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METHODOLOGY IN THE NEW LEGAL WORLD

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## **Abstract**

Law is a discipline in transition moving, among others, from a predominantly monodisciplinary dogmatic tradition towards more and more attention for multidisciplinary and empirical legal research, from a national to a more international and global orientation and from a research culture of 'laissez faire' towards more managerial control, rankings and research programming. Questions lying in wait are, among others: how can we revitalise doctrinal legal research in Europe in a way that it is up for the challenges of the future, such as the blurring of borders between European and national law, public and private law and state and non-state law and what does the multidisciplinary turn in legal research mean for the education of law students and starting researchers? Moreover, how should legal scholars react to the increased instrumentalisation of law in order to avoid that legal research is reduced to a policy tool that is meant to 'solve' the major societal problems of today? We believe that what is required is not only more focus on methodology with a small 'm' concentrating on how to train new generations of academics to conduct different sorts of legal research. Just as much needed is more attention in research and education for the importance of methodology with a big 'M' aiming for (self-)criticism, awareness of the risk of advocacy scholarship and herd behaviour and concentrating on slow science: theory-building with the intention to explain why law in a globalised world develops as it does.

## **Keywords**

Methodology, Globalisation, Instrumentalisation, Advocacy Scholarship, Herd Behaviour, Research Assessment

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## METHODOLOGY IN THE NEW LEGAL WORLD

### 1. Methodology: What's In a Name?

In 1999 a symposium on methodology was organised by the American Journal of International Law, one of the leading journals in its field. In the introduction to the special issue of the journal on the role of methods in international law the editors refer to a conventional definition of methodology of legal research, namely: 'the ways to identify and locate primary and secondary resources.'<sup>1</sup> These are the formal sources to determine what the law is, such as legislation, case law and doctrine. Through interpretation and argumentation both practitioners and legal scholars give (new) meaning to the sources of law.

Of course probably nobody will deny that 'data collection' is an important part of the research process in law. Finding relevant sources may even prove to be very difficult. Just think of projects involving comparison with legal systems where few legal sources are available in other languages. How does one start such a research? Who is to be consulted about the state of the art of the literature then? Which (digital) sources are authoritative and which ones should perhaps be treated with a healthy form of suspicion?<sup>2</sup> Notwithstanding this, in most other disciplines methodology covers more and other issues than how to retrieve and assess data from relevant (authoritative) sources. The editors of the special issue of the AJIL seem to realise this since they take a broader approach in which methodology represents 'the application of a conceptual apparatus or framework – a theory of international law – to the concrete problems faced in the international community.'<sup>3</sup> Examples that are given include articles on: Positivism, Law and Economics, New Legal Process, Critical Legal Studies, Rational International Relations and so on.

The special issue of AJIL concludes with the message that 'more attention for method is the message'. Interestingly enough, though, Greg Shaffer has argued that, in spite of this motto, none of the articles in the special issue actually deals with methodology in a way any social science discipline would.<sup>4</sup> There, methodology is usually understood as the path that needs to be followed to answer a research question. This reminds us of the etymological roots of the word methodology, which refer to the Greek 'meta-hodos': i.e. 'following the road'. In the social sciences methodology this road-metaphor is also associated with the rationale or the philosophical assumptions that underlie a certain study. The problem, however, is that in legal research the term methodology is used with rather different meanings, which are usually not being articulated. So for example a methodology can refer to the way a judge decides a case, how a legal scholar writes a case note or an article, of the way the discipline as such discerns between different types of legal research (e.g. socio-legal versus doctrinal), or how a certain school of thought presents itself to the research community (New legal realism or critical legal studies), and so on. Also the words methodology and method sometimes seem to express different things.

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<sup>1</sup> Steven R. Ratner & Anne-Marie Slaughter, Appraising the Methods of International Law: A Prospectus for Readers, 93 Am.J.Int'L. 291, 292 (1999).

<sup>2</sup> Think of the increasing amount of open source databases, such as Wikipedia. Every experienced legal scholar will both recognize the advantages of all sorts of search engines but also see the risks of too easily relying on the wide variety of digital sources that one can access through the Internet. Even very popular legal networks, such as the legal scholarship network on SSRN (see: <http://www.ssrn.com/>), may contain dubious legal research papers.

<sup>3</sup> Ibid p. 292.

<sup>4</sup> G. Schaffer, Melvin C. Steen Lecture, A Call for a New Legal Realism in International Law: The Need for Method, Minnesota Legal Studies Research Paper No. 09-02 (available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1323912](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323912)).

## 2. Methods, Methodology and Legal Theory

According to Van Roermund methodology is somewhat more than method. A method is a road to the solution of a problem or a set of problems, whereas the methodology of a discipline gives an account of why this road is appropriate in terms of two sets of reasons: (i) successful methods used in terms of best practices by professionals; and (ii) the conceptual framework of a philosophy of the relevant science.<sup>5</sup> Thus, he considers methodology of law as a back-and-forth between actual practice in legal scholarship and rather abstract philosophy.

This also seems to be the view expressed in ‘Research methodologies in EU and international law’ by Robert Cryer, Tamara Hervey, and Bal Sokhi-Bulley.<sup>6</sup> What is surprising though, is that their list of methodologies that are being used in European and international law is to a large extent different from the list in the AJIL and includes ‘methodologies’ as diverse as: Natural law, Legal Positivism, Cosmopolitanism, Constitutionalism, New Governance, Queer Theory, Feminism, Postcolonial Theory, Marxism, but also Law and Economics, Law and Literature, and Law and Sociology.

The latter raises two questions: 1) why do they call these ‘schools of thought’ methodologies and not just different legal styles or cultures? 2) why are there such major differences between experts in the same field with respect to the canon of methodologies?<sup>7</sup> Even more notable is that Cryer c.s. admit to use the words methodology, theory, and approach as synonyms but immediately add to this: ‘We rejected the use of the word ‘theory’ alone because in our experience many legal scholars, including the majority of PhD students in law, are uncomfortable with expressly identifying themselves as theorists.’<sup>8</sup> Although we can understand that legal scholars do not want to give the impression of being detached from legal practice, the latter remains strange for different reasons.

### 2.1 Methodology and Theory as Synonyms?

Firstly, why would anyone want to use the words methodology and theory as synonyms? Theory-building may certainly be the result of applying a certain method to a legal problem but does that justify putting theory and methodology on the same footing?<sup>9</sup> Is methodology not more concerned with making implicit assumptions explicit, with research design, and consistency between questions, data, skills and techniques to analyse these data, and the care for consistency between questions, data, methods, and conclusions? And does theory-building not have different meanings if we compare, for instance, doctrinal research (normative assertions, views and concepts with regard to the legal system) to empirical legal research (assertions about the functioning of the law as a result of testable hypothesis)?

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<sup>5</sup> B. van Roermund, *Theory and Object in Law: the Case for Legal Scholarship as Indirect Speech*, in M. van Hoecke (ed.), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?*, Hart Publishing, Oxford 2011, p. 277.

<sup>6</sup> The authors distinguish between ‘methods’ and ‘methodology’. In their view methods deal with the way in which a research project is pursued – what one actually does to enhance knowledge, test a thesis or answer a question – whereas methodology has more theoretical connotations. We find this distinction confusing because in most disciplines the methods are just as well selected because they contribute to theory-building.

<sup>7</sup> We put methodologies between brackets because we think it has little use to think of general approaches towards (legal) research as methodologies. Positivism, for example, is in our perception more of a general view on scientific inquiry and even within a subfield of law, such as, law and economics different approaches (behavioural law and economics) and methods (quantitative vs qualitative) are pursued.

<sup>8</sup> R. Cryer, T. Hervey and B. Sokhi-Bulley, *Research Methodologies in EU and International Law*, Hart Publishing: Oxford and Portland, Oregon 2011, p. 5.

