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REVITALIZING DOCTRINAL LEGAL RESEARCH IN EUROPE:
WHAT ABOUT METHODOLOGY?

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Abstract

Both in the U.S. and in Europe there is a debate on methodology in legal research. Doctrinalists and multidisciplinary appear to be in different camps fighting over the 'true nature' of legal scholarship. We wonder where this renewed attention for methodology is coming from and what is behind it. Should European legal scholars follow certain colleagues in the U.S. who believe that doctrinal research is dead and should we all engage in law and... research now? If not, does this imply that there is nothing wrong with mainstream European doctrinal legal scholarship? We believe the latter is not the case. Our hypothesis is that an increased instrumentalisation of European law, and legal research has decreased the attention for methodology, for legal theory, and for keeping enough professional distance to ones object of research. This has, among others, resulted in a lack of scholarly criticism towards European integration. We will argue that the answer to this problem is not to try to put doctrinal legal research out with the garbage. Instead, we suggest it should be revitalized so that it is up for the challenges that European law is facing.

Keywords

Legal methodology, legal research, legal scholarship, European integration, herd behaviour

I. Setting the Scene

1. *Is Doctrinal Legal Research Dead?*

On June 10th 2008, the newly established Research Group for Methodology of Lawmaking and Legal Research of Tilburg University's law faculty organized a kick-off conference about the importance of methodological awareness in lawmaking and legal research. Two of the keynote speakers, Professor Dame Hazel Genn (Socio-legal studies: University College London) and Professor Eric Posner (Law & economics: Chicago Law School) held a passionate plea for more emphasis on multidisciplinary legal research, which was welcomed by the audience. Eric Posner, however, went a lot further than just arguing for an enrichment of traditional legal scholarship with empirical methods or economic insights. In his lecture, he claimed that 'doctrinal legal research is dead'.

Posner's statement, first and foremost, referred to the situation in the U.S. but judging from his response to questions from the audience, he seemed quite convinced that law schools in Europe will sooner or later follow America's footsteps in burying 'black letter law'.¹ Doctrinal legal research might still be useful for legal practice but it has little to do with science, appeared to be the message. In this contribution we will argue that if Posner actually meant what he said, he is wrong, not only for the situation in the Netherlands but for Europe more in general. It is more likely that on this side of the Atlantic doctrinal and non-doctrinal approaches towards law and legal research are becoming more intertwined.

Interesting with respect to the claim that doctrinal research is dead, or at least close to death, is that Richard Posner, another prominent member of the Chicago School of Law & economics, and judge in the Court of Appeals for the Seventh Circuit, recently defended quite a different position than his son did in Tilburg.² In a sparkling debate with the former dean of Colorado Law School, Professor Pierre Schlag, Posner senior claims that 'The law schools need legal analysts, not merely as teachers but also as scholars. Doctrinal analysis cannot be left to judges. As Schlag puts it, 'Courts have dockets. Legal academics have time. Given this asymmetry, the academics could always outdo the courts in the intricacy of their analyses. In one of his latest books, he adds to this that sound doctrinal research is intellectually demanding, requiring vast knowledge and the ability to synthesize fragmentary materials.'³ According to Posner senior, this type of research is important for the vitality of the legal system and of greater social value than much esoteric interdisciplinary legal scholarship. We fully

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¹ In theory it is possible that the current credit crunch led to modesty in the Chicago School of Law & Economics about the scientific possibilities to predict the effects of regulatory interventions to 'fix' malfunctioning financial markets. At first sight, however, this seems unlikely looking at the recommendations to restore the market for mortgages at the lowest possible costs. See <<http://www.thebigmoney.com/articles/mothers-milk/2009/03/03/better-cheaper-mortgage-fix>>. After all, was the search for lowest costs 'solutions' not one of the major drivers behind the collapse of the financial sector in general and the mortgage market in particular?

² Richard A. Posner, *The State of Legal Scholarship Today: A Comment on Schlag*, *The Georgetown Law Journal*, Vol. 97, pp. 845-855 (2009).

³ Richard A. Posner, *How Judges Think*, Harvard University Press, Harvard 2008, p. 211.

agree with Richard Posner that doctrinal research cannot be left to judges and other legal practitioners. At the same time, we also believe that the negative image concerning legal doctrine that Eric Posner apparently shares with so many others has much to do with the formalism and the strong divide between the law as it is and the law as it ought to be, which are all too often associated with a dogmatic approach towards academic legal research. Especially interdisciplinarians often perceive doctrinalists to be intellectually rigid, inflexible, formalistic, and inward-looking.⁴ Other accusations include that doctrinalists show an unhealthy preoccupation with technicalities,⁵ often focus on unimportant topics, repeat existing knowledge, and fail to connect law to life by assessing the real world consequences of doctrinal frameworks. Proceeding otherwise would, according to Deborah Rhode, require significant time, money, and non-legal expertise, which she believes most authors of doctrinal work are more than happy to avoid.⁶ As a consequence, many doctrinal works are ‘glutted with theory and starved for facts’, according to Rhode.⁷ Pierre Schlag goes even further. He feels that much of the doctrinal research in the U.S. can be labelled as ‘case law journalism’.⁸ Many scholarly legal publications offer little more than comments on recent court rulings.

2. Problem Definition

As we have just shown, in the U.S. a debate on legal scholarship and methodology is going on between, at least, two camps: ‘doctrinalists’ and ‘multidisciplinarians’. Especially the elite law schools seem to move away from doctrinal research, whereas in education legal doctrine is still leading. In Europe, on the other hand, doctrinal legal research does not appear to be under attack (yet). Nevertheless, a debate on the scientific nature of legal research in general is emerging.⁹

The Netherlands is probably one of the first European countries where methodology of law and legal research became an issue (again) with many references to the situation in the U.S.¹⁰ An interesting conclusion of the latest Dutch research assessment exercise is that law is a ‘discipline in transition’. According to the evaluation committee, it is moving from a national to a more European and international discipline, from a teaching monopoly towards competition for students, from service-oriented towards legal practice to a purpose in itself, from overhead financing towards competitive financing and contract research, from single- to multi- and interdisciplinarity, and last but not least from implicit traditions to more focus on methodology.¹¹

⁴ Douglas Vick, *Interdisciplinarity and the Discipline of Law*, *Journal of Law and Society*, Vol. 31, nr. 2, p. 164 (2004).

⁵ R. Cotterell, *Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies*, *Journal of Law and Society*, Vol. 29, p. 633 (2002).

⁶ Deborah Rhode, *Legal Scholarship*, *Harvard Law Review* 115, pp. 1327-1361 (p. 1340) 2002.

⁷ *Id* Rhode at p. 1340.

⁸ Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 *GEO. L. J.* 803 (2009), pp. 821–823.

⁹ For the UK, P. Hillyard, *Law’s empire: Socio-legal empirical research in the Twenty-first century*, *Journal of Law and Society* 2007, Vol. 34, no. 2, pp. 269-277; H. Genn, M. Partington and S. Wheeler, *Law in the real world: Improving our understanding of how the law works*, *The Nuffield inquiry on empirical legal research*, Nuffield Foundation, London 2006: http://www.ucl.ac.uk/laws/socio-legal/empirical/docs/inquiry_report.pdf. Roger Brownsword, *An introduction to legal research*, www.wellcome.ac.uk/assets/wtx030897.pdf. For Germany Hans-Eberhard Heyke, *Ist ‘Rechtswissenschaft’ eine Wissenschaft? Rechtstheorie*, 2003, 229-244; R. M. Kiesow, *Rechtswissenschaft – was ist das?* *JZ* 2010, 585 and for Belgium S. Gutwirth, *Evaluatie rechtswetenschappelijk onderzoek: VLIR-model voor integrale kwaliteitsevaluatie van het onderzoek in de rechtswetenschappen*, *Nieuw Juridisch Weekblad* 2007/6, pp. 674-678. For France Eva Steiner, *French Legal method*, Oxford: Oxford University Press 2002.

¹⁰ C.J.J. Stolker, *Legal Journals in Pursuit of a More Scientific Approach*, *EJLE* 2005, No. 2, pp. 77-94 and Gerrit A. de Geest, *Hoe maken we van de rechtswetenschap een volwaardige wetenschap?* *NJB* 2004, 58-66.

¹¹ *Evaluatiecommissie Rechtswetenschappelijk onderzoek 2009, Kwaliteit en diversiteit*, VU 2009, with an English summary p. 6. (see: http://www.vu.nl/nl/Images/Evaluatie%20onderzoek%20Rechten_tcm9-169244.pdf).

We wonder where this renewed attention for legal scholarship and methodology is coming from and what is behind it. The trend is obvious and can be observed in many countries.¹² However, it seems as if the Dutch debate is perhaps special in the sense that there is a debate running through various disciplines: public, private, national, international law etc. There are dozens of articles now, and the debate has, as we already mentioned, even drawn the attention of the national research assessment exercise.¹³ It seems likely that sooner or later this debate will spread to the rest of Europe and to European law as such. The first signs of this are already there. Recently Hesselink has, for example, argued that the Europeanization of private law is gradually blurring the dividing line between internal and external perspectives towards legal research, with their respective methods.¹⁴ According to him, this increases the need for a new European legal methodology. But the question is of course: what does that entail: a European legal methodology? Should European legal scholars follow their colleagues in the U.S. and abandon doctrinal legal research altogether at a moment where prominent legal scholars in the U.S. are already making a U-turn in order to try to restore the doctrinal tradition? If the answer is no, does this imply that there is nothing wrong with European legal scholarship?

We believe the latter is not the case. There probably is something wrong with European legal scholarship and the study of European law. Our hypothesis is that an increased instrumentalization of law and legal research has decreased the attention for methodology, for legal theory (theory-building), and for keeping enough professional distance to ones object of research, which on its turn has resulted in a lack of scholarly criticism towards European integration. We will argue that the answer to this problem is not to put doctrinal legal research out with the garbage. Instead we suggest it should be revitalized it so that it is up for the challenges that European legal scholarship is facing, such as, increased multilevel governance, plurality of legal sources, and mixtures between different modes of government and governance.

3. *Is the Debate About the Scientific Nature of Legal Doctrine New?*

The debate about the scientific nature of legal doctrine is actually a rather old one. It has strong predecessors dating back to at least the 19th century, when legal formalism (Begriffsjurisprudenz) clashed with naturalism. Famous is, for instance, the speech that Julius von Kirchmann, a German Judge, gave in Berlin in 1847 before a society of German legal scholars in which he argued:

‘Die Juristen sind ‚Würmer‘, die nur vom faulen Holz leben; von dem gesunden sich abwendend, ist es nur das Kranke, in dem sie nisten und weben. Indem die Wissenschaft das Zufällige zu ihrem Gegenstand macht, wird sie selbst zur Zufälligkeit; drei berichtigende Worte des Gesetzgebers, und ganze Bibliotheken werden zu Makulatur.’¹⁵

Von Kirchmann criticized the arbitrariness in law and argued that doctrinal legal research was not expressing the true spirit of natural law as felt and experienced by the people (‘Volksgeist’). He felt that doctrinal work (Jurisprudenz) was merely a reproduction of what legislators and courts had to say. After Von Kirchmann, other former members of the ‘Historical school’, such as Rudolf von Jhering, followed in his footsteps by taking a distance from the formalism and emphasis on systematization.¹⁶

In Germany the debate on the scientific nature of legal doctrine reached a new culmination point after the adoption of the new Civil Code, which in the eyes of the member of the Freirechtsschule was using

¹² K. Riesenhuber (Hrsg.), *Europäische Methodenlehre: Grundfragen der Methoden des Europäischen Privatrechts*, De Gruyter Recht: Berlin 2004, p. 3, 2nd edition, *Handbuch für Ausbildung und Praxis*, 2010. The second edition also contains reports on the current debate in various Member States.

¹³ http://www.vu.nl/nl/Images/Evaluatie%20onderzoek%20Rechten_tcm9-169244.pdf.

¹⁴ M. Hesselink, *A European Legal Method? On European Private Law and Scientific Method*, *European Law Journal* 15(1), pp. 20-45 (44-45) 2008.

¹⁵ J. von Kirchmann, *Die Wertlosigkeit der Jurisprudenz als Wissenschaft*, Julius Springer Verlag, Berlin 1848, p. 29.

¹⁶ R. v. Jhering, *Im Juristischen Begriffshimmel. Ein Phantasiebild*, in: Schertz und Ernst in der Jurisprudenz, Leipzig 1909.

legal doctrine as a shield against the legal protection of the working class.¹⁷ The *Freirechtsschule* paved the way for the development of legal sociology as well as for other attempts to integrate social science into the legal system. However, the debate went beyond the German particularities and also led to the search for an appropriate legal methodology, one which reaches beyond a mere textual interpretation of cases and statutes and paves the way for the integration of social facts in theories and methods of law and legal interpretation.¹⁸

Later more or less similar debates emerged elsewhere. First in the Northern European countries, where Anders Vilhelm Lundstedt, for example, argued that doctrinal research was drenched with superstition instead of based on facts. To redress this he urged legal scholars to take a more empirical perspective on law.¹⁹ In line with Lundstedt, another prominent member of Scandinavian legal realism, Alf Ross, defended that the principle of verification must also apply to legal doctrine.²⁰ Accordingly, doctrinal propositions should be verified against the outcomes of judicial practice. After Scandinavian legal realism came the French May 1968 revolution, in which legal scholars stressed the socio-economic embeddedness of the legal system and the importance of legal research to redress situations of social injustice.²¹ Later on in the paper we will be more elaborate on the impact that the 1968 events had on legal thinking not only from the 'left', in order to transform society via law, but also from the 'right' 'to maintain' and or 'to re-establish' the formalist character of the law.

