser's Handleiding tot de beoefening van het Nederlandsch Burgerlijk Recht*, Zwolle, W.E.J. Tjeenk Willink, 1954, 75. See also W. TWINING, *Law in context,* Oxford, Clarendon Press, 1997, 134.

'legitimate expectations' allows a lawyer to determine whether or not a promise made by an individual in a specific situation could lead to the legal obligation to comply with it[1].

Due to this predictive function, scholars not merely create abstract theories, but they also focus on theories that are immediately applicable in legal practice[2]. This does not imply that legal scholars should fully subject the development of their theories to existing theories or constructions created by judges or legislators[3]. On the contrary, it is up to legal scholarship to find and cross boundaries and to break new grounds. In this respect, a new theory can cover situations that are not being covered by any legislation yet[4]. Legal practice with its existing theories, constructions or lines of reasoning can be an important source of inspiration without having to curtail the academic freedom of the researcher.

A theory-development research objective will eventually result in the creation of a new theory, the alteration of an already existing theory, the substitution of an existing theory or the conversion of two existing theories into one more general theory[5].

2.6. Explanatory research objective

An explanatory research objective aims to find out why a specific legal rule or phenomenon exists in a given society[6]. At this point a legal scholar *"does not say what something is or how it works, but tells why something is the way it is"*[7]. *Consequently, the emphasis lies on tracing consequences, background, underlying reasons and/or motives*[8].

On the one hand a researcher can try to explain the existence and nature of a legal phenomenon by only using legal sources, such as preparatory works, old legal doctrine, old case law, etc. (i.e. an internal approach). On the other hand a legal scholar can decide to search for an explanation outside the legal system. In this respect (data from) historical, social and economic sciences can be helpful[9]. Such an *external* approach will give the explanation a multidisciplinary or interdisciplinary character. In case of a multidisciplinary explanation the researcher will use research results or data from other scientific disciplines. An interdisciplinary explanation necessitates the researcher to generate him/herself data by applying methods from other scientific disciplines.

Explanatory research objectives are popular in legal research because the explanation of the existence, content or changes of a legal phenomenon contributes to its better understanding. In this respect it is sometimes difficult to distinguish a descriptive research objective from an explanatory one. After all, when a legal scholar tends to describe a legal phenomenon he/she will often go back in time in order to discover changes. At this point the line between merely describing old legislation and explaining why the legislator decided to introduce that legislation (the way he did) becomes rather thin.

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[1] M. BARENDRECHT, J. VRANKEN, I. GIESEN, *et al*, "Methoden van rechtswetenschap: komen we verder?", *NJB* 2004, 1425.

[2] J.M. BARENDRECHT, "Rechtswetenschap: stoffig of inventief", *NJB* 1996, 714.

[3] M. BARENDRECHT, J. VRANKEN, I. GIESEN, *et al*, "Methoden van rechtswetenschap: komen we verder?", *NJB* 2004, 1426.

[4] M. VAN QUICKENBORNE, "Rechtsstudie als wetenschap" in *Actori incumbit probatio. Opstellen aangeboden ter gelegenheid van de eerst promotie rechten aan de universitaire instelling Antwerpen,* Antwerp, Kluwer, 1975, 232.

[5] M. VAN HOECKE, "Aard en methode van de rechtsdogmatiek", *R&R* 1984, 199. See also W. TWINING, *Law in context,* Oxford, Clarendon Press, 1997, 135.

[6] M. VAN HOECKE, "Hoe wetenschappelijk is de rechtswetenschap?", *TPR* 2009, 649; G.A.F.M. VAN SCHAAIJK, *Praktijkgericht juridisch onderzoek*, The Hague, Boom Juridische Uitgevers, 2011, 72.

[7] H.A. OOST, *De kwaliteit van probleemstellingen in dissertaties*, Utrecht, Elinkwijk, 1999, 58.