<sup>9</sup> See about theory-building in legal research, M. van Hoecke, *Legal Doctrine: Which Method(s) for What Kind of Discipline?* *infra* nt. 1, p. 14ff.

Secondly, what is wrong with legal theory anyway? Why would PhD students need to feel uncomfortable with it? They are supposed to add something new to the body of knowledge with their dissertation. Wouldn't it be nice if dissertations include at least some theory? For colleagues from other (social) sciences the discomfort with theorising will probably appear as odd because for most of them scholarship without theory is hard to imagine. This urges attention to the question: is legal research really so different from other social sciences or from the humanities that it can do without generally accepted theories and methodologies? In the social sciences, for example, there is at least a minimum consensus on how to do a proper experiment or what the do's and don'ts are in participatory observation or interviewing but in law there do not appear to be generally accepted guidelines on how to write a case note or even how to do a proper literature review. As far as there are ground rules these are often kept implicit. Some legal scholars talk about the "Elephant paths" in legal research: everyone knows, for example, how writing a case note should be done but there is no official roadmap on how to do it. There are only authoritative examples that somehow seem to set a standard.<sup>10</sup> One could even argue that how to conduct legal research in a proper way is under theorised because most of the writings about 'how to find law' are written from a judicial instead of a scholarly perspective.

## ***2.2 Methodology and Legal Theory: A Complex Relationship***

Should legal scholars not be able to explain to colleagues from other sciences why they are so different? Here we enter the field of academic politics.<sup>11</sup> Is law a science? What kind of science? Should every type of legal scholarship (doctrinal, socio-legal, comparative...) be pushed through the same methodological mould? Who determines the 'rules of the game'? One of the weaknesses of law research seems to be that legal scholars sometimes claim of being different from other sciences but do not explain why they are so different and what the justification for this is. Does it suffice just to say that both legal practitioners and legal scholars use the same sources, theories, and interpretation methods but that their perspectives may be different?

If we take a look at the history of legal scholarship, there is an up-and down of particular methodological approaches and these are often linked to a particular background understanding of how the law should be used. One only has to think of the fierce debates between positivists and legal realists in the past or more recently between 'doctrinalists', who believe that legal research should primarily be seen as a service to legal practice, and 'multidisciplinarians' defending that scholarly legal research has a purpose in itself ('Verstehen'). This has of course theoretical consequences.

Neil Walker drew attention to this lack of theoretical self-consciousness in EU legal scholarship.<sup>12</sup> He noticed: '[...] a tendency towards a reactive, event-driven and context-dependent approach to EU legal studies. On this view, even when theoretical concerns surface on a crowded academic agenda, they often tend to be shaped by highly specific, infra-systemic developments and thus to highlight the peculiarity of EU 'legal problems' rather than their continuity with problems which have stimulated theoretical reflection before or elsewhere.'<sup>13</sup> Walker's infra-systemic developments appear to refer to what is going on in legal practice, whereas the observed specificity sees to the lack of generalisation and theory-building in much of the mainstream legal research not only with respect to EU law but regarding law more in general.

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<sup>10</sup> For example with respect to the case notes in European law the Common Market Law Review seems to function as a benchmark for how case notes should be written.

<sup>11</sup> The well-known quote "academic politics are so vicious precisely because the stakes are so low" is often attributed to former Secretary of State and Harvard professor Henry Kissinger.

<sup>12</sup> N. Walker, 'Legal Theory and the European Union: A 25<sup>th</sup> Anniversary Essay', *Oxford Journal of Legal Studies* 25, p. 581-601 (2005). Cryer c.s also point to this on p. 19.

<sup>13</sup> *Ibid.*, p. 538.

Van Gestel and Micklitz have added two observations to Neil Walker's analysis. Firstly, they claim that in Europe methods of judicial law-making are still dominant.<sup>14</sup> There is as yet too little awareness that scholarly legal methods might be fundamentally different from an intelligent practitioner's view on legal problems. This may also explain some of the discomfort of legal scholars with theory and methodology. In the eyes of quite some colleagues, emphasizing the importance of methodology and theory-building runs the risk of drifting away from legal practice and trying to copy/paste the approaches in other (natural and social) sciences to law. Secondly, methodology can easily drive legal researchers out of their comfort zone because it is at odds with putting too much faith in authoritative sources and mainstream legal thinking.

We would also like to stress that because of the traditional ties between legal practice and legal scholarship both in the US (e.g. the American Bar Association has a strong influence on the law school curriculum) and Europe (e.g. the growing importance policy-driven European Framework programmes and contract research for the financing of scholarly legal research) economic incentives have become a strong driving force behind the course that legal research is taking. Methodological awareness is becoming increasingly important to prevent that scholarly legal research is reduced to its use-value.

Last but not least, on the level of the individual researcher, methodology challenges us to make our implicit beliefs and assumptions explicit in order to avert herd behaviour, to avoid relying too easily on authoritative sources, and to test what may appear obvious at first sight. For those legal researchers with strong moral convictions and a desire towards social engineering a methodological approach to answer a legal research question may even create an inconvenient truth. Those who already know the normative answer to a legal problem probably do not want to be bothered with facts, with alternative explanations about what caused a problem, or with counter-evidence or lacunas in their analysis. All this can destroy one's 'theory' about what is going on and what is needed.<sup>15</sup> We believe this is a weak spot in much purely normative legal research dealing with what the law ought to be.<sup>16</sup>

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<sup>14</sup> This is not a new observation. See for instance J.B.M. Vranken, *Exploring the Jurist's Frame of Mind*, Kluwer Law International: The Hague 2006.

<sup>15</sup> Students who claim they have a 'theory' at the start of their PhD often mean they have a hypothesis (which is usually kept implicit) or a hunch about the most likely answer to the research question.

<sup>16</sup> According to Jan Smits answering normative legal questions is what law as a science should be about. Everything else he sees as a by-product or as non-legal research. See J.M. Smits, *Redefining Normative Legal Science: Towards an Argumentative Discipline*, in: F. Coomans, F. Grünfeld, M. Kamminga (eds.), *Methods of Human Rights Research*, Antwerp-Oxford 2009, p. 45-58.

### **3. The Importance Of ‘Why Questions’**

We feel that in the end the attention for the ‘why questions’ in legal research is what really distinguishes legal scholars from practitioners. As Nicholas Hancox has argued: ‘academic lawyers want to understand the way that law works and how it affects people and organizations, but practitioners are not interested in *why* the law says what it says.’<sup>17</sup> We would even go further in the sense that legal scholars should be more self-critical than practitioners in particular when it comes to questioning common beliefs and established theories. Hence, at the European University Institute, Hans Micklitz and Miguel Maduro started a series of lectures, called the ‘why seminar’, because they felt that more and more students and PhDs in law from all over Europe are not trained well-enough to be sceptical, observing, and willing to be ‘surprised by reality’. Many of the students entering the LLM or PhD programme in Florence (but our impression is that this is certainly not limited to Florence) every year are full of ambitions to change the world in order to make it a better place. Of course there is nothing wrong with this. On the contrary, we would say, it is good to see that students are full of hope as long as it does not result in a purely instrumental view in which law becomes a mere tool for policy making.