Critics might argue that instrumentalization of the law was going on long before that? Roscoe Pound was, for example, talking about law as a way of 'social engineering' already in 1910, and we also mentioned Scandinavian legal realism. Our point is not that there has not been a similar debate on the instrumental use of law in legal and political history. We have chosen 1968, as this constitutes a benchmark for societal change in a number of European countries. It triggered a political debate and it initiated an intellectual wave that challenged the preconceptions of so-called formal a-political law.²²

Just like in Europe, the American debate about the virtues and drawbacks of legal dogmatics has had its predecessors. In the U.S. the attack on legal formalism dates back to Oliver Wendell Holmes jr., who wrote that the black letter lawyer does not consider law to be a means to an end and therefore does not care about the social conditions in which the law has to function in the real world. According to Holmes, this is a serious mistake and in 'The Path of Law' (1897) he argues in favour of an approach in which law is more than mere logic and includes facts and experience.²³ Holmes heavily criticized the clinical 'law as a science' approach from Christopher Columbus Langdell, the inventor of the so-called case-method, who believed that legal research was first of all a matter of induction and formal logic. Langdell argued that law

'consists of certain principles or doctrines. To have such a mastery of these is to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law.'²⁴

¹⁷ A. Menger, *Das Bürgerliche Recht und die besitzlosen Volksklassen. Eine Kritik des Entwurfs eines Bürgerlichen Gesetzbuches für das Deutsche Reich*, 1890.

¹⁸ Dugiut, Salleilles and Gény, *Méthode d'Interprétation et Sources en Droit Privé Positif*, 1899/2nd edition 1919.

¹⁹ A.V. Lundstedt, *Die Unwissenschaftlichkeit der Rechtswissenschaft*, Berlin: Verlag für Staatswissenschaften und Geschichte, 1932.

²⁰ Alf Ross, *On Law and Justice*, London: Stevens & Sons, 1958, p. 40.

²¹ M. Mialle, *Introduction critique au Droit*, Maspero, Paris, 1976.

²² There is an abundant literature on the effects of the 1968 revolution/revolt on the society in a number of Member States, analysing the pros and cons of the then initiated transformation processes.

²³ O.W. Holmes jr., *The Path of Law*, *Harvard Law Review* 1897, 457 (469).

²⁴ C.C. Langdell, *A Selection of Cases on the Law of Contracts*, 2nd. ed. (Boston: Little, Brown, 1879), vii.

Holmes, however, did not accept Langdell's idea that all the relevant 'empirical' materials of legal science are contained in printed books and that the library is to legal scholars what laboratories are to chemists and physicist.²⁵ In a review of Langdell's second edition of his famous casebook, he acknowledged the advantages of a more scientific approach to law and legal research but only for as long as it does not result in clinical syllogistic reasoning:

'As a branch of anthropology, law is an object of science; the theory of legislation is a scientific study, but (...) to reduce the concrete details of an existing system to the merely logical consequence of simple postulates is always in danger of becoming unscientific, and of leading to a misapprehension of the nature of the problem and the data.'²⁶

According to Holmes, the 'bad man' serving as a role model for the judiciary does not care for one moment about axioms and deduction but is only interested in what the courts will do in fact. Inspired by Holmes but also by the German *Interessenjurisprudenz* and *Freirechtsschule*, Roscoe Pound developed his 'sociological jurisprudence' in the beginning of the 20th century underlining the importance of the societal effects of law and lawmaking, and taking into account the gap that often exists between the law in 'the books and the law in action'.²⁷

Pound's instrumentalistic view on law and lawmaking was the starting point for what is now known as American legal realism.²⁸ Basically, one can say that American legal realists tried to link the indeterminacy of especially judicial lawmaking with the need to draw on extra-legal considerations to resolve disputes. That of course requires multidisciplinary approaches to the study of law in order to be able to build legal decisions on sound knowledge about the sociological, anthropological, economic etcetera foundations of society.

All this is just to show that the current debate is certainly not new. It is an old if not an endless debate on the role and function of doctrinal research and how it should be conceived. Moreover, the debate seems to revolve in cycles with periods in which formalism is dominant alternating with periods of attention for the societal and economic relevance of law. Therefore, if doctrinal legal research has ever been dead, it has until today always succeeded in rising from the grave.

4. *Today: An Anglo-American or Again Also a European Debate?*

Where some have argued in the past that interdisciplinarians often produce such abstract knowledge that it has little relevance for legal practice, those who criticize doctrinal research normally do not claim that this research has no value for legal practice. In fact much of the criticism towards doctrinal legal research appears to be either outdated or lacking a clear focus.

As far as the first point is concerned; almost no doctrinalist still sees legal research as a matter of discovering the divine law that is somewhere out there waiting to be found in order to provide the one and only right answer to a legal problem.²⁹ Doctrinal scholarship has definitely moved beyond this.

Regarding the second point, it seems typical that in an overview of the disadvantages of a doctrinal approach in writing a law dissertation by Michael Salter and Julie Mason, the authors count no less

²⁵ C.C. Langdell, *Harvard Celebration Speeches*, *Law Quarterly Review* (1887), p. 124.

²⁶ O.W. Holmes jr., *Review Langdell casebook*, 14 *Am. U. L. Rev.* 1880, pp. 233-235 (234).

²⁷ Roscoe Pound, *Law in Books and Law in Action*, 44 *Am. L. Rev.* 12, 15 (1910).

²⁸ V. Nourse and G. Shaffer, *Varieties of New Legal Realism: Can A New World Order Prompt a New Legal Theory?*, *Cornell Law Review*, Vol. 95: 61, p. 71 (2009).

²⁹ In the same sense Michael Pendleton, *Non-empirical Discovery in Legal Scholarship – Choosing, Researching and Writing a Traditional Scholarly Article*, in: Mike McConville and Wing Hong Chui, *Research Methods for Law*, Edinburgh: Edinburgh University Press, 2007, p. 162.

than 42 ‘main objections’.³⁰ These objections vary from being too close to legal practice, helping to disguise judicial discretion and political manipulation in the law-making process, to becoming out of touch with that same legal practice. The latter, because of not paying enough attention to new developments, such as the major challenges that European integration are posing for law and legal research.

At this point a comparison between legal scholarship in the U.S. and the EU seems in place. In the U.S. judge Harry Edwards started a debate in the early 1990s because he felt that legal scholarship and legal practice were moving in opposite directions.³¹ Edwards claimed: ‘While the schools are moving toward pure theory, the (law) firms are moving toward pure commerce, and the middle ground – ethical practice – has been deserted by both.’³² Edwards’ provocative article has not remained unchallenged though.³³ In an interesting and equally provocative book with the catchy title ‘Saving the constitution from lawyers’, Robert J. Spitzer criticizes the fact that most American law students, including the ones who become legal scholars, are still trained as practicing lawyers instead of as academics. Whereas academics examine a problem by collecting information, investigating alternative explanations and testing their assumptions, law students are in the eyes of Spitzer, trained to gather arguments and evidence that support a certain position or focus on a certain desired outcome; they specialize in what he calls the ‘art of persuasion’. In the eyes of Spitzer, this ‘advocacy scholarship’ is not scholarship at all because it lacks the necessary intellectual openness and is not directed towards advancing the body of knowledge. It is about winning a debate.³⁴

As we mentioned before, there also appears to be an emerging debate in Europe about the ‘true nature’ of law as a science and about the consequences for legal scholarship.³⁵ Until today, however, doctrinal legal research has managed to keep its dominant position both at the national and the European level. We believe this is not necessarily a bad thing as long as it implies that legal scholars in Europe are not cut-off from important developments in legal practice. Nonetheless, in this paper we will argue that as far as some of the most important developments with respect to European integration are concerned, many legal scholars are not asking the right questions simply because they focus too much on EU lawmakers who see European integration as an ongoing process with no horizon and few constitutional limits.

³⁰ Michael Salter and Julie Mason, *Writing Law Dissertations*, Harlow: Pearson Education Limited, 2007, pp. 112-118.

³¹ H.T. Edwards, *The growing disjunction between legal education and the legal profession*, *Mich. L. Rev.* 34 1992-1993, pp. 34-70.

³² *Ibid.*, p. 34.

³³ P.D. Reingold, *Harry Edwards’ Nostalgia*, *Michigan Law Review*, Vol. 91, No. 8 (Aug. 1993), pp. 1998-2009; Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 *Mich. L. Rev.* 1921 (1993); Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 *GEO. L.J.* 173, 176-77 (2001). For Judge Edwards’ surrebuttal, see Harry T. Edwards, *Another ‘Postscript’ to ‘The Growing Disjunction Between Legal Education and the Legal Profession,’* 69 *Wash. L. Rev.* 561, 567 (1994). Later on the debate shifted to the use of empirical methods in assessing judicial decision-making. See Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 *Va. L. Rev.* 1335 (1998) v. Richard L. Revez, *Ideology, Collegiality, and the D. C. Circuit: A Reply to Chief Judge Harry T. Edwards*, *Virginia Law Review* Vol. 85, No. 5 (Aug., 1999), pp. 805-851; K.M. Clermont & T. Eisenberg, *Judge Harry Edwards: A case In Point*, *Washington University Law Quarterly*, Vol. 80: 2002: pp. 1275-1289 responding to Harry T. Edwards & Linda Elliott, *Beware of Numbers (and Unsupported Claims of Judicial Bias)*, 80 *Wash. U. L.Q.* 723 (2002); Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 *Duke L.J.* 1895 (2009).

³⁴ Robert J. Spitzer, *Saving the Constitution from Lawyers: How Legal Training and Law Reviews Distort Constitutional Meaning*, Cambridge University Press 2008, pp. 29-30.

³⁵ See for example M. Hesselink, *A European Legal Method? On European Private Law and Scientific Method*, *European Law Journal*, Vol. 15, No. 1, January 2009, pp. 20-45.

We believe that raising methodological awareness can be an important antidote in the study of European law. It may encourage legal researchers not to limit themselves to recycling what the ECJ or other EU institutions have to say about European law and hence avoid ‘Verzweigung der Rechtswissenschaft zur Rechtsprechungskunde’.³⁶ What is needed in Europe is not a schism between legal practice and legal scholarship or a wig between legal research and education as, for instance, Martin Scordato claims is taking place in the U.S.:

‘Thus one can come to appreciate that the shift from a generally accepted formalist paradigm to the current post-realist instrumentalist paradigm has created a subtle but profound separation between the law professor’s role as a legal scholar and her role as a law school instructor and service provider to the bar. In the former role, the scholar seeks to understand the nature of law and legal processes and to state what is true as she sees it. In the latter two roles, she is often obliged to abandon the more cynical or radical aspects of her understanding in an effort to help students and practitioners to work effectively within the existing faiths and conventional understandings of the current system.’³⁷

II. Coping with the Problem

I. *Is There Something Wrong with European Legal Scholarship?*

Taking into account the lessons from the U.S., a methodology debate in Europe should not start with what separates legal scholars from practitioners. It seems more fruitful to start with a debate about what may be the added value of a scholarly legal approach focussing on the development of positive EU law, compared to what EU institutions and legal practitioners think of it. What sort of new ideas, perspectives, theories and methods can legal scholars generate if they do not just follow law and policy makers but think about why EU law is developing as it does?³⁸

Interesting questions emerge in that case. What exactly is the relationship between law, legal research and European integration? Why is European legal research so overwhelmingly policy driven? Why are there so many implicit assumptions in scholarly legal publications, such as: harmonization of laws is good and legal diversity is bad, human rights are a blessing for EU law but economic rights are a curse, consulting stakeholders over new EU laws and policies is right but listening to lobbyists is wrong, transparency in decision-making is good, secrecy bad, and so on. Is it not an important academic responsibility for legal scholars studying EU law to test these implicit assumptions instead of taking them for granted?

Moreover, where has all the academic tradition gone that led scholarly research and legal scholarship to discuss and reveal the relationship between ‘Vorverständnis und Methodenwahl’ (preconception and choice of legal methods), as developed by Josef Esser, whose work on this subject has unfortunately never been translated into English or any other language?³⁹ We think Josef Esser has been paradigmatic for a particular ‘Zeitgeist’⁴⁰ that questioned the ‘apolitical’ character of law. He stands for a series of academics worldwide in the late 1960s and early 1970s who highlighted that law and legal systems cannot be disconnected from all sorts of implicit preconceptions that determine ones

³⁶ K. Riesenhuber (Hrsg.) *Europäische Methodenlehre: Grundfragen der Methoden des Europäischen Privatrechts*, De Gruyter Recht: Berlin 2004, p. 3, 2nd edition, *Handbuch für Ausbildung und Praxis*, 2010.

³⁷ Martin Roger Scordato, *Reflections on the Nature of Legal Scholarship in the Post-Realist Era*, *Santa Clara Law Review*, Vol. 48 (2008), pp. 353-440 (p. 380).

³⁸ This comes close to the definition of science by the German Constitutional Court that defines science as: serious and systematic attempt to gain new insights, ‘capable of’ external review and criticism, and guided by the regulative ideal of truth. See BVerfG 35, 79/113 (2004) and BVerfG 90, 1 (13/14).

³⁹ J. Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung*, 1972.

⁴⁰ G.W.F. Hegel, *Vorlesungen über die Philosophie der Geschichte*, Band 18, Frankfurt am Main, 1979.

perspective, including e.g. the prevalence of Western democracy over any other political system, the need to guarantee private property, to secure freedom of contract and maintain personal responsibility. These theorists did not advocate for a particular role that law and the legal function should meet. They left us with a strong message that the ‘poet of the tramps’ William Henry Davies⁴¹ enshrined in the following:

‘What is this life if, full of care, We have no time to stand and stare, A poor life this, if full of care,
We have no time to stand and stare’ (*emphasis added, R.v.G./H.-W.M.*).

Stand and stare requires self-reflection and self-control of our own premises from where we start our research activities. Methodology can assist in getting a hold of one’s own preconceptions, by challenging us to make our implicit (assumptions) explicit, by raising awareness so that we not only look for confirmation of what we (unconsciously) expect to be the outcome of the research, and by warning us to keep an open eye for alternative explanations and counter-evidence.