[8] I. CURRY-SUMNER, F. KIRSTEN, T. VAN DER LINDEN-SMITH & J. TIGCHELAAR, *Research skills. Instruction for lawyers,* Nijmegen, Ars Aequi Libri, 2010, 18; R.A.J. VAN GESTEL & J.B.M. VRANKEN, "Rechtswetenschappelijke artikelen", *NJB* 2007, 1454.

[9] M. VAN HOECKE, "Hoe wetenschappelijk is de rechtswetenschap?", *TPR* 2009, 649.

The following research questions are often used in case of an explanatory research objective: why is x like this? Why was x adopted, changed or later on abolished? What is the background of x? Why is x different from y[1]?

2.7. Evaluative research objective

An evaluative research objective incites a legal scholar to critically assess or value a legal phenomenon[2]. Because a scholar is bound to a lesser extent to current legislation and existing case law, some authors argue that legal scholars even have the duty to value and critically assess valid law[3]. The results of an evaluation often play an important role when the main objective of a research is recommendatory, i.e. making recommendations regarding the law[4].

In order to critically assess or value a specific legal rule of phenomenon a legal scholar will have to use a set of evaluation criteria. These criteria can have both an internal and external character[5].

Internal criteria

Internal criteria are derived from the legal system itself: the concordance of a legal phenomenon with a higher legal rule, a court judgement, a common view in legal literature or underlying general legal principles[6]. More concretely, a legal scholar could try to evaluate whether a legal issue is in accordance with the non-discrimination principle of art. 14 of the European Convention on Human Rights; whether a legal phenomenon serves the 'best interests of the child' as determined in the Convention on the Rights of the Child , whether a legal issue constitutes a hindrance to the freedom of movement of workers as set forth in the Treaty on the Functioning of the European Union, etc. It is clear that a legal researcher operating solely with internal criteria will put forward a purely judicial/legal evaluation.

External criteria

External criteria are not derived from the legal system itself. Examples are: optimal prevention, reduction of costs, optimal protection, deterrent effect of a legal measure, suitability, effectiveness et cetera[7]. Using external criteria implies deserting traditional legal research in favour of multi- or interdisciplinary legal research[8]. In other words,

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[1] These questions are derived from H. OOST, *Circling Around a Question: Defining Your Research Problem*, IVLOS, Utrecht 2003, 35; H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische. uitgevers, 2009, 58; TIJSSEN himself refers to H. OOST & A. MARKENHOF, *Een onderzoek voorbereiden,* Baarn, HB-uitgevers, 2007.

[2] H. TIJSSEN, *De juridische dissertatie onder de loep,* The Hague, Boom juridische uitgevers, 2009, 58.

[3] A.R. BLOEMBERGEN, "Iets over object en methode van wetenschap en rechtspraak in het privaatrecht" in O.W.M. KAMSTRA, F.B.M. KUNNEMAN & C.W. MARIS (eds.), *Nederlandse rechtswetenschap. Tussen distantie en betrokkenheid: paradigma's in de twingtigste eeuw,* Zwolle, W.E.J. Tjeenk Willink, 1988, 76; M. VERHORST, "De rechtswetenschappelijke gemeenschap" in O.W.M. KAMSTRA, F.B.M. KUNNEMAN & C.W. MARIS (eds.), *Nederlandse rechtswetenschap. Tussen distantie en betrokkenheid: paradigma's in de twingtigste eeuw,* Zwolle, W.E.J. Tjeenk Willink, 1988, 355.

[4] A.R. MACKOR, "Legal Doctrine As a Non-Normative Discipline", *Recht en Methode* 2012 (1), 24; H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische uitgevers, 2009, 59.

[5] CRYER, HERVEY EN SOKHI-BULLEY make a difference between 'assessment by reference to an external standard' and 'assessment by reference to a standard set by law itself'. See: R. CRYER, T. HERVEY & B. SOKHI-BULLEY, *Research Methodologies in EU and International Law*, Oxford, Hart Publishing, 2011, 9—10.