Perhaps even more important for starting researchers is to become aware of the fact that we all have our preconceptions. There is nothing wrong with that too, unless we are not prepared to make our implicit assumptions explicit and test them in order to see whether we are not simply biased or looking for confirmation of our own beliefs and convictions. These sort of considerations were sufficient reason for the EUI to start a series of lectures in order to make students aware that it is useful and important to question mainstream opinions, ideologies, and ideas such as: economic rights are suspicious, human rights are above suspicion; harmonisation of laws is desirable, differentiation is questionable; transparency is always good, secrecy is bad, and so on and so forth. The seminars were meant to show that law in the real world is not all black and white. Furthermore, the hope was that by confronting the students with their own beliefs and preconceptions, they would become more susceptible for facts and fact finding (what does the problem actually look like, who has it, for how long has it been a problem etcetera) and ‘law in context’. The idea was that students would grow aware of the importance of methodology for law and legal research in general and for their own writing in particular. It is here that the EUI has joined forces with Tilburg University’s Research Group for Law and Legal Research. This group was established in 2007 by Jan Vranken and Rob van Gestel in order to conduct research on the way methodology affects both law-making and legal research and develop education programmes initially for research master students (MPhil) and PhD’s, but more recently also for bachelor students, with the intention to take methodology beyond problems of finding one’s way around the library and learning how to build an argument.

Especially the training of law students in the ‘art of persuasion’, which is an important part of the education of lawyers in many law schools, not only in the U.S. but to a lesser extent also in Europe, is tricky from a methodological perspective since it can easily spur one-sidedness and may provide an impetus to leave aside sources, arguments, and opinions that do not fit with the claims one wants to make. Robert Spitzer calls this ‘advocacy scholarship’, which he believes is not scholarship at all because students are being educated to behave like advocates instead of scientists. Spitzer’s criticism does not imply that every law student should become an academic after graduation. Teaching the difference between a practitioner’s view and a scholarly perspective on law and legal research does, however, deserve a place in the law school curriculum simply because law schools are also a breeding ground for legislators, judges, policy-makers, academics and so forth. In those professions leaving counter-evidence to other parties is not self-evident.

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<sup>17</sup> M. McConville and W. Hong Chui (ed.), *Research Methods for Law*, Edinburgh University Press: Edinburgh 2007, p. 2.

What is then so typical for a scholarly perspective and where does methodology come into play? Regarding the scholarly view, we feel that it first and foremost requires a curious and open attitude and the willingness to expose one's research to the public in order to make criticism possible.<sup>18</sup> As far as methodology is concerned, we think that it cannot turn poor research into cutting-edge work. We do believe, however, that research skills, the research community and the methodological rules of the discipline together 'act as a mediator between the researcher's subjective beliefs and opinions and the data and evidence that he or she produces through research. If this domain is functioning properly, it acts as something like a filter which prevents bad research from passing through.'<sup>19</sup> Essential in this respect is that methodology should not be seen as something that is imposed upon legal scholars by others but as a voluntarily chosen *modus operandi* that can make one's research more challenging, more valid, and more credible.

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<sup>18</sup> In the same vein D. Feldman, *The Nature of Legal Scholarship*, *Modern Law Review*, Vol. 52, p. 503 (1989).

<sup>19</sup> *Infra* nt. 15, p. 22.

#### **4. Focus and Central Questions**

Legal researchers can benefit from training in methodology. Those who are very talented may see it as yet another way to prove their excellence and to keep a grip on one's preconceptions and personal beliefs. For the average student, methodology courses may serve as a roadmap that keeps one from taking too many detours or helps one to not get lost (all the time) during the quest for answers to legal questions. Above all, we will argue, methodology can bring you closer to theory-building because the two are intertwined.

Adding something new to 'the body of knowledge' requires an original contribution. Matthias Siems has shown that there are different ways of being original on different levels of abstraction but it almost always includes some sort of theory-building.<sup>20</sup> Other than some scholars nowadays seem to think it is very well possible to theorise in doctrinal ('black letter') research if the black letter analysis aims for a deeper understanding of the foundations of legal arguments, if the analysis aims to understand the validity of different sources of law and looks for what could be behind conflicting or converging doctrines. Doctrinal research can also be enriched by taking a comparative perspective, by reorganizing existing cases, statutes and doctrines in such a way that it leads to a completely new interpretation, or by formulating a normative hypothesis and test it with available sources. In other words sound legal dogmatic work relies on theories (doctrines), for example, to provide a new reading of an existing set of rules or principles or the introduction of new ones.

As far as socio-legal research is concerned, Roger Brownsword has argued that: 'it is now accepted that theoretical work without any empirical content is hollow and that empirical work without supporting theory is shallow.'<sup>21</sup> Hence, methodology first of all intends to stimulate self-reflection among legal researchers by asking three basic 'why questions', which may help law students and PhDs, but also legal scholars more in general, to understand the value and meaning of methodology. Relevant questions here are:

1. Why do we need methodology in legal research?
2. Why do we need more or other legal methods than in the past and what methodologies are available for law in a globalised world?
3. Why is there resistance against making our implicit legal methods more explicit and what are the pros and cons of methodological innovation in scholarly legal research?

In answer to the obvious question: why these questions and not others, we would be inclined to answer that there is a logical order behind them. The most pressing and 'dangerous' question is undoubtedly the first one. We are quite convinced that one can still find many colleagues in law schools throughout Europe who do not believe that 'true' legal research needs explicit methodologies, or who implicitly start from that premise. One of their arguments will be: legal scholars have managed to do well without making their implicit methods more explicit for many centuries, so why start now? What could be the problem that a debate on methodology in law is supposed to solve? In this group of sceptics one will probably also find people who claim that among the most well-known and esteemed legal scholars there are many who did not seem to care much about methodology. Should we qualify their research as 'unscientific' in retrospect? Is good legal research not what good legal researchers do?<sup>22</sup> Among the same group, there will also be colleagues who argue that more attention for

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<sup>20</sup> M. Siems, *Legal Originality*, *Oxford Journal of Legal Studies*, Vol. 28: 147-164 (2008).

<sup>21</sup> R. Brownsword, *An Introduction to Legal Research*, p. 19. Available at: [http://www.wellcome.ac.uk/stellent/groups/corporatesite/@msh\\_grants/documents/web\\_document/wtx030897.pdf](http://www.wellcome.ac.uk/stellent/groups/corporatesite/@msh_grants/documents/web_document/wtx030897.pdf).

<sup>22</sup> The answer is probably affirmative but it runs into a circular reasoning because why do we (the community of legal scholars) qualify some legal scholars as excellent whereas others are seen as mediocre or worse? What implicit or explicit criteria do we use?

methodology can conflict with the rhetorical tradition of legal scholarship. They may be driven by the idea that formulating research questions, justifying the data collection, and explaining one's research design is probably not the most exciting part of scholarly publications outside the realm of law. On the other hand, does methodology necessarily have to lead to more boring publications and is scholarly legal research in general less tedious and boring than research in the social sciences and humanities where methodological justification is more common?

The second reason why we need more or other legal methods than in the past has to do with globalisation and the increasing student mobility across countries and cultures. Traditional boundaries between national, European and international law are fading and this also affects the disciplinary borders between existing fields of law. It is, for example, no longer possible to study (national) environmental law without at least a strong basic knowledge of European law and international law. Martha Nussbaum goes even further by claiming that the next generation of students should be prepared for global citizenship since they are no longer exclusively a citizen of their country or local community but increasingly also a member of an interlocking and interdependent world.<sup>23</sup> For Jan Smits this means that students have to be exposed to legal diversity, which goes far beyond showing the differences between common law and civil law.<sup>24</sup> Smits argues that law students should be taught that different societies give different weight to issues concerning social justice, democratic legitimacy, and moral values. That is why he believes it is so important to learn to think about alternative ways to deal with legal problems in a globalised world. Smits links this to methodology because students should no longer be taught primarily to understand Dutch law, German law or even European law, but to apply different legal approaches to the questions they are confronted with.<sup>25</sup> In other words teaching student to 'think like a lawyer' means training them in methodology.