2. *Herd Behaviour and the Instrumental Use of Law*

Our hypothesis is that the answer to the suggested theoretical and methodological deficit that unites so much of today’s legal scholarship are somehow related to the aforementioned developments that occurred in and around 1968, the year of what the French call a ‘revolution’, the Germans remember as a Studentenrevolte, and the Dutch associate with the ‘opstand van arbeiders en studenten’. The events of May 1968, we think, initiated a change in the way the law was perceived not only in states where a political turmoil led to visible changes, but for Europe and the European Union as a whole. What happened is that legal scholarship, in the slipstream of law- and policymakers, gradually drifted away from a critical ‘stand and stare approach’ of Esser and others and slowly became more engaged with the idea that law is a political project and a vehicle for social change. For legislatures all over Europe, the latter resulted in a shift from *codification* (capturing in laws what grew bottom up from society) towards *modification* of human and corporate behaviour (legislation as a policy instrument).⁴² It soon became clear, though, that it is impossible to steer a highly complex society with a rational central rule approach and detailed instructions.⁴³ As a consequence, legislatures started to leave the judiciary with more and more discretion by reverting to open texture, legal principles and delegation of lawmaking powers to the executive. Some have even argued that Montesquieu’s concept of the *Trias Politica* transformed into a *Duas Politica* in which the executive and the judiciary took over much of the power of the legislature resulting in a more partial and policy-oriented way of lawmaking.⁴⁴

Much has been written about all this, but what has not been researched thoroughly is what the effects of these fundamental changes in lawmaking have been on doctrinal legal scholarship. Since legal research in Europe has always remained close to legal practice, is it not likely that at least some of this policy-orientedness rubbed off on doctrinal legal research? We think this is the case and believe that in particular those scholars studying European law were affected by it because European law had and

⁴¹ 1871-1940; We borrowed this wonderful metaphor from our colleague Roger Brownsword, who used the poem as a paradigm for what he misses in the current debate on the theoretical foundations of European private law; see R. Brownsword/H.-W. Micklitz/L. Niglia/St. Weatherill (eds.) *The Foundations of European Private Law*, Hart Publishing Oxford, 2011 forthcoming.

⁴² T. Koopmans, *De rol van de wetgever*, in: *Honderd jaar rechtsleven, Nederlandse Juristen-Vereniging, 1870-1970*, Zwolle: Tjeenk Willink, 1970, pp. 211-235.

⁴³ H.R. van Gunsteren, *The Quest for Control: A Critique of the Rational-Central-Rule Approach in Public Affairs*. By H.R. van Gunsteren, New York: John Wiley & Sons, 1976.

⁴⁴ M.G. Rood, *Heeft de rechter een taak in zogeheten politieke zaken?*, Zwolle: Tjeenk Willink 1975, p. 32; A.F.M. Brenninkmeijer, ‘De plaats van de rechter in onze constitutionele rechtsorde’, in: J.M. Polak e.a., *De rechter als dictator? Dynamiek in de trias. Verschuivingen in de verhouding regelgeving, bestuur en rechtspraak*, Lochem: Van den Brink & Co 1987, pp. 51-70; T. Koopmans, *Courts and Political Institutions*, Cambridge University Press 2003, p. 247.

still has no strong doctrinal roots that could have functioned as a barrier against the ongoing instrumentalization of European integration.

In our analysis we will focus on three stages of this development. We would like to distinguish *integration through law* – the first stage from 1968 until approximately 2002, *integration without law*, since 2002 and *integration beyond law*, spurred by the 2005 French and Dutch ‘no’ against a European Constitution, which indirectly underlined the role and function of the charter of fundamental rights. All three stages are united in a particular instrumental understanding of law, of legal scholarship and of legal methodology. We will argue that the instrumental perspective dominates all other possible perspectives on the role of EU law.

We have the feeling that the instrumentalization of European law has had important consequences for legal scholarship as well. It stimulated ‘herd behaviour’. This is a well-known phenomenon in behavioural economics.⁴⁵ It describes a behaviour, which has first been identified in the Tulipmania in the 17th century.⁴⁶ Herd behaviour means in essence that B follows A, although B has information that A might be wrong. C, D, E then follow B, as they mistakenly believe that A and B’s decision is based on better or more convincing information than they possess themselves.⁴⁷ Herd behaviour also reminds us of the famous parable of the ‘Tragedy of the commons’ in which Garret Hardin describes the situation in which a pasture is open to all herdsmen of a village. In such a situation what may happen is that herdsmen keep adding cattle to the herd beyond the point of overgrazing. Most of the herdsmen will probably not (want to) notice that point has passed, simply because it still seems profitable to add extra animals, while the growing shortage of food is shared with the rest of the herd.⁴⁸ As a result the herdsmen follow each other until finally tragedy takes place.

For legal scholarship herd behaviour implies that researchers choose to follow ‘hot topics’ and trends, often initiated by policymakers (e.g. the European Commission) instead of developing their own agendas. What is worse is that they often do it without questioning the preconceptions on which these choices rest and also without realizing the importance of taking an autonomous approach that calls for justification of the topic choice and for the development of a research design expressing what is new about the research and which methods will be applied. There is an endless list of dissertations, books, articles, etcetera, which simply follow mainstream ideas and ideologies, often developed by policymakers or judges, without questioning these. In many cases the authors do not even bother to explain on whose shoulders they stand, where they deviate from fellow researchers or from mainstream beliefs in practice or, more in general, to what extent they add something to the body of knowledge.

⁴⁵ See for example A. Banerjee, ‘A Simple Model of Herd Behavior’, *Quarterly Journal of Economics* 107 (3): 797-817 (1992).

⁴⁶ A. Maurits van der Veen, *The Dutch Tulip Mania: The Social Politics of a Financial Bubble*, March 2009.

⁴⁷ Garret Hardin, *Tragedy of the Commons*, *Science* 1968, pp. 1243-1248.

⁴⁸ Hardin calls this a double P double C game: A privatizing of profits and communizing of costs. See G. Hardin, *Filters against Folly. How to survive despite economists, ecologists, and the merely eloquent*, Harissonburg/Virginia: Penguin 1985, chapter 10.

Think of e.g. the current conflict around the scope of anti-discrimination rules. The European Union heavily contributed to making anti-discrimination one of its – perhaps even the – ‘guiding’ principle in which a genuine European dimension comes clear that reaches beyond its application in the Member States.⁴⁹ A conservative reading of the anti-discrimination principle tends to reduce its scope of application in order to keep the private legal order free from a concept, which is said to be alien to the idea that contracting partners can freely choose the contracting partner, whatever the motives and reasons behind the choice might be.⁵⁰

What many scholars tend to forget is that in this example one can also follow the opposite reform-oriented approach in order to defend that the boundaries of the anti-discrimination principle should be stretched to submit private law issues to its application. Otherwise the protection against, for example unequal treatment on the basis of sex by insurance companies, which was recently at stake in case C-236/09 of the ECJ, would come to depend solely on the accidental private or public status of in this case the insurer.⁵¹ One may cast doubts whether this is still justifiable in a context of increasing liberalization of markets and privatization of former public services. Unfortunately these sorts of questions are usually not brought to the foreground.

An important lesson for legal scholarship in this case is that one may sympathize with either position depending on our preconceptions and political preferences. What Josef Esser had in mind, however, even reaches beyond this. He was concerned with the question behind the question. Is discrimination really always bad? Do we not also need discrimination, for example, in order to stimulate competition?⁵² What exactly constitutes discrimination (is age for example a relevant criterion since we are all aging?), and can law really impose anti-discrimination on deeply rooted social behaviour or can it only deal with some of the symptoms of unequal treatment that appear at the surface of the legal system?

The identification of herd behaviour does not entail that all researchers are constantly running in the same direction. There are, and always have been, exceptional researchers that do not follow the herd. We have already argued that the need for (further) harmonization of national laws and policies is often an implicit assumption in the work of those writing about European law (‘harmonization is good, diversity is bad’). There are nevertheless scholars that explicitly stood back in order to stare at why so many others believe in harmonization so strongly and on what evidence they base their ideas that harmonization is in the general interest.

Katherina Sideri⁵³ and James Scott⁵⁴ stand for a methodological approach toward lawmaking that, if taken seriously, raises serious questions with respect to legislative policies that call for full harmonization in certain fields of EU law. Sideri’s argument is that instead of top down harmonization in the EU we often need to start more bottom up and try to link EU policy to local practice. The same argument has been made earlier by sociologist James Scott. He has shown that most legal systems working with blue print plans and unification models, such as the former USSR, have dramatically

⁴⁹ D. Kennedy, *Three Globalisations*, where he demonstrates that the nation states exempted family law from the scope of application of the anti-discrimination principle. It was for the European Union to enlarge the principle and to penetrate via citizen rights into national family law regimes.

⁵⁰ See e.g. J. Basedow, *Grundsatz der Nichtdiskriminierung*, ZEuP 2008, 230; F.-J. Säcker, *Vertragsfreiheit und Schutz vor Diskriminierung*, ZEuP 2006, 1.

⁵¹ AG Kokott, 30.9.2010, ECJ, Case C-236/09 – Test Achats, nyr.

⁵² In sports, for example, we do discriminate on the basis of sex on many occasions in order to make sure that men and women have their own competition in order not to discourage the members of the different groups. We even discriminate on many occasions in terms of payment between male and female athletes.

⁵³ *Law’s Practical Wisdom, the Theory of Law Making in the New Governance Structures of the European Union*, Ashgate Farnham, 2007.

⁵⁴ *Seeing it Like a State: How Certain Schemes to Improve the Human Condition Have Failed*, New Haven, Yale University Press, 1998.

failed in the end because they neglect the importance of ‘Metis’. This is a type of knowledge that cannot be reduced to formulaic instructions. The word contrasts with the Greek word ‘techne’, which describes that knowledge and practice that ‘may be logically derived from initial assumptions.’

We are not afraid that legal scholars following their own intuitions and interests are on the verge of becoming extinct. What worries us more is that there is a risk that those who do not want to follow a herd will nevertheless focus on policy-driven research because they feel pressured (by research foundations, faculty managers, publishers, and so on) to justify and explain why they are not ready to accept the overwhelming wisdom that law and hence legal research should have societal relevance. We refer to the current emphasis on ‘valorization’, on research programming, on matched funding of contract research, and more in general by the strong emphasis on the transfer of knowledge from one party (scholars) to another (business or government) for economic purposes (e.g. the direct link in the Seventh framework programme of the EC with the Lisbon agenda of becoming the most competitive economy in the world⁵⁵).

We do not want to argue that herd behaviour is necessarily and automatically wrong. There might be good and valid reasons why the instrumental use of law is justified in many situations. However, the inherent preconceptions and the reasons lying behind such an assumption have to be disclosed. After all, the history of science shows that ‘opting out’, ‘swimming against the tide’, and ‘picking the fruits of serendipity’ have often resulted in a much deeper knowledge than much of the pre-programmed research that we can see today everywhere around us.

3. *Integration through Law*

We would like to repeat here that there probably is an ideological link between the French revolution and the German student revolt in 1968 and the adoption of the Single European Act in 1986.

1968 constitutes the break-even point in the European post war society, the year that became the start of a new era, a post war society, driven by a new generation that expected from the nation state more than securing a flourishing economy. It demanded from the state the establishment of a just society.⁵⁶ The May revolution also triggered a debate on the role and function of law and legal scholarship. In retrospect it seems as if the clock was turned backwards. Once again, the formalist character of (doctrinal) legal scholarship was attacked. And again Julius von Kirchmann,⁵⁷ Rudolf von Jhering,⁵⁸ Max Weber⁵⁹ and the *Freirechtsschule*⁶⁰ served as witnesses for considering the societal role and function of law afresh.

Law, was the overall message, should serve to redistribute wealth, to domesticize economic power and to secure liberty and justice for the weakest in society. Interestingly enough, this message united critical legal thought in Europe and the U.S.⁶¹ Legal scholarship was expected to take a political stance, legal scholarship should stand up for using the legal system for the transformation of the society. 1968 nourished the welfare state and F. Scharpf coined the term of the social-democratization

⁵⁵ See: http://cordis.europa.eu/fp7/understand_en.html.

⁵⁶ At least this is what could be regarded as a common denominator for France and Germany.

⁵⁷ *Ibid.*

⁵⁸ *Der Kampf ums Recht*, in alluding to Darwin; see Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2. neubearbeitete Auflage, 1967, p. 566.

⁵⁹ *Wirtschaft und Gesellschaft. Grundriß der verstehenden Soziologie*, 1922.

⁶⁰ Hermann Kantorowicz, *Der Kampf um die Rechtswissenschaft* (unter dem Pseudonym Gnaeus Flavius), 1906.

⁶¹ Ch. Joerges/D. Trubek (eds.), *Critical Legal Thought*, 1988. In the U.S. it led to the birth of the Critical legal studies movement. See about CLS: Mark Tushnet, ‘Critical Legal Studies: A Political History,’ *Yale Law Journal* 100 (1991), 1515-1544.

of Member States, whatever their political regime looked like.⁶² There is a strong ideological link in the instrumental use of law to transform the Member States' legal order in the aftermath of 1968 and the 1986 EU project to establish the Internal Market.⁶³ What is sometimes forgotten nowadays is that the establishment of this market was also a gigantic regulatory project. Around 300 directives and regulations should be and were adopted in about five years with the aim to create a market without frontiers. The focus laid on rules meant to guarantee access to the European market. Distributive justice was certainly not the main concern of the inventors of the single market, but completion of this market opened the door for the EU to formulate minimum standards for social protection.⁶⁴ Part of the ideological link between 1968 and 1986 lies in the fact that never before in the history of the EU has the law been so systematically used for a particular instrumental purpose; as a means to an end. In other words, there was no market without EU law and, at the same time, the most visible representation of this European market was a set of laws.