[6] M. BARENDRECHT, J. VRANKEN, I. GIESEN, *et al*, "Methoden van rechtswetenschap: komen we verder?", *NJB* 2004, 1425; H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische uitgevers, 2009, 74; S. TAEKEMA & B. VAN KLINK, "On the Border. Limits and Possibilities of Interdisciplinary Research" in S. TAEKEMA & B. VAN KLINK (eds.), *Law and Method,* Tübingen, Mohr Siebeck, 2011, 22; G. VAN DIJCK, *Kwaliteit van de juridische annotatie,* The Hague, Boom Juridische Uitgevers, 2011, 79.

[7] M. BARENDRECHT, J. VRANKEN, I. GIESEN *et al*, "Methoden van rechtswetenschap: komen we verder?", *NJB* 2004, 1426; F. KUNNEMAN, *Rechtswetenschap*, Nijmegen, Ars Aequi Libri, 1991, 9; H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische uitgevers, 2009, 75.

[8] M. BARENDRECHT, J. VRANKEN, I. GIESEN, *et al*, "Methoden van rechtswetenschap: komen we verder?", *NJB* 2004, 1426.

the methods or data (already generated) from other scientific disciplines will be necessary to be able to make an evaluation based on external criteria.

Personal preferences

A legal scholar's personal preferences will — often subconsciously — play an important role while selecting the evaluation criteria. In this respect a researcher is more likely to choose criteria that reflect (the structure of) the own national law system, its underlying principles and the moral standards within its social community[1]. We will discuss these personal preferences more in detail below under 'Recommendatory research objective'. Although personal preferences usually play an important role, a legal scholar can decide to refrain from these preferences, in order to choose evaluation criteria based on the preferences of other actors (e.g. legislator, judges, lawyers, individuals subject to a specific legislation etc.). When a researcher decides to venture an evaluation in view of preferences of other actors, personal elements may not influence the choice of criteria anymore.

In case of an evaluative research objective the following research questions could be asked: what are the advantages and disadvantages of x? Does x achieve its purposes? What is x's value? Is x in concordance with y[2]?

2.8. Recommendatory (normative) research objective

Legal research often advocates a recommendatory research objective: determining how the law *should be* or what the *desired* law is. This research objective is essential to and typical for legal scholarship[3]. It embodies the *"solution attitude"* of lawyers: trying to come to a more justified functioning or more efficient operation of the law by carrying out corrections or adaptations[4].

Legal research that advocates recommendations will often result in a proposal to complete, adapt or even abolish existing rules in order to solve specific problems, inconsistencies, lacunas or at least ameliorate them[5]. In this respect both local, international or universal problems could be envisaged[6]. Although legal scholars like to pursue a recommendatory research objective, attaining such an objective demands some intensive preliminary research. After all, determining how a specific legal phenomenon

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[1] C. MCCRUDDEN, "Legal Research and the Social Sciences", *LQR* 2006, 634; C.E. SMITH, W. GEELHOED, M.J. DUBELAAR *et al*, "Criteria voor goed rechtswetenschappelijk onderzoek. De omgekeerde route.", *NJB* 2008, 689.

[2] These questions are derived from H. OOST, *Circling Around a Question: Defining Your Research Problem*, IVLOS, Utrecht 2003, 35; H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische uitgevers, 2009, 58; TIJSSEN himself refers to H. OOST & A. MARKENHOF, *Een onderzoek voorbereiden,* Baarn, HB-uitgevers, 2007.