A third reason for more attention in law and legal research for methodology has to do with the renewed interest of a growing number of law schools in law and ... research, such as behavioural economics, neuroscience, cognitive psychology and so on. These disciplines put more emphasis on empirical evidence compared to doctrinal research.<sup>26</sup> What is interesting is that the new law and... research is accompanied in jurisprudence by a 'New Legal Realism'.<sup>27</sup> NLR challenges legal scholars to develop more rigorous and multidisciplinary methods for studying legal problems in their social, cultural, political and economic context. What exactly are suitable methods to do this and how easy or difficult is it to learn to apply them properly? In the meanwhile NLR also holds up a mirror to traditional doctrinal legal scholarship. It is probably no coincidence that so many colleagues nowadays perceive doctrinal research(ers) to be intellectually rigid and inward-looking. Unfortunately one reason for this is that doctrinalists all too often have: shown a preoccupation with technicalities and topics with little or no theoretical relevance, and have often limited themselves to repeating existing knowledge ('facing future problems backwards') and, more in general, have failed to connect law to life.<sup>28</sup> On the other hand, as Martijn Hesselink has argued that many law and... disciplines depend on doctrinal legal scholarship for their comparative, historical, economic, sociological or other extra-legal analysis especially now that these disciplines increasingly engage in normative discussions. What is

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<sup>23</sup> M.C. Nussbaum, 'Cultivating Humanity in Legal Education', *University of Chicago Law Review*, Vol. 70 (2003), p. 265-279, at 265.

<sup>24</sup> J.M. Smits, *European Legal Education or: How to Prepare Students for Global Citizenship*, *The Law Teacher*, Vol. 45, pp. 163-180 (2011).

<sup>25</sup> *Ibid* p. 7.

<sup>26</sup> K. Burns and T. Hutchinson, 'The impact of "empirical facts" on legal scholarship and research training', *The Law Teacher*, Vol. 43, No. 2, July 2009, p. 168-169.

<sup>27</sup> Stewart Macaulay, 'The New versus The Old Legal Realism: Things Ain't What They Used To Be', *Wisconsin Law Review* 2005, p. 365-403.

<sup>28</sup> Deborah Rhode, 'Legal Scholarship', *Harvard Law Review* 115, pp. 1327-1361, at 1340 (2002).

paradoxical is that they cannot do without the research provided by the scholarship they sometimes criticize as being unscientific.

All this raises important questions as to what sort of legal research we need in the 'New legal world' and how we can achieve a better match between doctrinal and non-doctrinal scholarship. Some of the methodological challenges are a by-product of globalisation and Europeanisation. Others go beyond that and are resulting from the new role law is exercising in society or, at least, a different perception of the role of law in society, such as the judicialisation of politics as a counterweight to 'fact free politics' and a diminished trust in politicians and legislators.<sup>29</sup>

There is, however, also another reason behind the confusion about the role of methodology in law and legal research. As we mentioned before, methodology of law and legal research is associated with a very broad range of topics varying from epistemological issues about how facts or rules and principles are perceived, constructed or deconstructed<sup>30</sup>, to methods of judicial interpretation and the skills needed for proper academic legal writing. Thus, it should not come as a surprise that there is a lot of miscommunication concerning what methodology in law is about. Some of the scepticism against methodology in law, however, probably has to do with the fact that methodological issues are associated with old quarrels about whether law is a science or not. Although the debate on this topic has been going on for several centuries now, not much progress seems to have been made there. On the contrary, we would say. The result has been that doctrinalists sometimes get the feeling that their world is colonized by multi- and interdisciplinarians who do not understand what it means for law to be a normative science, whereas the latter make a mockery out of doctrinal legal research because they have the feeling that doctrinal legal 'research' is not much more than merely defending personal opinions.<sup>31</sup>

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<sup>29</sup> However, See R. Hirschl, R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Harvard University Press: Cambridge, Massachusetts 2004. Hirschl argues that there is little evidence that we should put more trust in highest courts as guardians of the constitution than in legislators. On the basis of empirical research, he concludes that the move towards what he calls 'juristocracy' first and foremost benefits the political elite to remain in control because highest courts seldom deviate from mainstream political opinions

<sup>30</sup> G. Samuel, *Epistemology and Method in Law*, Ashgate: Aldershot 2003.

<sup>31</sup> Illustrative is M. Saltor & J. Mason, *Writing Law Dissertations*, who provide a list of 20 advantages of a black approach towards legal research versus 42 alleged disadvantages. What the authors seem to overlook though is that there are very different methods and styles of 'black letter research' and the same is true for what they call socio-legal research.

## 5. The Wrong Debate

Methodological questions seem to have a tendency to result in a debate on the scientific nature of legal scholarship. Although there has been some renewed attention for the question whether law is a ‘true’ science<sup>32</sup>, this debate is actually a very old one. It has strong predecessors dating back to at least the 19<sup>th</sup> 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.<sup>33</sup>

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 the legal research at the time 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.<sup>34</sup> 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 legal doctrine as a shield against the legal protection of the working class.<sup>35</sup> The Freirechtsschule paved the way for the integration of social sciences and law. However, the debate went beyond the German particularities and also led to the search for an appropriate legal methodology, one which reaches beyond textual interpretation of cases and statutes in order to integrate social facts in theories and methods of law and legal research.<sup>36</sup>

Later, similar debates emerged elsewhere. First in the Northern European countries, where Anders Vilhelm Lundstedt argued that legal 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.<sup>37</sup> 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.<sup>38</sup> Accordingly, scholarly propositions should be verified against the outcomes of judicial practice. After Scandinavian legal realism came the French

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<sup>32</sup> See for example for the US, Robin Feldman, *The Role of Science in Law*, Oxford University Press 2009 and Thomas S. Uhlen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, *Illinois Law Review* 2002, p. 875-920. For the UK, Christopher Mc Crudden, *Legal Research and Social Sciences*, *Law Quarterly Review*, Vol. 122, p. 632-650 (2006) For Germany Hans-Eberhard Heyke, *Ist ‘Rechtswissenschaft’ eine Wissenschaft? Rechtstheorie*, 2003, p. 229-244, for Belgium S. Gutwirth, *Evaluatie rechtswetenschappelijk onderzoek: VLIR-model voor integrale kwaliteitsevaluatie van het onderzoek in de rechtswetenschappen*, *Nieuw Juridisch Weekblad* 2007/6, p. 674-678. For the Netherlands, C.J.J.M. Stolker, ‘Ja, geléerd zijn jullie wel!’ *Over de status van de rechtswetenschap*, *NJB* 2002/15, pp. 1409-1418.

<sup>33</sup> J. von Kirchmann, *Die Wertlosigkeit der Jurisprudenz als Wissenschaft*, Julius Springer Verlag, Berlin 1848, p. 29.

<sup>34</sup> R. v. Jhering, *Im Juristischen Begriffshimmel. Ein Phantasiebild*, in: *Schertz und Ernst in der Jurisprudenz*, Leipzig 1909.

<sup>35</sup> A. Menger, *Das Bürgerliche Recht und die besitzlosen Volksklassen. Eine Kritik des Entwurfs eines Bürgerlichen Gesetzbuches für das Deutsche Reich*, Tübingen: Laupp 1890.

<sup>36</sup> Dugiut, Salleilles and Gény, *Méthode d’Interprétation et Sources en Droit Privé Positif*, 1899/2<sup>nd</sup> edition 1919.

<sup>37</sup> A.V. Lundstedt, *Die Unwissenschaftlichkeit der Rechtswissenschaft*, Berlin: Verlag für Staatswissenschaften und Geschichte, 1932.

<sup>38</sup> Alf Ross, *On Law and Justice*, London: Stevens & Sons, 1958, p. 40.