Based on the ground prepared by the ECJ in transforming an international treaty into a constitutional charter – integration should be achieved through legal means.⁶⁵ After 1986 legal scholars turned into co-drafters of the new Internal Market law. In the 1980s and 1990s the European Commission has benefited tremendously from the leeway in the academic research agenda. A close community, an alliance even, between the European Commission and Euro-friendly academics was constituted, and back then the tendering of research projects seldom took place. The envisaged social outlook of the, until then, very much market-based European legal policy facilitated close co-operation. It made EU legal research attractive for soixante-huitard scholars with social reform ambitions from all over Europe.

In the meanwhile the European Commission became one of the most important sponsors of policy-driven research as we can witness today in the large European research programmes, such as ESF, KP7. The Member States themselves facilitated this by delegating not only lawmaking competences but also a lot of legal research to the EU. The foundation of the EUI in Florence, with which we as authors of this paper both have close ties, is perhaps the most visible proof of the transfer of research(ers) from the Member States to the EU. Each year around 50 young law students from the Member States start their career there as a PhD or LLM. After completing their projects they spread all over Europe again often ending up in leading positions in business and academia in which European law plays an important role.

An important by-product of 1986 was the increase in status of European law and legal research. Using *Sen*⁶⁶ we can speak of a certain hegemony of law over other sciences. Lawyers were omnipresent in the European Commission, law making was high on the agenda, and European legal scholarship was on its peak. Unfortunately though, a price had to be paid for all this. What we have witnessed is a shift from fundamental to applied research, from fully independent research to more hybrid forms of contract research where contractors set the agenda, and from sponsoring of research on the basis of trust and confidence towards tendering and competition. Moreover, research projects were not given to European academia by policymakers in order to learn that their targets could not be reached. The research question was 'how', not 'if'. Whatever the sub-categories might have been, all forces were directed to one major goal – completion of the Internal Market. We do not want to suggest some sort

⁶² F.W. Scharpf, *Crisis and Social Democracy in Europe*, translated by R. Crowley and F. Thompsen, Ithaca, Cornell University Press, 1991.

⁶³ COM (1985) 310 final.

⁶⁴ H.-W. Micklitz argued elsewhere that the EU strives for a model of access justice – *Zugangsgerechtigkeit*, which differs from social distributive justice; see *Social Justice and Access Justice in Private Law*, EUI Working Paper 2011, forthcoming.

⁶⁵ See the research project undertaken at the EUI in Florence, 'Integration Through Law', M. Cappelletti, M. Seccombe & J. Weiler (eds.), Berlin–New York: Walter de Gruyter, 1986.

⁶⁶ Amartya Sen, *The Idea of Justice*, Cambridge, Mass.: Belknap Press/Harvard University Press, 2009.

of conspiracy here. The intentions may have been sincere; however, we are arguing that the Internal Market project created a particular research spirit, one where the instrumental use of law and the legal system dominated over any other possible objective. ‘Stand and stare’ was certainly not the credo Europe offered to its scholars. The outcome of the integration process was fixed in the sense that being very critical towards the integration process was an unwelcome message. Perhaps this is also part of the reason why groundbreaking research projects undertaken in the 1990s were executed outside Europe, mainly in the U.S.⁶⁷

4. *Integration without Law*

After completion of the Internal Market, the European Commission had to monitor the implementation process at the Member State level. Moreover, the newly adopted over 300 EU laws needed to be enforced. It is in this context that the notion of multi-level governance arose. It required a thorough management of who should be responsible for what in the Internal Market or European polity.⁶⁸ The most visible sign of the changing paradigm was the White paper on Governance adopted in 2002.⁶⁹

We will not argue that the Internal Market programme yielded ‘European Governance’. Indeed, one might even claim that both concepts emerged more or less simultaneously and that European governance has deeper and older roots (see e.g. hereafter the so-called ‘New approach’) than the White paper suggests. What is relevant here is the structural deficit in the capacity of the EU to promulgate rules and its lack of capacity and competence to enforce them.⁷⁰ As the Commission originally held executive power only in the fields of competition and agricultural policy, it is not surprising that it was here that the idea was born to establish committees uniting the expertise of national and EC officials.⁷¹ From the midst 1980s onwards, one might therefore identify a growing awareness of the European Commission to use and to test regulatory techniques which are not just copying national instrumental laws, but introduce new modes of law-making and enforcement which fit into the category of multi-level governance.

The 1984 New Approach to Technical Standards and Regulations eventually led to the adoption of ‘comitology’ in 1987.⁷² The former document and its interplay with comitology are paradigmatic in the coming together of Internal Market policy and what was later termed ‘governance’. The New Approach and ‘comitology’ served as a blueprint for similar concepts, the 2001 Lamfalussy procedure, the Open Method of Co-ordination (OMC) launched in 2000 and last but not least co-regulation in 2002. The Lamfalussy procedure established a four-step law-making and law enforcement mechanism in the field of financial services, which combines binding European standard-making at the first two levels and non-binding rule-making at the third level via national regulatory agencies, which must enforce the rules as well.⁷³

⁶⁷ The most striking evidence is the research project run by M. Cappelletti, who was a professor at Stanford Law School and the EUI in Florence, who designed the project and J.H.H. Weiler, today Professor at NYU, who joined and who shaped the project which until today stands a landmark in the research landscape. See ‘Integration Through Law’, M. Cappelletti, M. Seccombe & J. Weiler (eds.), Vol. 1, Book 1, Berlin–New York: Walter de Gruyter, 1986.

⁶⁸ W. van Gerven, *The European Union: A Polity of States and People*, Hart Publishing: Oxford 2005.

⁶⁹ *European Governance*, COM (2001) 428 final.

⁷⁰ There is considerable discussion of the roots within the doctrine; see Ch. Joerges/M. Everson u.a., *The European Turn to Governance and unanswered Questions of Legitimacy: Two Examples and Counterintuitive Suggestions*, in Ch. Joerges/B. Strath/P. Wagner (Hrsg.), *The Economy as Polity: The Political Constitution of Contemporary Capitalism*, 2005, p. 159; O. de Schutter, *The implementation of fundamental rights through the open method of co-ordination*, in O. de Schutter/S. Deakin (eds.), *Social rights and market forces: is the open method of co-ordination of employment and social rights the future of social Europe?*, 2005, p. 279; M. Dawson, *The OMC and the European Economic Constitution*, 2007, PhD EUI Florence.

⁷¹ E. Vos, *The rise of committees*, (1997) 3 *European Law Journal*, p. 211.

⁷² Directive 99/468/EC, OJ L 184, 17.7.1999, 23.

⁷³ Th. M.J. Möllers, *Lamfalussy-Verfahren und Europäisches Wirtschaftsrecht*, ZEuP 2008, 480.

Completion of the Internal Market yielded a paradigm shift in EU lawmaking in order to overcome a number of negative side effects of globalization. Especially the Lisbon Council promoted *inter alia social inclusion* as a means to compensate those citizens, workers, consumers who are not able to meet the challenges resulting from a globalizing economy and run the risk to be cut off from the labour market and the consumer market. Social exclusion, this is the overall message, shall be overcome. So the transition from the Internal Market to globalization yielded the need to respond to social concerns and was an important driving force behind the introduction of the European social model.

The European social model is supposed to form a solid basis for the transformation of the EU into a knowledge economy. However, national legal systems also need to be adapted as part of an active welfare state to ensure that work pays, to secure long-term sustainability in the face of an ageing population, to promote social inclusion and gender equality, and to provide quality health services. More specific with regard to the information society, different means of access must prevent from info-exclusion. The combat against illiteracy must be reinforced. Special attention must be given to disabled people.⁷⁴

Especially the OMC and the ‘Social dialogue’⁷⁵ operate in those areas of social policy, where the European Union has no competences. National governments remain the key actors, able to control the process. In particular the OMC does not produce binding results and exclusion of the ECJ was vital for its establishment. There is now a rich academic debate on the success or failure of the OMC, on the practical effects, on the role and function of Member States, the European Commission and on the NGO’s, and on the impact on European integration.⁷⁶

For the community of legal scholars throughout Europe, however, all these attempts remained for a long time widely unnoticed, as they took place in rather remote areas of EU law and did not (yet) reach the higher level of a more general debate on implementation and enforcement. All this changed after the launch of the 2002 White Paper on Governance. It changed not only the political landscape, but also reshaped the research agenda.

Governance led to a far-reaching politicization of lawmaking and enforcement, politicization here being understood as circumventing or overruling ‘law’ as the decisive means for shaping the European integration process. Traditional legislation became less popular to the advantage of self-regulation,⁷⁷ co-regulation⁷⁸ and other ‘new’ modes of governance.⁷⁹ And politics and political scientists ‘replaced’ law and lawyers in many of these new areas. Legislative studies (*Gesetzgebungslehre*), once dominated by jurists/public lawyers, lost terrain to new disciplines, such as regulation and governance,⁸⁰ where political scientists now rule the game.⁸¹ New sub-fields emerged, such as risk

⁷⁴ At p. 1.

⁷⁵ The European social dialogue refers to discussions, consultations, negotiations and joint actions involving organizations representing the two sides of industry (employers and workers). It takes two main forms – a tripartite dialogue involving the public authorities, and a bipartite dialogue between the European employers and trade union organizations. It has resulted in over 300 joint texts by the European social partners, which are included in a database.

⁷⁶ For an overview of the arguments, M. Dawson, 2009. For a critical account, see in particular D. Trubek & L. Trubek, *Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination*, *European Law Journal* 11 (2005), p. 343.

⁷⁷ F. Cafaggi (ed.), *Reframing self-regulation in European private law*, 2006.

⁷⁸ A. Héritier and S. Eckert, *New modes of governance in the shadow of hierarchy: self-regulation by industry in Europe*, RSCAS 2007/20.

⁷⁹ Colin Scott has argued that many of the new modes of governance are not really new and as far as they are new, they are often not all that innovative; *Governing Without Law or Governing Without Government? New-ish Governance and the Legitimacy of the EU*, *European Law Journal*, 15 (2):160; see more comprehensively F. Cafaggi/H. Muir Watt (eds.), *Making of European Private Law: Governance Design*, 2008; F. Cafaggi/H. Muir Watt (eds.), *The regulatory functions of European private law*, 2009.

⁸⁰ See the journal *Regulation & Governance* that mentions political scientist as its first target group.

regulation, ICT-regulation, energy and transport regulation, and so on. What all these fields have in common is that, as far as law still plays a role, doctrinal legal research is usually replaced by multidisciplinary law and... approaches requiring different methods and theories.

'Integration through law' of course did not come to an end, but as the dominant paradigm it was replaced by 'integration without law'.⁸² Political scientists were upgraded and lawyers were downgraded. That this has repercussions also for legal practice can be demonstrated by referring to the involvement of political scientists in the law-making process. A key element of the 2002 White Paper on Governance is the better-regulation programme.⁸³ An important part of this programme is the introduction of ex ante evaluation and impact assessments, which should forestall the adoption of new rules. Impact assessments are in practice often executed by political scientists (or economists), lawyers play an auxiliary role only. Their competence is needed to fill in templates designed by political scientists and economists. Also the task of the legal service of the European Commission in the legislative drafting process is changing more and more into a role of offering technical-legal assistance.

From the late 1990s onwards, legal scholarship was also faced with the theoretical implications of integration without law. The new modes of governance raise first and foremost a problem of legitimacy. How can the drift away from established law-making procedures, from traditional sets of regulatory instruments, from hard judicial and/or administrative enforcement to softer forms be given democratic legitimacy? The normative side of this academic debate is whether governance may only be democratically legitimated if basic procedural requirements, such as transparency, participation and accountability, are safeguarded and if the enforceability of these parameters is secured via individual or collective rights.⁸⁴

These are of course all interesting and highly relevant questions, but where is the legal research about what all this means for the development of positive law? What happens for example as soon as parties disagree on the interpretation of codes of conducts, certification schemes, covenants or other hybrid forms of governance? What 'rule of recognition' should the EJC adopt in order to determine if and when these rules are (ir)relevant for the legal system? Or what is (or will be) the function of impact assessments, Internet consultations, and other better regulation tools for the ECJ in the interpretation of directives and regulations once a conflict arises about how EU law has to be applied or enforced?⁸⁵ At the beginning of the new millennium, integration without law dominated not only legal practice but also legal scholarship. If and as far as lawyers embarked on topics related to regulation and governance, they were faced with the methodological problems and the theoretical approaches in political science. Again we can witness herd behaviour. Legal scholarship silently shifted its focus, without much resistance. Unfortunately, little has been written on the relationship between law and political science,⁸⁶ about why the shift occurred, what the possible methodological implications resulting there from are, whether the quality of multidisciplinary research has suffered from translation problems between different disciplinary approaches.

(Contd.) _____

⁸¹ See for example the ECPR standing group on regulatory governance: <http://regulation.upf.edu/>

⁸² Ch. Joerges, *Integration durch Entrechtlichung? Ein Zwischenruf*, ZERP-Diskussionspapier 1/2007.

⁸³ S. Weatherill, *Better regulation*, Oxford, Hart, 2007. There is a huge academic debate in this area; see more generally Weimar, 2007 as well as various publications from Joerges, inter alia with Everson, in Joerges/Strath/Wagner (eds.), 2005, pp. 159 et seq. and on the legitimacy of soft law, L. Senden, *Soft Law in European Community Law*, 2006.

⁸⁴ This is the argument Hans-W. Micklitz made in 'The Politics of Judicial Co-operation', 2005, p. 479 et seq.

⁸⁵ See A.C.M. Meuwese, *Impact assessment in EU Lawmaking*, Alphen a/d Rijn: Kluwer Law International, 2008, and A. Alemanno, *The Better regulation initiative at the judicial gate: A trojan horse within the Commission's walls or the way forward?*, *European Law Journal* 2009, Vol. 15, nr. 3, p. 396 versus R. Munday, *In the wake of 'good governance': impact assessments and the politicisation of statutory interpretation*, *Modern Law Review* 2008, nr. 3, 385-412.