[3] E.L. RUBIN, "The Practice and Discourse of Legal Scholarship", *Michigan Law Review* 1987—88, 1847; VRANKEN, "Exiciting Times for Legal Scholarship", *Recht en Methode* 2012 (2), 48; M. VAN HOECKE, "Legal Doctrine: Which method(s) for What Kind of Discipline?" in M. VAN HOECKE (ed.), *Methodologies of Legal Research*, Oxford, Hart Publishing, 2011, 10; E.L. RUBIN, "Law and the Methodology of Law", *Wisconsin Law Review* 1997, 523; D.W. VICK, "Interdisciplinarity and the Discipline of Law", *Journal of Law and Society* 2004,179; J. HAGE, "The Method of a Truly Normative Legal Science" in M. VAN HOECKE (ed.), *Methodologies of Legal Research*, Oxford, Hart Publishing, 2011, 29; F. KUNNEMAN, *Rechtswetenschap*, Nijmegen, Ars Aequi Libri, 1991, 8; E.M.H. HIRSCH BALLIN, "Object en methode van de wetenschap van het staatsrecht en het bestuursrecht" in O.W.M. KAMSTRA, F.B.M. KUNNEMAN & C.W. MARIS (eds.), *Nederlandse rechtswetenschap. Tussen distantie en betrokkenheid: paradigma's in de twingtigste eeuw,* Zwolle, W.E.J. Tjeenk Willink, 1988, 86; C. STOLKER, "Een discipline in transitie, *Recht en Methode* 2011 (1), 23; R.A.J. VAN GESTEL & J.B.M. VRANKEN, "Rechtswetenschappelijke artikelen", *NJB* 2007, 1455; P. WESTERMAN & M. WISSINK, "Rechtsgeleerdheid als rechtswetenschap", *NJB* 2008, 505.

[4] H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische uitgevers, 2009, 165.

[5] F. KUNNEMAN, *Rechtswetenschap*, Nijmegen, Ars Aequi Libri, 1991, 9; H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische uitgevers, 2009, 59, 74 en 165.

[6] L. ALEXANDER, "What We Do, and Why We Do it", *Stanford Law Review* 1993, 1887.

should be, presupposes it's detailed description, explanation and evaluation[1]. Only when a legal scholar has gathered this information, he/she can determine if the legal issue needs to be adapted and how this adjustment should look like.

Normative criteria

In order to make a recommendation, a legal scholar will have to use normative criteria. These criteria can be internal or external. E.g.: the proposed recommendation will have to respect the existing structure and internal logic of the legal system[2] (internal), must guarantee the principle of equal treatment between men and women as guaranteed by the national Constitution (internal) and must result in a cost reduction of the health care system (external)[3].

When a legal scholar only uses internal criteria, he/she is able to make a legal/judicial recommendation. From a set of internal normative criteria it is not possible to derive policy or economic recommendations.

Personal preferences

As already pointed out under 'Evaluative research objective', the choice of criteria will heavily depend on the personal preferences of the researcher. After all, *"outlining a possible development of law presupposes a point of view about (desirable) law"*[4]. *In this respect, determining how the law should be* and settling what the *best solution* is to a problem might differ from one legal scholar to another[5].

First of all, lawyers have developed a legal intuition advising them when a decision has to be made[6]. This intuition is the result of many years of legal education combined with practical experience. When legal scholars need to make a normative conclusion, their intuition will manifest itself mainly by avoiding normative criteria that would clash with the coherence of their legal system, its fundamental legal principles and the ethical principles that apply within their society and culture[7]. Scholars from different legal systems and cultures might therefore choose different normative criteria.

Secondly, it is possible that two legal scholars, born and raised in the same society, will nevertheless sense and solve a legal problem differently because they have received a different legal education (e.g. scholars from different generations or from different universities). After all, legal education always presupposes *"an (implicit) assumption about law and jurisprudence"*[8] and this assumption is passed on to students. A researcher whose education was pervaded by the principle of legal certainty will perhaps tackle a problem differently than a legal scholar who has continually learned that equality is the most important legal principle.

Thirdly, personal views on the subject of the research, on how a legal system can efficiently work, on moral standards and ethical principles heavily influence the choice

[1] R.A.J. VAN GESTEL & J.B.M. VRANKEN, "Rechtswetenschappelijke artikelen", *NJB* 2007, 1454; H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische uitgevers, 2009, 59.