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.<sup>39</sup>

In the US Roscoe Pound developed his 'sociological jurisprudence' in the beginning of the 20<sup>th</sup> century underlining the importance of the societal effects of law and law-making, and taking into account the gap that often exists between the law in 'the books and the law in action'.<sup>40</sup> Pound's instrumentalistic view on law and law-making was an important starting point for what is now known as American legal realism.<sup>41</sup> Basically, one can say that American legal realists, such as Karl Llewellyn, Oliver Wendell Holmes, Louis D. Brandeis, and Benjamin Cardozo, tried to get away from CC Langdell's famous case method in order to link the indeterminacy of especially judicial law-making in the common law with the need to draw on extra-legal considerations to resolve disputes. That of course requires more multidisciplinary approaches to the study of law in order to be able to build legal decisions on sound knowledge about the sociological, anthropological, economic and... foundations of society.

All this is just to show that the current debate on the nature of legal scholarship is certainly not new. It is actually a very old and recurring debate on the role and function of legal research and how it should be conceived. What is more important is that 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.<sup>42</sup> In a certain way it is also a safe and comfortable debate since there is not one right answer to the question: what is the true nature of legal scholarship? The answer to this question ultimately depends on one's definition of science. In other words, this is first of all a matter of axioms. We do not want to add yet another chapter to this probably never-ending debate on whether law is a science or not. We believe this debate detracts us from far more pressing methodological questions concerning the future of law and legal research.

Far more interesting with respect to the future is the question what sort of science is law becoming under the influence of globalisation and Europeanisation, technological innovation, the increasing influence of the behavioural sciences and accordingly the rise of new law and...disciplines.

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<sup>39</sup> M. Miaille, *Introduction critique au Droit*, Maspero, Paris, 1976.

<sup>40</sup> Roscoe Pound, *Law in Books and Law in Action*, 44 *Am. L. Rev.* 12, 15 (1910).

<sup>41</sup> 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). For an overview: Wouter de Been, *Legal Realism Regained*, Stanford University Press: Stanford 2008.

<sup>42</sup> See Victoria Nourse and Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory*, *Cornell Law Review*, Vol. 95, p. 61-138 (2009).

## 6. Law a Discipline in Transition

So what are the new and more pressing questions with respect to the role of methodology in law? The answer has to do with the fact that law is a ‘discipline in transition’ moving, among others, from: a predominantly monodisciplinary (doctrinal) tradition towards more and more attention for multidisciplinary and empirical legal research, from a national to a more international and global orientation and from a research culture of ‘laissez faire’ towards more monitoring, managerial control, and research programming on the basis of output indicators.<sup>43</sup> What needs to be done is to meet the needs of those who study law by describing the demands these transitions pose for legal scholarship.

### 6.1 From Mono- to Multidisciplinarity

Let us start with the shift from monodisciplinary to more multidisciplinary legal research. Everyone who has studied this trend will soon realise that it is not so easy to determine how to appreciate this development. In the US, for example, there has been a fierce debate about the question whether legal research, especially at the elite law schools, is not drifting away from legal practice. On the one side there are people who claim that doctrinal research is dead. Pierre Schlag, for instance, brands 95% of that research as ‘case law journalism’ in which legal scholars do little more than commenting upon judicial decision-making which puts practitioners in the leading position and turns legal scholars into herd followers..

On the other side there are still strong adherents of doctrinalism, such as Harry Edwards<sup>44</sup>, who defend traditional legal scholarship because they feel that legal scholarship and legal practice are moving in opposite directions.<sup>45</sup> To quote Edwards: ‘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.’<sup>46</sup> Edwards’ provocative article has not remained unchallenged though. He has been accused of, among others, narrow-mindedness and a misplaced nostalgia regarding the value of doctrinal research.<sup>47</sup> Recently the debate even sparked a debate in the New York Times about the purpose of

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<sup>43</sup> This term ‘discipline in transition’ is borrowed from the latest national legal research assessment exercise in the Netherlands, which signals 10 distinctive features of the transition phase that law is in, which we believe have to a large extent broader implications than the situation in the Netherlands. The report, *Kwaliteit & diversiteit: Rechtswetenschappelijk onderzoek in Nederland 2003-2008* (Quality & diversity: Scholarly legal research in the Netherlands 2003-2008), Vrije Universiteit Amsterdam 2009. See: [http://www.ru.nl/publish/pages/518190/rapport\\_ero.pdf](http://www.ru.nl/publish/pages/518190/rapport_ero.pdf). The report has an English summary.

<sup>44</sup> See more recently, however, also Brent E. Newton, *Preaching What They Don’t Practice: Why Law Faculties Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, *South Carolina Law Review*, Vol. 62, p. 104-156 (2010).

<sup>45</sup> H.T. Edwards, *The growing disjunction between legal education and the legal profession*, *Mich. L. Rev.* 34 1992-1993, pp. 34-70.

<sup>46</sup> *Ibid.*, p. 34.

<sup>47</sup> 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*

legal scholarship. In an editorial the NYT defended that law is now regarded as a means rather than an end, a tool for solving problems. Hence law students should be prepared better for today's problems in legal practice.<sup>48</sup> Other have argued though that one of the problems of law and law school training today is that it is too much oriented on hot topics instead of basic themes. The central premise of scholarly research should not be measured by its use-value or short-term payoff but by its contribution to the body of knowledge.<sup>49</sup> Nevertheless, this does not clarify the role that, for example, doctrinal scholarly legal research can or should play as a mediator between the academy and legal practice.

What is interesting is that one of the strongest adherents of multidisciplinary and empirical research in the US, Richard Posner, now seems to feel that legal dogmatics needs to be reinstated. In "How judges think" he argues that doctrinal research is vital for the development of law: '(t)he messy work product of judges and legislators requires much tidying up, synthesis, analysis, restatement and critique. These are intellectually demanding tasks, requiring vast knowledge and the ability (not only brains, knowledge, and judgment but also *Sitzfleisch*) to organise dispersed, fragmentary, prolix, and rebarbative materials. Though these tasks lack the theoretical ambition of scholarship in many more typically academic fields, they are vital to the legal system and of greater social value than much of today's esoteric interdisciplinary legal scholarship.'<sup>50</sup>

Where Richard Posner in the late nineteen eighties argued in favour of the establishment of departments for legal theory in US law schools to counterbalance the dominance of doctrinal scholarship, he now claims that departments for doctrinal law should be founded as a counter-weight to the dominance of the law and... movements.<sup>51</sup> Others agree with him, at least where it concerns the risk that the trend towards multidisciplinary in legal research will drive a wig between legal education and scholarly legal research in law schools.<sup>52</sup> The question is whether we can expect law professors to do highly specialized multidisciplinary and/or empirical legal research and at the same time expect them to stay 'top dogs' who teach law students the latest developments in doctrinal legal practice. Is that not a mission impossible in an increasingly specialized international legal order? Does this mean that doctrinal research runs the risk of becoming obsolete? We think not. As Mattias Siems has argued, it is quite likely that even in a world without law professors, doctrinal legal research would survive. Courts, law firms, government agencies, and others, would probably (financially) support this type of research because of the value it has for legal practice. The fact that there are today few incentives for law firms and business to sponsor doctrinal research is probably not the result of the poor quality of doctrinal scholarship. It is more likely caused by an oversupply of textbooks, handbooks, commentaries and so on, sponsored with tax payers' money.<sup>53</sup>

Siems does not seem too worried that doctrinal legal research will disappear altogether. But as he noticed himself, the consequence of a trend in which doctrinal research will become more dependent on private funding is that this type of research is reduced to its 'use-value' for legal practice.<sup>54</sup> Apart

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of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decision-making, 58 Duke L.J. 1895 (2009).

<sup>48</sup> See: <http://www.nytimes.com/2011/12/05/opinion/the-law-school-experience.html>.