⁸⁶ But see K.J. Alter/R. Dehousse/G. Vanberg, *Law, Political Science and EU Legal Studies: An interdisciplinary Project?* *European Union Politics* 2002, 113.

5. *Integration beyond Law*

Integration through law and integration without law are in a way self-explanatory. Integration beyond law deserves a deeper investigation. It is only against this background that the tendency towards herd behaviour in EU-legal scholarship and the impact of integration beyond law on legal methodology become clearer.

We are referring here to the current state of EU law, EU methodology and EU legal scholarship. The lacking distance makes it more difficult to so clearly structure mainstream thinking. However, we would identify two developments emerging from the idea of ‘integration beyond law’. First, there is the efficiency paradigm dating back to the Lisbon declaration in 2000. Second, we have seen a paradoxical acceleration of the constitutionalization process in the aftermath of the 2005 French and Dutch ‘no’ to the EU Constitution. Where one would expect EU institutions, such as the ECJ, to be more careful and reserved in their lawmaking ambitions, almost the opposite seems the case; the credo appears to be: ‘full speed ahead’ with the integration process and with the constitutionalization of EU law with or without a formal constitution.

Why then ‘integration beyond law’? Where is the ‘beyond’? Or hypothesis is that the current integration paradigm can no longer be associated to one dominant ideology. It is the combination of the aim to become ‘the most competitive and most dynamic knowledge-based economy’ in the world, as formulated in the Lisbon agenda, with the need to redress the negative consequences of globalization that stamp the European integration process. Constitutionalization beyond the borders of the Lisbon treaty (‘creeping constitutionalization’⁸⁷) will probably be necessary to guide the future integration process, which has no clear border or horizon. Constitutionalization turns into a substitute for a formal constitution. Fundamental and human rights, to be located somewhere in between ‘law’ and ‘politics’ have already gained and may gain an ever stronger impetus, legally and politically (ideologically). We believe to observe that the current trend in legal scholarship may be caught in the paradigm of integration beyond law that enshrines the main stream paradigms of ‘efficiency in law’ and ‘constitutionalization through fundamental and human rights’, and that poses new challenges to the methodology of law.

Let us begin with the first strain. The efficiency doctrine is linked to what might be called the economization of European law, a process that started with the ECJ using the market freedoms to build a European legal order separate and distinct from the national orders. Economization of the legal order has found its most prominent expression in the concept of the European Economic Constitution, a concept borrowed from post-war Germany.⁸⁸ A strong competition law should shield the private law society (*Privatrechtsgesellschaft*) against regulatory intrusion guided by various policy purposes, be they industrial, social or environmental policies. The concept of a European Economic Constitution introduced economic theory into the way in which law should be used in the European integration process, here in down-grading regulatory law but likewise requesting strong legal rules to guarantee market freedoms and freedom of contract. However, the introduction of economics into the European integration process may unfold various effects on the role and function of law in the integration process. Economics may strengthen the role of law, but economics may also undermine the role of law. There is a hidden link between *ordo-liberalism* requesting a tight legal frame and law & economics putting the role and function of law into question (Posner), which definitely deserves more attention. *Ordo-liberalism* opens the floodgate for economics into law. Seen this way the Internal Market Programme, in combination with various Treaty amendments, turned law into a regulatory tool, not to ‘shield’ the private law society but to ‘shape’ private law society. The underpinning

⁸⁷ G. Teubner, *Constitutionalism and transnational governance*, in: Christian Joerges, Inge-Johanne Sand and Gunther Teubner (eds.), Oxford Press, pp. 3-28, 2004.

⁸⁸ D. Gerber, *Constitutionalising the Economy: German Neo-Liberalism, Competition Law and the ‘New’ Europe*, *AJCL* 1994, 25.

economic ideology enshrined in the Internal Market programme was the suggested set of market failures of a ‘Common Market’ that could not further European integration and that could not yield the necessary social dimension. The concept of the European Economic Constitution outlasted the regulatory wave in the aftermath of the Internal Market programme, in a somewhat revised form though. But the story of economization went on, though in a new form. Law and regulation became subject to one major ideology – economic efficiency. Here law is not upgraded, but submitted to a yardstick, one which fits to the law & economics type of thinking. Here is the gate through which the herd of law & economics lawyers could enter the backyard of (European) law.

The 2000 Lisbon Council declaration, although not an official legally binding document, heavily affected the spirit of the law-making process in the EU, in its content and its procedure. Despite its soft character the Lisbon Council 2000 must be regarded as the backbone of the economic efficiency doctrine till today, at least the one which is favoured and advocated for by the European Commission, while traces of it can also be found in the case law of the ECJ.⁸⁹ In the presidential conclusion of the Lisbon Council decision we may find the following statement:

‘An effective framework review and improvement based on the Internal Market Strategy endorsed by the Helsinki Council, is essential if the full benefits of market liberalization *are to be reaped* (emphasis added). Moreover, fair and uniformly applied competition and state aid rules are essential for ensuring that business can thrive and operate effectively on a level playing field in the internal market.’⁹⁰

The so-called ‘new economic approach’ (state aid,⁹¹ competition⁹² and consumer contracts⁹³) could have been understood as a revival and reinvigoration of the Internal Market programme, though in light of the 21st century⁹⁴ it has taken on a slightly different connotation. In short, the European Commission shapes⁹⁵ *industrial* policy through state aid law, competition law and consumer law, to mention just a number of key areas.⁹⁶ The downgrading of competition policy raised much concern with German academics who fear for the European Economic Constitution.⁹⁷ Tied to the efficiency doctrine, it seems as if these fears are justified to a certain extent.

⁸⁹ St. Smismans, *From Harmonisation to coordination? EU law in the Lisbon governance architecture*, *Journal of European Public Policy*, forthcoming.

⁹⁰ At p. 3.

⁹¹ See Kroes, Commissioner for Competition Policy, *The refined economic approach in state aid law: a policy perspective*, 21st September 2006.

⁹² H. Ulrich (ed.), *The Evolution of European Competition Law*, 2006.

⁹³ The very same thinking may be found in COM (2006) 744 final, *Review of the Consumer Acquis*; see H.-W. Micklitz, *Der gemeinschaftsrechtliche Verbraucherschutz-Acquis. Rechtspolitischer Überblick und Zukunftsperspektiven*, in: Wagner/Wedl, *Bilanz und Perspektiven zum europäischen Recht*, *Nachdenkschrift anlässlich 50 Jahre Römische Verträge*, 2007, pp. 293-323; first condensed in the Draft on Consumer Rights COM (2008) 614 final, thereto H.-W. Micklitz/N. Reich, *Crónica de una Muerte Anunciada: The Commission Proposal for a Directive on Consumer Rights*, *CMLR* 46 (2009) 471–519; see for broader perspective K. Soper/F. Trentmann (eds.), *Citizenship and Consumption*, 2008. The EU is about to adopt the Consumer Rights Directive, but limited to a revision of the Directive 85/577/EEC on doorstep selling and Directive 97/7/EC on distant selling.

⁹⁴ COM (2007) 724 final, 20.11.2007.

⁹⁵ A prominent candidate is certainly the field of regulated markets; see H.-W. Micklitz, *The Visible Hand of European Private Law*, in *Yearbook of European Law* 2009, volume 28, P. Eeckhout/T. Tridimas (eds.), 2010, 3.

⁹⁶ One could easily think of other policy areas, such as environmental policy, where the European Commission uses emission standards to urge the German car industry to engage in the production of small cars.

⁹⁷ J. Drexler, *Wettbewerbsverfassung*, in: von Bogdandy, Armin/Bast, Jürgen (Hrsg.), *Europäisches Verfassungsrecht*, 2. Auflage, Dordrecht etc., Springer, 2009, p. 905.

A new initiative of the European Commissioner for industry and entrepreneurship to submit draft laws to an EU competitiveness test fits all too well into such a perspective.⁹⁸ Here it is not the law providing a framework for competition, but competition setting the boundaries for law(s). Another visible expression of the new economic approach is the much-favoured concept of full harmonization. Full harmonization is claimed to increase economic efficiency. Consumer law here stands at the forefront of the debate and may serve as an example of paradigmatic importance:⁹⁹

‘The Green Paper on Consumer Protection (COM 2001, 531 final) set out options for the further harmonization of rules on commercial practices, either on a case-by-case basis or supplementing this through framework legislation. There is also a need to review and reform existing EU consumer protection directives, to bring them up to date and progressively adapt them from minimum harmonization to ‘full harmonization’ measures. The Green Paper and the Commission’s strategy on services (COM 2000, 888) make it clear that the simple application of mutual recognition, without harmonization, is not likely to be appropriate for such consumer protection issues. However, provided a sufficient degree of harmonization is achieved, the country of origin approach could be applied to remaining questions’.

The incriminated draft on consumer rights is written within the spirit of the Lisbon Council, of shifting regulation from minimum to maximum harmonization, of increasing economic efficiency of consumer protection to the benefit of traders and service providers. This vision might fail, but what remains is the powerful attempt to submit a particular area of European policy, which is said to represent the social dimension of the Internal Market, to the dominance of economic efficiency. A similar type of thinking might be found in the discussion around the European Civil Code. The solution the European Commission seems to have in mind should and must meet the efficiency rhetoric.¹⁰⁰

The increasing importance of economic efficiency led to major changes in legal scholarship and legal research in European law. European legal scholarship seen as whole has been relatively reluctant to integrate law and economics into its research design, at least until recently. It is fair to assume that contrary to the United States, law and economics does not represent the mainstream thinking in European scholarly research. The inner reason might indeed be that legal doctrine in Europe is traditionally much deeper anchored in legal science and scholarly research than in the United States.¹⁰¹ However, here again the wind seems to change. The European Commission is shifting the focus more and more to using law and economics type of thinking for shaping and testing the feasibility of European rule making. Even the DCFR has been submitted to a ‘economic efficiency test’.¹⁰² And again the academic herd seems to follow suit. Today good scholarly research often seems to require familiarity with law & economics. This is particularly true whenever information or tort turn up as potential regulatory tools. Whilst there is nothing to criticize here, as legal scholars have to be acquainted with mainstream thinking, the basic assumptions of law and economics, the theoretical preconceptions behind this major strain in legal scholarship today, often remain unscrutinised.¹⁰³

The second current mainstream results from the constitutionalization process. On the surface there is a link between the increasing attention given to new forms of governance in the EU, the initial project to adopt a European Constitution and the ever stronger drift towards constitutionalization via

⁹⁸ <http://www.europeanvoice.com/article/imported/draft-laws-to-be-put-to-eu-competitiveness-test/69238.aspx>

⁹⁹ OJ C 137, 8.6.2002, 2.

¹⁰⁰ See Website of DG Justice on the expert committee that is currently reviewing the DCFR
http://ec.europa.eu/justice/policies/consumer/policies_consumer_intro_en.htm

¹⁰¹ K. Grechenig/M. Gelter, *Divergente Evolution des Rechtsdenkens – Von amerikanischer Rechtsökonomik und deutscher Dogmatik*, *RabelsZ* 72 (2008), 513.

¹⁰² See G. Wagner (ed.), *The Common Frame of Reference, A View from Law and Economics*, 2009.

¹⁰³ But see E.J. Mestmäcker, *A Legal Theory without Law, Posner v. Hayek on Economic Analysis of Law*, 2007. One might wonder whether the question to be raised should not be whether law and economics is downgraded in practices to an economic instrument without legal theory behind.

fundamental and human rights. One might even wonder whether the human rights' rhetoric must also be regarded as a late heritage of the 1968 revolt/revolution. Looking back, fundamental rights and human rights have gained ground in scholarly legal research in the last decades. Today they begin to dominate legal scholarship in whatever area of the law, including private law which in the ordo-liberal thinking should be kept separate from the constitutional order.¹⁰⁴

Let us roughly reconstruct the European constitutionalization from scratch. The ECJ started speaking of a constitutional charter in *Les Verts* in 1986.¹⁰⁵ However, it never used the word Constitution with a big 'C'.¹⁰⁶ The White Paper on Governance enhanced a scholarly debate on how the constitutionalization process should and might look like. L. Azoulay¹⁰⁷ distinguished four forms of constitutionalization: 1) federalization, 2) multi-pluralism, 3) conflictual constitutionalization and 4) dualistic constitutionalization in an attempt to structure the current debate. K. Tuori uses the metaphor of the many constitutions of Europe very much in line with constitutional pluralism but going beyond that debate in looking in the substance of the different constitutions, e.g. the political, the economic and the social constitution. The big 'C' was introduced via the political debate in the constitutional assembly.

The 'failure' of the Constitution deprives us of the need to discuss whether the project could be regarded as a constitution at all. What remains, however, and what seems to be the most important outcome of the Treaty of Lisbon is the integration of the Charter of Fundamental Rights into the European legal order. Secondary community law will now have to be tested whether it complies with fundamental rights. The opinion of the Advocate General Kokott¹⁰⁸ sheds light on the potential of the Charter. It is not difficult to predict that the academic attention will focus on the constitutionalization process, in its various forms and its potential impact on the legal system per se.

The fundamental rights are dominating and will dominate scholarly research. Just like economic efficiency human rights issue are omnipresent today in scholarly research. Good scholarly research is hardly unthinkable without giving due account to the human rights dimension. The situation resembles to the economic efficiency doctrine. Whilst there is little to say against such a pressure on the scope of scholarly research, a lot has to be said on the sometimes even unreflected instrumentalization of human rights. Scholarly research turns on the question whether this and that 'right' should and must be understood as a subjective enforceable right – and not be left in the realms to politics – and once the existence of a right has to be identified – how far the newly established human or fundamental right can be stretched. What is missing is a deeper reflection of the role and function of human rights and fundamental rights in a European legal order, and not in the European legal order alone.¹⁰⁹

¹⁰⁴ E.J. Mestmäcker, E. Böhm, Canaris, and the recent research in Constitutionalisation of Private Law, Cherednychenko, *Fundament Rights, Contract Law and the Protection of the Weaker Party, A Comparative Analysis of the Constitutionalisation of the Contract Law with Emphasis on Risky Financial Transactions*, 2008; Ch. Mak, *Fundamental Rights in European Contract Law, A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, 2008; A. C. Ciachhi/G. Brüggemeier/G. Commandé (eds.), *Fundamental Rights and Private Law in the European Union, Volume I and II, Comparative Analysis of Selected Case Patterns*, Cambridge University Press 2010.