[2] F. KUNNEMAN, *Rechtswetenschap*, Nijmegen, Ars Aequi Libri, 1991, 9.

[3] L. ALEXANDER, "What We Do, and Why We Do it", *Stanford Law Review* 1993, 1887.

[4] F. KUNNEMAN, *Rechtswetenschap*, Nijmegen, Ars Aequi Libri, 1991, 4.

[5] C.H. SIEBURGH, "L'art de la distinction", *NJB* 2008, 3—13; J. HAGE, "The Method of a Truly Normative Legal Science" in M. VAN HOECKE (ed.), *Methodologies of Legal Research*, Oxford, Hart Publishing, 2011, 30; F. KUNNEMAN, *Rechtswetenschap*, Nijmegen, Ars Aequi Libri, 1991, 9.

[6] See e.g. C.H. SIEBURGH, "L'art de la distinction", *NJB* 2008, 3—13.

[7] P.C. WESTERMAN, "Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law" in M. VAN HOECKE (ed.), *Methodologies of Legal Research*, Oxford, Hart Publishing, 2011, 89; C.J.J.M. STOLKER, "Ja, geléérd zijn jullie wel!", https://openaccess.leidenuniv.nl/handle/1887/3727, 2002, 9.

[8] F.B.M. KUNNEMAN, "Object en methoden van rechtswetenschap en juridisch onderwijs" in O.W.M. KAMSTRA, F.B.M. KUNNEMAN & C.W. MARIS (red.), *Nederlandse* rechtswetenschap, Zwolle, W.E.J. Tjeenk Willink, 1988, 173.

of normative criteria[1]. Legal scholars are however the least conscious of the influence of these personal views[2].

In sum, when two legal scholars have conducted the preliminary research together (i.e. describing, explaining and evaluating a legal phenomenon), it is possible that they propose a different recommendation at the end of the research[3]. One scholar could highly value a traditional view of legal doctrine while the other scholar is heavily influenced by 'law and economics' theories. These personal preferences are likely to result in another kind of recommendation.

Jump from evaluation to recommendation?

As personal preferences are of significant importance both in the process of evaluating and the process of formulating legal recommendations, the normative criteria used for a recommendatory research objective can be rather similar to the criteria used for an evaluation preceding the recommendation. This is because the personal preferences that played a role when the internal and/or external evaluation criteria were chosen, also influence the choice of normative criteria. Indeed, when a legal scholar highly values the principle of legal certainty, it is most likely that 'compliance with the principle of legal certainty' will be selected both as an evaluation criterion (e.g. when assessing a specific legislation) and as a normative criterion (e.g. when making recommendations to adapt that legislation).

However, this does not imply that after an evaluation a legal scholar can jump to a legal recommendation[4]. On the contrary, after evaluating a legal phenomenon additional normative criteria remain necessary in order to formulate recommendations regarding this phenomenon.

First of all, the results of an evaluation rarely point out one clear direction for making a recommendation. In this respect it is possible that an evaluation assesses several proposals of law regarding a specific legal issue as being 'positive.' However, this evaluation result will not be able to indicate which proposal of law *is preferable to* the others. In order to make such a recommendation possible additional normative criteria are necessary.

Secondly, an evaluation will assess a legal phenomenon: positive or negative, advantageous or disadvantageous, etc. These assessments will however not indicate which actual changes or adjustments *should be made*. Additional normative criteria will be necessary in order to formulate these recommendations.

A legal research aiming to formulate a legal recommendation can use the following research questions: How should x be? Does x still have to exist? How should x be improved? What should be avoided? Should x be replaced by y[5]?

3. Conclusion

Although the abovementioned typology of research objectives for legal scholarship is still a work in progress, it nevertheless provides an interesting way to look at the implicit *savoir faire* to conduct legal research through explicit methodological glasses. This does not only allow us to better grasp the research objectives of old and new legal studies, it also allows

[1] H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische uitgevers, 2009, 154; F. KUNNEMAN, *Rechtswetenschap*, Nijmegen, Ars Aequi Libri, 1991, 9.