<sup>49</sup> See: <http://opinionator.blogs.nytimes.com/2011/12/12/teaching-law/#>.

<sup>50</sup> Richard Posner, *How Judges Think*, Harvard University Press 2008, p. 211. He repeated this viewpoint in a comment on Piere Schlag's 'Spam jurisprudence'. See Richard Posner, *The State of Legal Scholarship Today: A Comment on Schlag*, *The Georgetown Law Journal*, 2009, p. 845 ff.

<sup>51</sup> *Ibid* p. 854-855. With thanks to Jan Vranken who noticed this shift in Posner's thinking.

<sup>52</sup> 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).

<sup>53</sup> M. Siems, *A World without Law Professors*, in M. van Hoecke (ed.), *Methodologies of Legal Research*, Hart publishing: Oxford 2011, p. 81.

<sup>54</sup> *Ibid*, p. 84. Siems makes this argument for 'deep' law and... research but we think the same applies to doctrinal research unless one believes that doctrinal research as such is a synonym for applied research without any theoretical potential.

from that, private sponsoring would endanger the independency of doctrinal scholarship in a branch that is already close to legal practice. It would also complicate certain types of doctrinal research, such as studies aiming for law reform or explaining the differences between legal systems. We feel that the importance of systematisation, looking for common principles and learning by comparative research (see hereafter) should not be underestimated in a legal world that is becoming more and more fragmented, multi-layered, and untransparent. At the same time we believe doctrinalists also have a lot to gain from a methodological revitalisation. Doctrinalists will certainly benefit if they succeed in explaining to others how they approach their research questions, what their methodology is and how that is related to theory-building and moving beyond purely descriptive work.

Multidisciplinarians in legal research on the other hand need methodology to avoid accusations of being ‘amateur social scientists’.<sup>55</sup> Even in the US where many legal scholars in the elite law schools have a PhD in another field than law there is quite a lot of multidisciplinary research that is seriously flawed from a methodological perspective as Epstein and King have shown us.<sup>56</sup> Why would it be different in Europe where there is no tradition that legal scholars who want to conduct multidisciplinary or empirical research have a doctoral degree in a another field than law? Methodology is also needed to prevent that multidisciplinarians build their analysis on a misconception of legal doctrine. This can easily lead to the building of a theory on, for example, judicial decision-making on the basis of a one-sided selection or a total misinterpretation of court cases.<sup>57</sup> One of the weak spots in multidisciplinary research is that the relevance of the outcomes of empirical work to positive law, in light of effecting a change, is often rather weak. For example, what is the legal value of research that reveals that both judges and juries are sometimes biased? As long as we cannot translate this knowledge to positive law (e.g. procedural law) in order to prevent the negative effects from happening, the knowledge has little value for legal practice. This is problematic as long as we see legal practice as the touchstone for legal scholarship.

The example also shows that methodology is an important communication tool for doctrinalists and multidisciplinarians to understand each other’s language. Whether this communication will become a success will, however, also depend on the training of the next generation of law students. Future legal scholars need to be multi-lingual, not only in terms speaking and writing (English is becoming the lingua franca<sup>58</sup>) but also in terms of understanding the basics of different methodological approaches towards legal problems (‘lingua methodologica’).

## 6.2 From National, to International and Global Law

In Europe we have not yet had a strong debate on (methods of) doctrinal scholarship versus law and... disciplines. That is to say, there is an emerging debate in different member states, such as in the UK, where the Nuffield Foundation signalled a ‘crisis’ developing concerning the capacity and expertise available in law schools to do proper socio-legal and empirical research.<sup>59</sup> Almost simultaneously Fiona Cowney has shown that legal scholars in the UK feel increasingly uncomfortable labelling themselves as ‘black letter lawyers’ because the label is often used to stigmatize doctrinalist for being

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<sup>55</sup> See about the difficulties of multi- and interdisciplinary legal research B. van Klink & S. Taekema (eds.), *Law and Method: Interdisciplinary Research into Law*, Mohr Siebek: Tübingen 2011.

<sup>56</sup> Lee Epstein & Gary King, *The Rules of Inference*, *U. Chi. L. Rev.* Vo. 69, No 1, p. 1-133 (2002).

<sup>57</sup> A Misinterpretation in the sense that the interpretation of the case law runs against mainstream thinking without acknowledging that the usual interpretation differs from what is suggested by the particular researcher.

<sup>58</sup> That English is becoming the lingua franca, especially in EU-law, has also methodological implications that we often tend to overlook, such as: writing about a legal system in English for non-native speakers must lead to a reduction of meaning because of the limitations that most legal researchers will experience in expressing themselves in a foreign language.

<sup>59</sup> H. Genn, M. Partington, 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](http://www.ucl.ac.uk/laws/socio-legal/empirical/docs/inquiry_report.pdf)>.

rigid and inward-looking.<sup>60</sup> Similar debates can be witnessed in other member states, including the Netherlands and Belgium.<sup>61</sup> Until today, however, there is no European-wide debate. This is at least partly due to the fact that there is no unified, cross national, community of legal scholars in different fields of law (private, criminal, constitutional etcetera) in Europe, not even in EU-law, as Bruno de Witte has argued.<sup>62</sup> We want to make a start with a European debate on methodology because we feel the time is ripe and the debate is necessary, not only for legal research but also for legal education.<sup>63</sup>

There is undoubtedly a growing competition between law schools in offering an education that prepares students for an international career. Law schools are starting to respond to the demands of the market where international law firms, multinational corporations, but also NGO's, are becoming increasingly active in competing to recruit the best young lawyers with a diverse and multi-national training. 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 no longer possible to teach contract law, consumer law or environmental law, to name just a few, without at least some basic knowledge 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. EU law cuts across traditional boundaries of private and public law, state-made law and non-state law and so on. This is why mastering EU law is so complicated. One has to understand the co-actorship between national law-makers and EU-institutions and be able to think beyond the boxes and categories of national law.

Due to globalisation it will not be enough for students to acquire 'just' a minimum understanding of how EU law works. It is not only EU-law that permeates national legal systems but also European and international human rights law, international trade and commercial law (including *Lex Mercatoria* and Islamic finance), global administrative law, and so on. Because national and international legal orders are becoming more and more intertwined, the challenge will be to develop a better understanding of different sorts of legal arguments deriving from both national, international, and EU law. To give an example: in most law suits before national courts, European courts and international arbitrations in which a dispute over EU law plays a role, a firm knowledge of at least two, but more often three or more, legal systems is required. One cannot expect lawyers, judges, or other legal professionals to always possess that knowledge. What we may expect, however, is that law schools prepare students so that they know how to acquire such knowledge when they need it. We may also expect that the training in law school teaches students to navigate between different legal systems. This is not only about having some basic knowledge about the different legal systems in the world. It is also about how to simultaneously work with sources from different legal systems.<sup>64</sup> Pluralism of legal sources is a problem of information costs but also of a different paradigm on how those legal sources are to be related towards another and towards the problem at hand.<sup>65</sup>

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<sup>60</sup> Fiona Cownie, *Legal Academics: Culture and Identities*, Hart Publishing, Oxford and Portland/Oregon 2004, pp. 197-198.

<sup>61</sup> But apparently not in Germany. See Wolfgang Schön, Vorwort, in Christoph Engel and Wolfgang Schön (eds), *Das Proprium der Rechtswissenschaft*, Tübingen: Mohr, 2007. See: <<http://www.coll.mpg.de/book/cii48-proper-task-academic-law>>.

<sup>62</sup> 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>>.

<sup>63</sup> In the same sense: Jaakko Husa, *Turning the Curriculum Upside Down: Comparative Law as an Educational Tool for Constructing Pluralistic Legal Mind*, 10 *German Law Journal* 913-928 (2009), available at <<http://www.germanlawjournal.com/index.php?pageID=11&artID=1129>>.