¹⁰⁵ ECJ, 26.9.1984, Case 294/83 (1986) ECR 1339 at 23.

¹⁰⁶ N. Walker, Big 'C' or small 'c', *ELJ* 2006, 12.

¹⁰⁷ *Intégration juridique et légitimité*, in L. Fontaine (dir.), *Droit et légitimité*, collection 'Droit et justice', Bruylant, Bruxelles, forthcoming.

¹⁰⁸ AG Kokott, 30.9.2010, ECJ, Case C-236/09 – *Test Achats*, nyr.

¹⁰⁹ There are exceptions to the rule. A. Sen, *Elements of a Theory on Human Rights, Philosophy and Public Affairs*, 2004, 315; H. Collins, *The Constitutionalisation of Private Law as a Path to Social Justice* in H.-W. Micklitz (ed.), *The Many Faces of Social Justice in Private Law*, Elgar, forthcoming.

6. *An Interim Remark*

The analysis of herd behaviour in European legal scholarship should be understood as a lesson on how legal scholarship might be caught in one major understanding of how the law can be used for all sorts of social, political and economic purposes. It is the blatant and unquestioned instrumentalization of law over the last decades in whatever form which raises our concern as legal scholars. The instrumental use of law as a means to shape the European integration process has left deep traces in legal scholarship and in legal methodology. The solution is not to return to the past, to set aside the instrumental use of law and to understand law as a formal system that should not be inflicted with politics and economics, a system that stands on its own, disconnected and a-political. The 1968-1986 paradigm taught us the political character of the law, in both directions, as a means to transform and change society or as a means to preserve and conserve society. Whilst the 1968 'revolution' started a process in scholarly legal research to disclose ideological pre-conceptions, it has itself triggered a new ideology, one which first overstretched the belief in 'law' and then 'undermined' the belief in law. The instrumental use of law yielded the need for legal methods that could cope with the law and... disciplines, be they law and politics, or law and economics, just to mention those which had the major impact on European scholarly research. Much, maybe too much emphasis has been put on the law and... disciplines, on the somewhat helpless search for a legal method, which allows for the integration of non-legal disciplines into the legal system.¹¹⁰ What has gone somewhat lost in the overall mainstream is the role and function of legal doctrine. The second part of the paper is meant to analyse how legal doctrine might be revitalized against the backdrop of the law & disciplines.

III. Ways Out

1. *The Role and Function of Legal Methods*

1.1. Why methods: globalization and legal education

The first reason why we need a European debate on a European methodology results from the Europeanization of legal education. Both the Bologna process with its mutual recognition of credits and the Erasmus/Socrates programme grant system has stimulated student mobility throughout Europe. But since legal scholarship and teaching have always had close ties with legal practice, the recognition directives 89/48/EEC and 98/5 EEC, allowing lawyers established in one Member State to practise law in another one under their own academic title have probably been even more important in creating a European legal market.¹¹¹ What we can witness today is a growing competition between law schools in offering students an education that prepares them for an international career. These law schools are responding to the demands of the market where multi-national law firms, multinational corporations, but also NGO's are becoming increasingly active in setting up offices in different Member States and competing with each other in order to recruit the best young lawyers with a diverse and multi-national training.¹¹²

An essential part of the training and education of lawyers who want to pursue an international career will be European law. As Miguel Maduro has argued, it is today no longer possible to teach contract law, consumer law or environmental law, to name just a few, without at least some basic knowledge

¹¹⁰ See the analysis of V. Nourse and G. Shaffer, *Varieties of New Legal Realism: Can A New World Order Prompt a New Legal Theory?*, *Cornell law review*, Vol. 95 (2009) pp. 61-139.

¹¹¹ N. Reich, *Recent trends in European legal education: the place of the European Law Faculties Association* 21 *Penn St Int'l L Rev*, 2002, pp. 21-38.

¹¹² See for example G. Morgan and S. Quack, *Institutional Legacies and Firm Dynamics: The Growth and Internationalisation of UK and German Law Firms*, *Organization Studies* 26 (12): pp. 1765-1785.

about the nature and function(s) of EU law, its unique system, its general principles and methods of interpretation developed by, among others, the CFI and ECJ.¹¹³ EU law cuts across through traditional boundaries of private and public law; EU law is both and does not care about national legal thinking in boxes and categories.¹¹⁴ Simultaneously, however, it is not enough for students to acquire ‘just’ a minimum understanding of how EU law works. Because of the fact that EU law and national law are becoming more and more intertwined, the challenge is to develop a better understanding of different sorts of legal arguments deriving from both national and EU law. In most law suits before national courts, European courts and international arbitrations in which a dispute over EU law plays a role, for example, require a firm knowledge of at least two, but more often three or more, legal systems.

In reality most of the research in nationally bound legal subjects takes a vertical perspective, in that legal scholars just pick out of the ‘supreme’ legal order the bits and pieces they need for the understanding of the problem at stake. The EU legal order, however, is a horizontal order that rests on the 27 vertical national legal orders, which necessarily implies to look into the European dimension of each and every question concerned and does not fit to the particular national context in which the European question arises.

Even if one does not believe in convergence of legal systems or an ongoing process of European integration, it seems hard to deny that, for instance, methods and techniques of comparative law have an important role to play in facilitating intercultural legal communication between both practicing lawyers and academics in order to build bridges across jurisdictions and between domestic legal traditions. Therefore, as Esin Örüçü has stated, research has to go beyond ‘juxtaposing, contrasting and comparing’. This strengthens the call for comparative lawyers to be trained in interdisciplinary research problems, to have knowledge of and familiarity with different legal cultures, to have a good command of languages, knowledge of history, economics and politics, and also to receive training in methodology.¹¹⁵ Unfortunately though, most handbooks do explain how difficult comparative legal research is but offer little guidance on how to do it. Could it perhaps be that we do not really have a well-developed methodology of comparative law yet because we as researchers rely so heavily on the craftsmanship, the common sense and practical wisdom that is given centre-stage in law school? The rising importance of comparative history¹¹⁶ could provide promising ground for linking history and law into a joint concept.

Notwithstanding this, one of the major benefits of making lawyers and legal scholars familiar with methods of comparative law could be that it pushes the analysis of legal problems to broader levels of abstraction.¹¹⁷ After all, comparative law is not first and foremost about finding similarities and differences but about explaining *why* there are different answers to (functional) equivalent legal questions and *what* the argumentation is behind those answers. The quest for explanations guides legal researchers in a natural way towards hypothesis and theory-building. As we will argue hereafter, this is exactly where both legal scholarship and legal practice can benefit from it. Comparative law opens new perspectives on European law and questions. Add to this that, especially in many smaller European countries, the academic forum is too limited for a broad scholarly debate on European law-related issues and the fact that there is still no relatively ‘unified, cross national community’ of

¹¹³ M. Maduro, *The Europeanization and Globalisation of Law*, Contraditorio, Policy Paper 10/1, February 2010, p. 5. (see: http://www.contraditorio.pt/admin/source/files/1276200432-PolicyPaper10_01_LegalEducationandtheEuropeanizationandGlobalisationofLaw-Original.pdf).

¹¹⁴ See, N. Reich, *The public/private divide in European law* in H.-W. Micklitz/F. Cafaggi (eds.), *European Private Law after the Common Frame of Reference*, 2010, p. 56; L. Azoulai, *Sur un sens de la distinction public/privé dans le droit de l’union européenne*, RTD eur. 48 (2010), 853.

¹¹⁵ Esin Örüçü, *Looking at convergence through the eyes of a comparative lawyer*, EJCL, Vol. 9.2 2005, p. 11.

¹¹⁶ There is even a journal under that title, comparative history, which provides an account for the research undertaken.

¹¹⁷ John C. Reitz, *How To Do Comparative Law*, 46 Am. J. Comp. L. 617 (1998), pp. 625-626.

scholars specialized in European law,¹¹⁸ and one will understand the importance of comparative research for building bridges between legal scholars.

1.2. Why methods: Americanization of EU law? What about Europeanization of American law?

In the early 1990s, Wolfgang Wiegand reported about the growing importance of a 'reception of American law in Europe'.¹¹⁹ Wiegand even went as far as comparing the Americanization of European law with the medieval reception of Roman law throughout Europe, which started in Bologna in the eleventh century. He concluded, among other things, that the political and economic dominance of the U.S., the spread of the English language in science,¹²⁰ together with the fact that lawyers occupying leading positions in academia, law firms, major banks and private industry increasingly display a strong leaning towards American legal thinking. Wiegand believed that would have fundamental effects on European law even if the powerbase of the U.S. were going to fade because of the rise of other economic super powers.

Whilst most legal scholarship is focusing on some sort of comparison between national law and EU law or between EU law and U.S. law, we do not know whether and to what extent Americanization of the legal systems in Europe has really taken place, and where and how. There is some evidence that the OECD served as a catalyst for the transferral of U.S. law to Europe, in particular in fields such as environmental law and consumer law. After 1990, however, the EU got more and more involved in external relations and took gradually over a similar task, though in a more discrete form in that the EU used the American legal order as a blueprint and channelled regulatory models through the common law systems to continental Europe. The liberalization and privatization of former public services may serve as evidence for such a transformation process. But again, even where such an influence is hard to neglect, we do not know exactly how the European legal order differs from its counterpart, whether the legal transplants work only in one direction or whether the EU law also influences the U.S. legal system and be it in a rather remote form.

Even for those who do not believe in the Americanization of European law because of tremendous cultural differences and deviating styles of regulation and litigation¹²¹, which lead to differences in the application even if the legal system resemble each other at the first hand sight, it is hard to deny that European legal scholarship as such has undergone major changes over the last thirty years. Comparative legal analysis under exclusion of U.S. law has become hard to justify. But the changes reach beyond the formal broadening of the subject matter under investigation. In an eloquent article in honour of Sir Francis Jacobs, former Advocate General at the ECJ, Anthony Arnall convincingly argues that, since the 1980s, European scholars of EU law have clearly travelled part of the way down the path that moves away from legal technicalities, which is followed by academics across the Atlantic, who often display a dismissive attitude towards traditional doctrinal legal analysis.¹²²

We would not deny such a finding, but we would argue that contrary to the U.S., in Europe there is no mainstream legal scholarship that shies away from legal dogmatics. Quite to the contrary, we would very much insist on the side-by-side of two different strains of legal scholarship, one which is still tied

¹¹⁸ B. de Witte, *European Union Law: A Unified 'Academic Discipline'?* (EUI Working Papers RSCAS no. 34, 2008) Retrieved from: <http://cadmus.eui.eu/dspace/handle/1814/10028>.

¹¹⁹ Wolfgang Wiegand, *The Reception of American Law in Europe*, J. COMP. L. 229 (1991), Vol. 39, nr. 2 pp. 229-248.

¹²⁰ L. Borghans & F. Cörvers, *The Americanization of European Higher Education and Research*, Research Centre for Education and the Labour Market, Maastricht University, NBER Working Paper No. w15217, August 2009, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1454933##

¹²¹ Robert A. Kagan, *Globalization and Legal Change: The Americanization of European Law, Regulation & Governance*, Vol. 1, no. 2 (2007) pp. 99-120.

¹²² A. M. Arnall, 'The Americanization of EU law scholarship', in A. M. Arnall, P. Eeckhout and T. Tridimas (eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (OUP, 2008), pp. 415-431 (424).

to legal dogmatics and another one that reaches beyond legal dogmatics and follows the current main stream trend in focusing on law and economics, and increasingly also on other law and ...disciplines.

The big question remains, however, if this trend is the result of Americanization of European law or of intra-European developments which have their roots in the Member States, in internationalization more in general, or in a growing competition between law and (other) social sciences for research funding requiring clarity about what distinguishes fundamental legal research from applied research, to name just a few possible explanations.

2. *Have European Legal Scholars to Learn from American Empiricism? Or Have American Legal Scholars to Learn from European Legal Dogmatics?*

The dominant perspective is that European scholars look to the U.S. as a source of inspiration. There is this well-known bonmot that the U.S. is always five-ten years ahead of us and that the EU is still following American trends when these have already lost pace in the US and are replaced by new patterns of legal scholarship. The more serious question is whether Richard Posner's plea to enhance legal dogmatics brings U.S. legal scholarship closer to Europe, in that Europe preserved a tradition that has lost ground in U.S. scholarship.

One lesson that European legal scholars can learn from experiences in the U.S. is that there is a lot of added value in the introduction of multidisciplinary law and... approaches on top of a tradition of sophisticated doctrinal research as long as this does not lead to self-indulgence and the tendency to neglect or disparage legal scholarship that is unfashionable for the time being.¹²³

An interesting case in point of both innovation and naivety is the rise of empirical legal scholarship in the U.S. From a European perspective this looks like a revitalization of the so-called *Rechtstatsachenforschung* as founded by Max Weber in the 1920s and as reinvigorated in the 1970s in most Western European democracies. Seen this way, behavioural economics is just a variant of what has been called *Verhaltensforschung* in the 1920s and 1970s. As Lawless, Rubbenolt and Ulen noticed, American legal scholars have done much borrowing from other disciplines lately in order to enrich their theoretical understanding of the law with two major results for the legal academy.¹²⁴

First, successful interdisciplinary approaches have led to an explosion of attention for empiricism from law professors keen on illuminating under researched questions, such as judicial biases, adverse effects of laws and regulations, and matters of causation like the (unintended) behavioural effects of strict liability regimes. Second, this attention resulted in also borrowing research methods and techniques from other disciplines, such as economics, sociology, psychology, biology and political science.