[2] J. SINGER, "Normative Methods for Lawyers", *Harvard Law School Public Law Research Paper № 08-05*, 2008, 55.

[3] P. SCHOLTEN, "De structuur der rechtswetenschap" in *Verzamelde Geschriften van wijlen Prof. Mr. Paul Scholten*, Zwolle, Tjeenk Willink, 1949, 462.

[4] TIJSSEN argues that this is a mistake legal researcher often make. See H. TIJSSEN, *De juridische dissertatie onder de loep*, Den Haag, Boom juridische uitgevers, 2009, 183.

[5] These questions are derived from H. OOST, *Circling Around a Question: Defining Your Research Problem*, IVLOS, Utrecht 2003, 35; H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische uitgevers, 2009, 59; TIJSSEN himself refers to H. OOST & A. MARKENHOF, *Een onderzoek voorbereiden*, Baarn, HB-uitgevers, 2007.

legal scholarship to present its own 'research identity' to members of other scientific disciplines.

Other classifications of legal research do exist[1], however the proposed typology has one main advantage: because of its practical line of approach (departing from research objectives) the typology is rather concrete and can be of direct use for (young) researchers developing a research project. Not only does it allow to immediately label the research objective(s) a legal scholar is considering (perhaps intuitively), but this labelling will also have a significant advantage when searching for an appropriate method to pursue the chosen research objective(s). In this respect the next step in the process to establish an explicit methodological framework consists of completing the typology on research objectives by adding possible methods to pursue and attain the proposed objectives.

Instead of simply copy-pasting research objectives and methods from other scientific disciplines in order to establish an explicit methodological framework, legal scholarship should be aware of its own research identity. By making explicit and clarifying the methodological specificities of conducting legal research (including research objectives and methods) legal scholarship will be able to position itself between the other scientific disciplines[2] by showing them what it's all about.

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[1] M.M. SIEMS & D. MAC SITHIGH, "Mapping Legal Research", *Cambridge Law Journal* 2012, 653 ff.; T. HUTCHINSON & N. DUNCAN, "Defining and Describing What We Do: Doctrinal Legal Research", *Deakin Law Review* 2012, 101 ff.; J.M. SMITS, *The Mind and Method of the Legal Academic,* Cheltenham, Edward Elgar, 2012, 8—34; M. VAN HOECKE, "Legal Doctrine: Which method(s) for What Kind of Discipline?" in M. VAN HOECKE (ed.), *Methodologies of Legal Research,* Oxford, Hart Publishing, 2011, 1—11; COUNCIL OF AUSTRALIAN LAW DEANS, *Statement on the Nature of Legal Research*, http://www.cald.asn.au/docs/cald%20statement%20on%20the%20nature%20of%20legal%20research%20-%202005.pdf, May and October 2005, 7 p.; W.H. VAN BOOM, "Empirisch privaatrecht: enige beschouwingen over de rol van empirisch onderzoek in de hedendaagse privaatrechtswetenschap", *Tijdschrift voor Privaatrecht* 2013, 7—84; H. TIJSSEN, *De juridische dissertatie onder de loep*, The Hague, Boom juridische uitgevers, 2009, 58—59; TIJSSEN himself refers to H. OOST & A. MARKENHOF, *Een onderzoek voorbereiden,* Baarn, HB-uitgevers, 2007 M.M. SIEMS, "Legal Originality", *Oxford Journal of Legal Studies* 2008, 147—164; P. CHYNOWETH, "Legal Research" in A. KNIGHT & L. RUDDOCK (eds.), *Advanced research methods in built environment*, Oxford, John Wiley & Sons, 2008, 28—38; C. MCCRUDDEN, "Legal Research and the Social Sciences", *LQR* 2006, 634 ff.

[2] See also M.M. SIEMS & D. MAC SITHIGH, "Mapping Legal Research", *Cambridge Law Journal* 2012, 652.

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