<sup>64</sup> The question is of course to what extent we can really learn to 'know' another legal system in its socio-political, historical, economic context. It is, however, not always necessary to do 'deep level' comparative legal research. For many practical legal questions (even complicated ones) that is not always useful.

<sup>65</sup> An under researched element is the search for electronic information. In a globalised legal world search engines and electronic databases will become of increasing importance. But with the "informationalisation" of legal research the problems of research methods will also grow because searching with key words, for example, will frequently fail to track legally relevant actions or behaviour. Search engines understand word patterns not what is the essence of what you need

Apart from conflicts between different legal regimes it is obvious that certain problems, such as privacy on the Internet, global warming, or terrorism, require a law that goes beyond the boundaries of the nation state. This will seriously affect both legal research and education. As Harry Arthurs formulated it:

'If states do not after all enjoy a monopoly over the making, promulgation, administration and enforcement of law, law teachers and law students will have to start using a new mental map to navigate ordinary courses in contracts, criminal law, labour law and family law. And to do so, they will need a new repertoire of intellectual skills. After all, by whatever means we have traditionally taught students to "think like lawyers", we will have to do something different to teach them not to think like lawyers — or at least not like the lawyers we've been training up to this point. Instead of parsing judicial decisions, for example, they may have to peruse arbitration awards or observe mediators at work; instead of reading legislation, they may be asked to scrutinize corporate codes of conduct or consult ethnographic studies; and instead of being taught to fetishize fairness, rationality, predictability and clarity as law's contribution to social ordering, they may find themselves learning to value pragmatism, imagination, flexibility and ambiguity.'<sup>66</sup>

Probably nobody wants to deny the far-reaching consequences of globalisation for law anymore. The only thing is that many of us still do not recognize that, compared to law-making at the national level, it is far more complex to predict the effects of transnational legal regimes as, for instance, the rules for banking and financial markets have demonstrated almost on a daily basis since the credit crunch started in 2008. One of the reasons for this unpredictability is that globalisation has made the role of private parties, NGO's, and other non-state actors in law-making much more important than it used to be. We can already witness this today by studying the tremendous increase in non-state law, alternative dispute resolution, and private enforcement of public norms. The problem of these shifts in regulation and governance is that it leads to more fragmentation, hybridity and polycontextuality in law and law-making.<sup>67</sup>

There are basically two different ways of dealing with this. The first option is trying to restore unity by a strong emphasis on parliamentary supremacy, harmonisation of legislation, and central monitoring and control. The second option is accepting diversity and relying on policy learning through variation and selection. Inspired by Charles Tiebout<sup>68</sup>, Jan Smits has held a plea for the second option, which he calls 'jurisdictional competition'.<sup>69</sup> The idea behind it is that more preferences will be satisfied if different legal regimes compete with each other, at least as long as consumers and firms can choose freely between the regimes they believe offer the best protection of their interests. Although this may sound good, we have our doubts whether legal competition will automatically lead to 'the greatest happiness for the greatest number' as long as there is no truly global market for legal products and the market that does exist is not transparent. Nevertheless, Smits may have a point when he argues that competition between legal regimes can stimulate policy learning and innovation. It reminds us of justice Brandeis' famous 'states as laboratories' metaphor, which he used to highlight how in federal states experimentation with different legal regimes may not only facilitate innovation but can also lead to the transplantation of successful parts of legal regimes to other jurisdictions. Experimental

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to know. The often come up with haystacks of information while you are looking for needles. See Patrick Quirck, Internationalisation of legal research: finding facts and finding law before the next big crash, in: M. Hiscock (ed.), The internationalisation of law: legislating, decision-making, practice and education, Cheltenham: Edward Elgar 2010, p. 169-183 (170).

<sup>66</sup> Harry W. Arthurs, Law and Learning in an Era of Globalization, German Law Journal, Vol. 10, no. 7, p. 629-640, at 635 (2009).

<sup>67</sup> See: Christian Joerges, Inger-Johanne Sand, Gunther Teubner, Transnational governance and constitutionalism, Hart publishing: Oxford 2004, p. 41 ff.

<sup>68</sup> C. Tiebout, A Pure Theory of Local Expenditures", Journal of Political Economy 64 (1956), p. 416 ff.

<sup>69</sup> J. Smits, Legal Engineering in an Age of Globalisation: Is There a Future for Jurisdictional Competition? In E. Ritaine-Cashin (Ed.), Legal Engineering and Comparative Law, Genève: Schulthess 2009, pp. 51-57.

governance enables federal governments to monitor how different states deal with more or less similar problems and use that knowledge for the purpose of law reform.

In case globalisation will actually go hand in hand with more diversity and competition between jurisdictions<sup>70</sup>, this will probably boost the demand for comparative legal research.<sup>71</sup> A case in point is the debate on the World Bank “Doing business” reports. These reports have claimed that common law systems are in general more effective in stimulating innovation than civil law countries because of the alleged flexibility of the common law. In the economic literature this has raised a strong debate about the need for law reform and legal transplants. What is surprising is that, while legal transplants are a well-known topic in the field of comparative law, comparative lawyers have almost totally ignored the World Bank reports and the legal origins debate among economists.<sup>72</sup> This is odd because it seems almost impossible that one can have a debate about the most appropriate methods to determine the competitiveness of common law versus civil law systems and about the transferability of legal rules and concepts without at least some expertise in comparative law. Why then ignore each other?

Methodology might very well be the key word here. Before comparative lawyers start to point fingers to economists for being ignorant about the complexities of foreign legal systems, they should perhaps also reflect on their own role. Authoritative handbooks on comparative law may be very good at highlighting the difficulties of ‘deep level comparative law’.<sup>73</sup> At the same time they certainly do not excel in explaining when deep level comparative law is absolutely necessary and, especially, how to do it. How can they expect economists to take them seriously as long as they do not make their methodological standards on how to do comparative law more explicit?<sup>74</sup> Even on basic questions, such as: how to formulate a comparative research question avoiding ethnocentricity, how to select relevant jurisdictions for comparison, how to find authoritative sources in a legal system one is not familiar with, or how to make normative sense of the outcomes of the comparison in terms of reflection on one’s own legal system, there are few practical guidelines on how to proceed. All in all, there appears to be much high theory but relatively little down to earth methodology in existing handbooks on comparative law.<sup>75</sup>

The lack of methodological ground rules does not only raise problems for starting legal scholars but it also affects legal practice. In the case law of a growing amount of supreme courts, for example, comparative constitutional analysis plays a major role. Supreme courts increasingly take each other’s case law into account on transnational issues, such as the interpretation of human rights. Just as legal scholars, judges need to avoid the ‘pitfalls of globalisation’. Therefore constitutional courts need to consider the context in which other national courts have decided over a certain dispute.<sup>76</sup> Otherwise the dangers of transplanting infected donor rules to a healthy body of national law are not illusory.

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<sup>70</sup> See also, Anthony Ogus, *The Economic Approach: Competition between Legal Systems*, in: Esin Öricü & David Nelken (eds.) *Comparative Law: a Handbook*, Hart publishing: Oxford 2007, p. 155-168.

<sup>71</sup> W. Twining, *Globalisation and Legal Scholarship*, Montesquieu lecture 2009, Wolf Legal Publishers 2010 even argues that because of globalisation we are all comparatists now.

<sup>72</sup> Ralph Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the silence of Traditional Comparative Law*, *AJCL*, Vol. 57, p. 765-796 (2009).

<sup>73</sup> See also M. van Hoecke, *Deep Level Comparative Law*, in M. van Hoecke (ed.), *Epistemology and methodology of comparative law*, Hart publishing: Oxford 2004.