Especially this second trend has had a number of unintended side effects that do not concern the quantity of empirical legal research but relate to the average quality of that work. V. Nourse and G. Shaffer have forcefully demonstrated¹²⁵ that all these investments into empirical research did not find their way into a legal methodology that allows for a using of social facts in the interpretation of the legal system.

What legal scholarship did, however, is to reveal the methodological weakness of empirical research undertaken under the new regime. That serious concerns exist regarding the quality of empirical legal research in the U.S. is shown in a seminal article by Lee Epstein and Gary King, two experts in

¹²³ Ibid, p. 431.

¹²⁴ Robert M. Lawless, Jennifer K. Robbenolt, Thomas S. Ulen, *Empirical Methods in Law*, Aspen Publishers, New York 2010, pp. 3-4.

¹²⁵ *Varieties of New Legal Realism: Can A New World Order Prompt a New Legal Theory?*, University of Minnesota Law School, Legal Studies Research Paper Series, Research Paper No. 09-17.

research methodology who studied around 350 journal articles with empirical ambitions published in American law journals between 1990 and 2000, including 50 of the most cited articles according to the SSRN legal scholarship network. The overall conclusion of Epstein and King was that ‘the current state of empirical legal scholarship is deeply flawed’.¹²⁶ While they admit that some articles in law reviews are better than others, the authors claim that every single one of them violated at least one of the methodological rules of inference that guide empirical research, such as rules on data collection, causation, replicability, etcetera.¹²⁷

As could be expected, Epstein and King’s article aroused a lot of debate. Some opponents accused them of violating their own rules of inference.¹²⁸ Others claimed that many of the methodological ills that they attributed to legal scholarship, such as explaining in detail how cases are coded or how data are archived, are problems that are certainly not exclusive to legal scholarship.¹²⁹ This objection is a strange one since it is hard to comprehend how methodological pitfalls in other disciplines could ever make up for similar shortcomings in scholarly legal publications. Perhaps even stranger, though, is the critique by two well-known Harvard law professors that ‘particular versions of the truth’ ventilated in journal articles that are tendentious when taken separately may, at the systemic level, produce close approximations of the truth because advocacy legal scholarship will probably raise criticism of ‘opposing camps’.¹³⁰ This is a peculiar way of arguing that there is not so much wrong with empirical legal scholarship. Epstein and King refute this argument convincingly by noting that adversary scholarship might work in theory in the sense that in the end anything is possible, but that they have never seen examples of academic disciplines trying to make progress through such an adversarial approach.¹³¹ In fact, the argument that the validity of empirical legal articles depends on the exposition by fellow scholars of a one-sided or coloured presentation of empirical evidence seems to support Epstein and King’s claim that too many lawyers engaged in scholarly legal work behave more like advocates than as independent researchers who are willing to be surprised by reality.

Is there no truth whatsoever in the critique that Epstein and King treat all empirical legal research too much alike? Perhaps there is. Jan Smits has, for example, argued that one could regard law as a ‘normative-empirical’ science in which existing legal systems are sources of law.¹³² National laws and court decisions can then be treated as empirical data, according to Smits, in order to explain how different arguments are being used to respond to certain legal questions and problems.¹³³ If we view empiricism in this way, Epstein and King’s strict demands of replicability may simply go too far because the collection of data is not first and foremost a matter of finding the truth. According to Smits, legal research should be about dealing with (conflicting) arguments that have been tested elsewhere in practice and comparative law becomes an empirical endeavour.¹³⁴

¹²⁶ Lee Epstein & Gary King, *The Rules of Inference*, 69 *U. Chi. L. Rev.* 1, p. 6 (2002).

¹²⁷ *Ibid.* p. 17. The rules of inference are worked out in parts III-VIII of the article.

¹²⁸ Frank Cross, Michael Heise & Gregory C. Sisk, *Above the Rules: A Response to Epstein and King*, 69 *U. Chi. L. Rev.* 135 (2002).

¹²⁹ Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 *U. Chi. L. Rev.* 169, p. 184 (2002).

¹³⁰ Jack Goldsmith and Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 *U. Chi. L. Rev.* 153, 156 (2002).

¹³¹ Lee Epstein & Gary King, *A Reply*, *U. Chi. L. Rev.* 69, 194 (2002).

¹³² Jan M. Smits, *Redefining Normative Legal Science: Towards an Argumentative Discipline*, in: F. Coomans, F. Grünfeld & M. Kamminga (eds.), *Methods of Human Rights Research*, Antwerpen-Oxford: Intersentia, 2009, pp. 45-58.

¹³³ Jan Smits, *Omstreden rechtswetenschap*, BJU, Den Haag 2009, p. 114.

¹³⁴ *Ibid.*, p. 160.

Even if one does not share Smit's liberal opinion about what counts as empirical legal research,¹³⁵ it is still possible to have fundamental doubts about the extent to which it is possible or desirable to apply empirical methods to answer legal questions. Interesting in this respect is Robin Feldman's observation that law's fascination with science in order to make law and legal research more 'neutral' reaches back at least two hundred years in American legal history.¹³⁶ She describes how throughout history American legal scholars have always cast doubts about whether law is capable of resolving difficult social and moral conflicts and there has been a constant hope that science can do better. The attention for empirical research by legal realists, members of the critical legal studies movement and adherents of new legal realism is closely related to this fixation on scientific methods. According to Feldman, there is a constant return to the same well, despite the fact that scientification has never succeeded in rescuing legal scholars from the discomfort and uncertainties that go along with legal research.¹³⁷

Does the latter imply that European legal scholars better refrain from empirical or socio-legal research? The answer is definitely no. There is nothing wrong with interdisciplinary approaches and applying social-science research methods on legal questions as such. On the contrary, we would say. European law can benefit tremendously by paying close attention to, for example, political sciences in order to get more grip on the legal politics (Rechtspolitik) that play such an important role in law and policymaking.¹³⁸ However, we may not forget that doctrinal legal expertise is often crucial in order to be able to raise the right questions and determine which variables should be tested in attempting to explain a particular legal phenomenon.¹³⁹ Moreover, one has to realise that normative questions concerning how the law should read can never be fully answered through empirical or socio-legal research. One will always need interpretation and argumentation to bridge the gap between facts and norms.

Is this what American legal scholarship can learn from European legal scholarship – a more balanced going together of legal dogmatics with extra-legal empirical research? In the U.S. hardcore law & economics is on the decline, which, however, never gained the same ground in Europe as legal dogmatics rested in place for the good and for the bad.¹⁴⁰ European legal scholarship is not following the different mainstreams of legal scholarship to the same extreme as it happens in the U.S. Nobody would claim the death of legal dogmatics or the death of empirical research. There are ups and downs too, but the ups and the downs are less high, respectively less low. It is true legal dogmatics is back on the agenda, here termed the revival of legal formalism. On the other hand, however, there are more and more legal scholars that engage into social empirical legal research that reaches beyond law. The problem we see is that empirical legal research in Europe is discredited by the attempts of the European Commission to equate empirical analysis with impact assessments. It suffices to contrast the superficial analysis of collective actions in Europe¹⁴¹ as initiated by the European Commission with

¹³⁵ The problem is that laws, court decisions and scholarly legal publications have no direct link with the real world but only an indirect one in the sense that only after the implementation or enforcement of legal rules, law's impact becomes clear. This explains why there can be such a thing as a gap between the law in the books and the law in action.

¹³⁶ Robin Feldman, *The Role of Science in Law*, Oxford University Press 2009.

¹³⁷ Robin Feldman, *Law's Misguided Love Affair with Science*, *Minn. J.L. Sci. & Tech.* 2009;10(1): 95-116 (97, 115).

¹³⁸ Karen J. Alter, Renaud Dehousse, Georg Vanberg, *Law, Political Science and EU Legal Studies*, *European Union Politics*, Volume 3 (1): 113–136 (126) 2002.

¹³⁹ Matthias Siems, *The Taxonomy of Interdisciplinary Legal Research: Finding the Way Out of the Desert* *Journal of Commonwealth Law and Legal Education* 7 (2009): 5-17.

¹⁴⁰ K. Grechenig/M. Gelter, *Divergente Evolution des Rechtsdenkens – Von amerikanischer Rechtsökonomik und deutscher Dogmatik*, *RabelsZ* 72 (2008), 513.

¹⁴¹ 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union'; http://ec.europa.eu/consumers/redress_cons/finalreportevaluationstudypart1-final2008-11-26.pdf and the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems' http://ec.europa.eu/consumers/redress_cons/docs/finalreport-focusgroup2-final.pdf.

the carefully and methodologically sound analysis of US class actions.¹⁴² In so far Europe remains behind the U.S. standards on empirical legal research. One may nevertheless recognize a stronger approximation of scholarly research in these two parts of the world, which allows for a stronger exchange of ideas in both directions.

3. *What is Doctrinal Legal Research and Why Is It Still Important for the Study of European Law?*

It is difficult, if not impossible, to come up with one generally accepted definition of doctrinal legal research in Europe. The characteristics of legal doctrine are certainly not identical in every country. The role that legislation or precedents fulfil in legal dogmatics is, for example, obviously not identical in common law and civil law countries. Nevertheless, there appear to be some core features that most doctrinal research has in common, both in European countries and even across the Atlantic in the U.S. The most important ones are:

- In doctrinal work, arguments are derived from authoritative sources, such as existing rules, principles, precedents, and scholarly publications
- The law somehow represents a system. Through the production of general and defeasible theories, legal doctrine aims to present the law as a coherent net of principles, rules, meta-rules and exceptions, at different levels of abstraction.¹⁴³
- Decisions in individual cases are supposed to exceed arbitrariness because they have to (be) fit into the system. Deciding in hard cases implies that existing rules will be stretched or even replaced but always in such a way that in the end the system is coherent again.

Contested is the view whether doctrinalists need to take an internal perspective in studying the law. Undoubtedly many scholars still do it, but it is exactly this feature that is nowadays often considered to be too narrow. That is why so many think it should be replaced by a 'law in context' approach.¹⁴⁴ Other views on what doctrinal legal research entails have evolved over the years. In the past most scholars associated legal doctrine first and foremost with a faithful and consistent application of legal rules and principles by the judiciary. According to Emerson Tiller and Frank Cross, however, academics increasingly recognize that law is not applied with perfect neutrality.¹⁴⁵ This, however, is not really new for European scholars who are familiar with the methodological discussions in the aftermath of 1968. Again we would like to point to J. Esser. How the law is found and shaped is influenced by many internal and external (societal) factors, including personal biases and preconceptions, judicial ideology and socio-economic consequences of court decisions (Folgenorientierung). This again is an old issue, widely discussed in the 1970s and 1980s.¹⁴⁶

While we started this paper with the assertion by Posner jr. that doctrinal legal research is dead in the U.S., Rubin and Freeley claim that a new doctrinal approach emerged in the U.S., which is a product of both judicial ideology and pre-existing legal principles upon which judges must build their argumentation.¹⁴⁷ They believe that, not in the least because of the multidisciplinary research with

¹⁴² See e.g. T. Eisenberg/G. Miller/E. Sherwin, *Arbitration's Summer Soldiers: An Empirical Study on Arbitration in Consumer and Non-Consumer Contracts*, 41 U. Mich. Law Reform, 871 (2007-2008); J. Coffee, *Law and The Market, The Impact of Enforcement*, <http://cbe.anu.edu.au/capitalmarkets/papers/COFFEE-CAPITAL-MARKETS.pdf>

¹⁴³ A Pecznick, *A Theory of Legal Doctrine*, Ratio Juris, Volume 14, Issue 1, pp. 75–105 (2001).

¹⁴⁴ Fiona Cownie, *Legal Academics: Culture and Identities*, Hart Publishing, Oxford and Portland/Oregon 2004, pp. 197-198.

¹⁴⁵ Emerson H. Tiller & Frank B. Cross, *What is Legal Doctrine?*, Northwestern University Law Review Vol. 100, No. 1, (2006) pp. 517-534 (522).

¹⁴⁶ E. Schmidt, *Der Umgang mit Normtatsachen im Zivilprozeß*, in FS Wassermann (1985), S. 807.

¹⁴⁷ Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. Cal. L. Rev 1989 (1996).

respect to judicial lawmaking, both legal scholars and social scientists increasingly recognize the independent significance of legal doctrine. Social scientist may remain more focused on what is the driving force behind judicial outcomes, but there is a growing awareness that doctrine is certainly not irrelevant, according to Rubin and Freeley. The other way around, doctrinalists in the U.S. also seem to have learned to understand and appreciate how important extralegal influences on court decisions can be and why it is better to realise this than to try to hide it.¹⁴⁸ The same holds true for European scholarship, where Maduro has shown how the role of the European Court of Justice is increasingly impacted by, and needs to be adapted to, a context of constitutional pluralism and multiplicity of legal sources.¹⁴⁹

What can we say with respect to the development of European doctrinal legal research? First of all, we should make clear at the outset that there is no ‘methodological *ius commune Europaeum*’.¹⁵⁰ There are, and always have been, many different doctrinal traditions in the Member States of the EU. However, the story does not end here. First of all, each and every Member State has to deal with a growing plurality of legal sources since EU law and European human rights law are increasingly pervading both public and private law in the Member States. This has a direct influence on the methodology of legal research since the interpretation of national legal rules is more than ever before affected by multiple legal sources, on multiple levels of government (e.g. International treaties, Council of Europe/ECHR, primary and secondary EU law, including the interpretation of EU law by the ECJ, and national law). Not only national courts and local governments, but also legal scholars, increasingly have to interpret national law in accordance with EU law and European legal doctrine.

Secondly, EU law knows its own system and fundamental principles. In many cases that system deviates from the Member States’ legal systems. Hence EU law irritates an autonomous systematization of national law. So not only do doctrinalists have to learn to find the right sources of EU law, which is not always easy because EU law is also increasingly a combination of hard and soft law (e.g. co-regulation), but they also have to understand the distinct features of the EU legal system. One of those features is that the EU legislature(s) sometimes deliberately uses ambiguous language in order to reach a compromise between conflicting Member States. Other typical features are the autonomous interpretation of legal concepts by the ECJ and the relative insignificance, compared to the situation in most Member States, of legal history, *travaux préparatoires*, and legal doctrine itself as a source of law.

The aforementioned challenges the idea of guaranteeing certainty through a consistent application of legal methods. There is no longer one pyramid-like organized national legal system in which judges and legal scholars function as ‘gatekeepers’ who are supposed to guard and maintain the consistency of the system. Instead a plurality of legal systems (‘an archipelago instead of an island’) has developed in which hierarchy plays a less prominent role¹⁵¹ and the interpretation of EU law in country A can affect the way how the law in country B should be applied with the preliminary rulings procedure of the ECJ functioning as an intermediary. The other side of the coin is that EU institutions increasingly use comparative law methods in the drafting of new EU law and in the decision-making by the ECJ.¹⁵²

¹⁴⁸ Emerson H. Tiller & Frank B. Cross, *What is Legal Doctrine?*, *Northwestern University Law Review* Vol. 100, No. 1, (2006) pp. 517-534 (522) at p. 527.

¹⁴⁹ Miguel Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, 1 *Eur. J. Leg. Stud.* (Dec. 2007), available at <http://www.ejls.eu/>.

¹⁵⁰ J. Smits, *The Europeanisation of national legal systems: some consequences for legal thinking in civil law countries*, in: M. van Hoecke (ed.), *Epistemology and Methodology of Comparative Law*, Oxford: Hart Publishing 2004, pp. 229-245 (229).

¹⁵¹ Especially with respect to constitutional law, the idea of a ‘constitutional dialogue’ between several ‘highest’ courts (ICJ, ECHR, ECJ, national Supreme Courts) is gaining terrain.

¹⁵² K. Lenaerts, *Interlocking Legal Orders in the European Union and Comparative Law*, *International & Comparative Law Quarterly*, (2003), 52: 873-906.

Comparative law, using a doctrinal approach, is important for EU lawmakers in order to assess ex ante some of the implications of new European rules for the different Member States.

We believe there are also more fundamental reasons why doctrinal legal research will become of growing importance for EU law. A vigorous debate between Armin von Bogdandy and Matthias Kumm on the past and future of European (constitutional) scholarship demonstrates this.¹⁵³ Von Bogdandy has argued that a European legal research area is emerging and that due to the fact that European law has long passed the stage of occasional ‘irritation’ of national legal systems, a European doctrinal legal scholarship is likely to occur sooner or later.¹⁵⁴ He believes the litmus test for a common European scholarship should not be the emergence of more comprehensive and fragmented doctrinal patterns. Instead, the best response to growing heterogeneity of legal sources should be matched with a strengthening of theoretical (and so we add methodological) components, where possible drawn from the common European heritage in legal theory and spurred by transnational scientific legal communities.

Kumm, from his part, claims that it is misleading to characterize mainstream European legal scholarship as ‘doctrinal constructivism’ as Bogdandy does. According to him, European scholars in the course of history have rejected three extremes in legal scholarship trying to reduce it to its moral, its empirical/factual, or its formal/conceptual dimension.¹⁵⁵ If anything characterizes European legal scholarship, Kumm argues, it would be the continuous attempts to integrate the formal, the empirical and the moral dimensions of law. At the same time, he acknowledges: ‘There might not be much agreement on how, exactly, the various elements complement one another and why.’¹⁵⁶ We believe Kumm is right in pointing to disagreement here, but wonder whether this is not where methodology should come into the picture?

Kumm seems to admire the methodological pluralism in the U.S., where he feels legal scholars to a large extent apply the methodologies of other disciplines to law.¹⁵⁷ As we have demonstrated above by referring to the debate on methodology in empirical legal scholarship, this is exactly where the problems in U.S. legal scholarship have come to the surface; lawyers neglecting the rules of inference that accompany the methods and techniques of the social sciences. We also have serious doubts whether the answer to this is the outsourcing of legal research to scholars with a non-legal background, as Kumm argues is already taking place in the elite law schools in the U.S. We believe it is just as impossible to undertake good multidisciplinary or empirical research without a proper understanding of legal doctrine as it is to conduct solid doctrinal research with at least some knowledge of facts and fact finding. One needs this understanding, not in the last place, in order to be able to raise the right questions without making a mockery of law and legal theory. If the opposite were true, things would be a lot easier and there would probably not have been such a long history of frictions between legal formalism, naturalism and (new) legal realism in the U.S. and in Europe.

4. *An Agenda for Revitalization of European Doctrinal Research*

One of the great advantages of the study of European law from a methodological viewpoint is that it does not have this long history of battles between formalism, naturalism and legal realism. Moreover, traditional doctrinal legal scholarship is already changing because of the Europeanization of different

¹⁵³ A. von Bogdandy, The past and promise of doctrinal constructivism: A strategy for responding to the challenges facing constitutional scholarship in Europe, *ICON*, July 2009, pp. 364-399. M. Kumm, On the past and future of European constitutional scholarship, *ICON*, July 2009, pp. 401-415.

¹⁵⁴ A. von Bogdandy, *ibid.*, p. 399.

¹⁵⁵ P. 407.

¹⁵⁶ P. 408.

¹⁵⁷ P. 410.

legal fields. This should facilitate in making our spirits ready for a revitalization of doctrinal legal research with more emphasis on methodology (!) *and* theory (!).

We do not have the illusion that we can come up with a simple blueprint for a European methodology of law and legal research. What we will sketch hereafter are some thoughts and ideas that need further research and debate. We sincerely believe, however, that such a methodology debate is useful and necessary and should not be postponed simply because it implies a willingness to take a long ride on a bumpy and winding road. ‘Reflexion auf Eigenes Tun’ is never easy, but European law has a lot to gain from it. Having said this, what are some of the implications of the revitalization of European law we are supposing?

1. European legal research, doctrinal or not doctrinal should start with a disclosure of ideological preconceptions. This is the major lesson we can learn from the instrumental use of law in the aftermath of 1968, by legal leftist lawyers who intended to change society via law and by rightist lawyers who intended to preserve the status quo or even wanted to turn the clock back to the 19th century. Emphasis has to be put on ‘disclosure’, as we all start as legal scholars from preconceptions in our research. What is needed is a constant process of ‘Selbstvergewisserung’ and of ‘Hinterfragen’ of these pre-conceptions, whatever they are. This will not be possible without having a sound background in legal methodology, which cannot be understood without reference to legal theory. Methodology determines how one looks at legal problems. It sets the ‘rules of the game’. An interesting case in point is the debate on the legal origins thesis – the thesis that legal origin impacts economic growth and the common law is better for economic growth than the civil law – challenging traditional approaches to comparative law that have not paid much attention to the economic consequences of legal regimes and how these can be explained.¹⁵⁸
2. European doctrinal legal research should be *freed from the role model and research methods of the judge* as its sole point of reference and look for answers to the question what can be the added value of a legal scholarship that goes beyond being a service for legal practice.¹⁵⁹ We believe this indicates that academic legal research should primarily be engaged with trying to understand what is behind the law on a certain subject, why lawmakers operate as they do, why they look for legal answers to (certain) societal problems instead of pursuing alternatives to law, and why the law says what it says instead of pondering about how the answer to a legal problem can be embedded in the legal system. Legal practitioners are capable of doing the latter, but they are usually not interested or do not have the time to look for the answers to these ‘why’ questions.¹⁶⁰
3. Since European lawmakers are increasingly emphasizing the importance of *evidence-based lawmaking* (impact assessments, consultations, expert advice etcetera), a doctrinal legal scholarship that wants to stay in touch with legal practice without being lured into ‘herd behaviour’ should start *asking critical questions*, such as: how is the empirical evidence on which new EU laws are being based collected and what guarantees are build into the process to prevent ‘policy-based evidence making’? What are, or should be, the legal consequences if EU institutions neglect their own rules, guidelines and procedures for lawmaking and facilitate integration without or beyond law? What ‘rules of recognition’ could or should the ECJ apply

¹⁵⁸ R. Michaels, Comparative Law by Numbers, Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law, 57 AM. J. COMP. L. 765-795 (2009), M. Siems, The End of Comparative Law’, Journal of Comparative Law 2: (2007) 133-150.

¹⁵⁹ J.B.M. Vranken, Exploring the Jurist’s Frame of Mind, Kluwer Law International, 2006.

¹⁶⁰ M. McConville and W. Hong Chui (ed.), Research Methods for Law, Edinburgh University Press: Edinburgh 2007, p. 2.

when deciding over the question whether alternative modes of governance are legally relevant and how can the legitimacy of those rules can be assessed?

4. If consensus can be reached, now or in the future, about the importance of a ‘law in context’ approach as, for instance, advocated by Francis Snyder, the founding father and editor in chief of the European Law Journal, this needs to be reflected in legal education in order to ascertain that lawyers and legal researchers are cognisant of the most important parameters of political science, law & economics, comparative law and empirical legal research methods. We can quote Kyle and Hutchinson here, who have stated: ‘*More extensive training needs to be offered in fundamental research.* This is ‘Research deigned to secure a deeper understanding of law as a social phenomenon, including research on the historical, philosophical, linguistic, economic, social or political implications of law.’ [...] Fundamental research, which can include empirical and social science models, needs to be part of the graduating lawyers’ research skills and attributes.’¹⁶¹
5. It is of vital importance that the introduction to these other ‘*non-legal*’ research methodologies does not replace the training in doctrinal research but come on top of that training and that they are taught in combination with doctrinal methods. Again this is a lesson to be drawn from the revision of legal education initiated in the aftermath of 1968 in many European countries.¹⁶² If one of the major problems of doctrinal research(ers) is that they do not possess a good understanding of how normative and empirical arguments interact, then that is exactly what we should work on. As far as we are concerned, this should not imply that we want to turn law students into amateur social or political scientists or economists, but they should at least be able to understand (some of) the language and methods that other (social) sciences apply in order to learn more about the value, validity and reliability of non-doctrinal research methods and techniques. Moreover, law students should be taught how facts and fact finding play a role in legal decision making in, for example, teleological interpretation, considerations of proportionality and subsidiarity in the interpretation and application of European law and in ‘Normkonkretisierung’ or the filling in of open norms and legal principles.¹⁶³
6. For doctrinal research itself the latter means raising awareness as to what methodology actually entails and why it is particularly important for those scholars who focus on European law in their research. We believe that especially European legal scholarship can no longer rely on the informal ‘elephant paths’ earlier generations may (or may not) have laid down for others to follow. The plurality of sources on which European law rests, the interrelation between national and European law, the blurring of the public private divide in EU law and the introduction of new modes of government and governance have made the system extremely complex, fluid and unstable. Moreover, the instrumentalization of European legal scholarship has led to a lack of critical distance towards the object of legal research. In combination these developments underline the importance of methodological rules that can help to *filter out poor research and function as ‘a mediator between the researcher’s*

¹⁶¹ K. Burns and T. Hutchinson, The impact of ‘empirical facts’ on legal scholarship and legal research training, *The Law Teacher*, Vol. 43, No. 2, July 2009, pp. 153-178 (159).

¹⁶² See the experience in Germany with the so-called Einstufige Juristenausbildung, E. Schmidt, *Theorie/Praxis-Verknüpfung und künftige Einheitsausbildung*, DRiZ 1982, 47.

¹⁶³ Niels Petersen, *Braucht die Rechtswissenschaft eine empirische Wende?*, Max Planck Institute for Research on Collective Goods, Bonn 2010/10. [Http://www.coll.mpg.de/pdf_dat/2010_10online.pdf](http://www.coll.mpg.de/pdf_dat/2010_10online.pdf).

subjective beliefs and opinions and the data and evidence that he or she produces through research.’¹⁶⁴

7. Revitalization entails, among other things: *more attention from legal scholarship for the advantages of a solid research design, with special attention for the formulation of a good research question/hypothesis*, which: challenges researchers to embed their research in a scholarly debate by showing on whose shoulders they stand and where they deviate from mainstream thinking; explains what the theoretical relevance of their research is, in other words, what doctrinal positions or other theories are being attacked, adjusted or strengthened, or how certain developments in positive law can be explained or predicted; highlights ones research aim with respect to what will be added to the existing body of knowledge on the subject, and to explain what methods or techniques will be used to answer the research question and justifies why this approach is suitable for that purpose.
8. A revitalized doctrinal European legal scholarship should not be mistaken for ‘methodological fetishism’ or for a strict separation between methods of legal scholarship and methods of law and policymaking. On the contrary, if ‘policy’ means ‘a course of action adopted or proposed by an organization or person, more specifically an action which implies a choice of one action among others’¹⁶⁵, especially doctrinalists should be interested in the parallels and disparities between methods of lawmaking by EU institutions and methods of legal research. Both doctrinal legal scholars and lawmakers increasingly have to overcome similar sorts of ‘translation problems’, such as giving legal meaning to facts and empirical evidence, making sense of what foreign legal concepts learn for the EU legal context (‘Member States as laboratories’) and assessing the credibility of a steadily growing amount of electronic legal sources. What are the underlying values and methods that guide these policy choices? How can legal scholars and lawmakers avoid ‘tunnel vision’, overcome cognitive biases (e.g. misperceiving risks) and how do they balance intuition and practical wisdom with counter intuitiveness and a consistent application of methods?

To be continued

¹⁶⁴ M. McConville and W.H.Chui (eds.), *Research Methods for Law*, Edinburgh: Edinburgh University Press, 2007, p. 22.

¹⁶⁵ W. van Gerven, *Politics, Ethics & the Law, Legal Practice & Scholarship*, LSE Law, Society and Economy Working Papers 20/2008, p. 20.

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