<sup>74</sup> John C. Reitz, *How To Do Comparative Law*, 46 *AM. J. COMP. L.* 617 (1998).

<sup>75</sup> See Jaakko Husa, *Farewell to Functionalism or Methodological Tolerance?*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 67, No. 3, pp. 419-447, July 2003, who claims that the methodology of comparative law in the new millennium is necessarily a pluralistic one and it lacks a common framework or paradigm. We could not agree more but it offers little help with respect to the question which methods of comparison should be used for what kind of research question. If ‘anything goes’ we would be inclined to argue that there is no methodology involved.

<sup>76</sup> Cody Moon, *Comparative Constitutional Analysis: Should the United States Supreme Court Join the Dialogue?*, *Journal of Law and Policy*, Vol. 12, 242 (2003).

Moreover, there is of course a risk that supreme courts will quote other supreme courts but only in the affirmative. In that case judges run the same risk of ‘advocacy’ that is sometimes attributed to legal scholars who are only interested in winning a debate.

### **6.3 From *Laissez Faire* towards Output Indicators and Criteria for Research Assessment**

A fairly recent development in legal scholarship is the discussion on the assessment of the scientific quality of scholarly publications. In other sciences this debate took place decades ago but in law it has only just begun. Sooner or later, however, law as a discipline will no longer be able to avoid some sort of ranking of law journals and/or publishers and making a choice between peer review, metrics or other methods to assess the quality of scholarly legal publications. It will become increasingly difficult to explain to the outside world that in an international legal world double blind peer reviewed journals co-exist with student-edited journals and non-reviewed journals without much clarity about the consequences in terms of quality and reputation of both the journal itself and the articles published in it.<sup>77</sup> What is unacceptable, for instance, is that until today the format of most law journals in the US is so different from the European format that it is relatively difficult for a European legal scholar to publish in the US and vice versa, if only due to matters of style and format.

Due to globalisation, increased competition between law schools because of a growing student (and more limited) faculty mobility, the rise of new ‘law &...’ disciplines and the increase of electronic journals, blogs, and other Internet platforms, legal research is spreading its wings like never before. In combination with the diversity of editorial requirements of journals and the various ways in which articles and books are being reviewed, these developments press the need for harmonized quality indicators for legal publications.<sup>78</sup> It will become more and more difficult to explain that and why there are no worldwide rules on: ranking of journals, accessibility of publications (in the US on average much better organised than in Europe), independency of the authors who write for a journal<sup>79</sup>, composition of editorial boards, and how to deal with joint publications.<sup>80</sup> Something similar holds true for research funding. Today we can witness more and more competitive financing of research by national and European research foundations. Most of these foundations do not grant law a special position, which means that legal scholars have to compete for funding with scholars from other social sciences and humanities. In these other disciplines both methodological justification and performance measurement are considered to be quite normal. Unless legal scholars succeed in explaining why there are good reasons to be implicit about methodology and about the status of journals and publishers, success in obtaining funding will not last.

With respect to the latter, law could perhaps learn something from the humanities, where there are also differences in terms of traditions and publishing culture compared to other disciplines. It is for that reason that the European Research Foundation is developing a European Reference Index for the Humanities, with the aim to identify and increase the visibility of top-quality research published in academic journals in all European languages. In the humanities claims for an exceptional position due to a deviating publication culture (e.g., the importance of books and publications in other languages than English) have not been accepted as an excuse for making the quality of scholarly publications more transparent and internationally comparable. If law as a discipline does not follow this trend in the

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<sup>77</sup> For example: The Modern Law Review is one of the top law journals in Europe with a system of independent peer review, whereas the Harvard Law Journal is a top law journal in the US that is student-edited.

<sup>78</sup> Rob van Gestel & Jan Vranken, Assessing Legal Research: Sense and Nonsense of Peer Review versus Bibliometrics and the Need for a European Approach, German Law Journal, Vol. 12, no. 3 p. 901-929 at 905 (2011).

<sup>79</sup> In most medical journals that authors have to explain their connections with the industry in order to prevent conflicts of interest. Usually authors have to fill out a disclosure form drafted by the International Committee of Medical Journal Editors. See: [http://www.icmje.org/coi\\_disclosure.pdf](http://www.icmje.org/coi_disclosure.pdf).

<sup>80</sup> See C.J.J.M. Stolker, Legal Journals: In Pursuit of a More Scientific Approach, European Journal of Legal Education, Vol. 2, no 2, 77-94 (2005).

humanities we run the risk that in the end others will force their quality criteria and assessment systems upon us. That is of course a doom scenario but even if this scenario will not unfold and the consequences will be less severe, we still believe that research assessment and quality management are too important to let non-lawyers take the lead in the debate.

Apart from the risk of external pressure there are also internal arguments for change. Let us take the need for reform of our publication culture as an example. Even legal scholars who favour peer review as the best way to assess scholarly legal research must be susceptible to the argument that most law journals and legal publishers do not explain which criteria are being applied in the review process. Those who have studied the editorial guidelines of popular law journals must have noticed that these usually explain at length how to deal with: the number of words, quotations, footnotes, abbreviations etcetera. But as far as quality indicators, criteria for peer review, and editorial policy are concerned, those who want to submit an article are mostly left in the dark. Here we could perhaps learn something from other sciences where methodological justification of one's research design is usually an important requirement to filter out substandard contributions. Why could it not work the same way in law? Perhaps more attention from editorial boards on what they expect from authors in terms of an innovative research question, justification of the use of (digital) sources, explanation about the methods applied to answer the main question, may even push more authors towards innovation.

On the other side, we need to make sure that methodological justification does not turn into rigidity and rule-fetishism. Even more important is that quality assessment, methodology, and who decides over creativity and innovation should not be left to managers or to the market. Legal scholars should take and keep the lead in the process towards more methodological awareness in order to avoid that managers impose restrictions on the academic freedom under the guise of quality management. The best way to do this is probably to take the initiative and organise a debate among about the pros and cons of methodological justification in legal publications and the difficulties with respect to ranking of (national) law journals. The book we propose also wants to contribute to that debate in order to debunk the myth that law can only be studied in its national context and that therefore methods of legal research are almost by definition national methods.

## 7. Conclusion: Where is the Room for Innovation?

The above mentioned trends in law from monodisciplinarity to multidisciplinarity, from a purely national orientation to a situation in which law has to be studied in a European and international context, and from academic freedom towards more emphasis on performance monitoring and research assessment, will in our view sooner or later lead to a debate about methodology. Questions lying in wait here are, among others: how can we revitalise legal research in a way that it is up for the challenges of the future, such as the blurring of borders between: jurisdictions, public and private law, state and non-state law etcetera; how should legal scholars react to the increased instrumentalisation of law in order to avoid that legal research is reduced to a policy instrument; how can we guarantee the quality of scholarly legal publications in an increasingly globalised world? Do we need rankings or other forms of standardised output control or should we perhaps first try to reach consensus on what quality entails and what methodology and theory-building have to do with it? These are wicked questions for which there are no easy answers. More than anything else they require a debate about the future of legal scholarship and about methodology.

### 7.1 From Methods with a Small 'M' to Methodology with a Big 'M'.

There is not yet an abundant literature on methods of law and legal research, at least if one takes the word methodology seriously and leaves aside the many books and articles on legal writing, finding relevant sources, and reading cases and statutes and other materials. For the most part this literature is concerned with how to acquire the technical skills needed to do legal research. Quite often the existing literature does not make a clear-cut distinction between scholarly legal research and legal research performed by practising lawyers. One of the problems of many current books on how to do legal research is that they lack a level of sophistication, criticism, and self-reflection that we believe is essential for *scholarly* legal research. Most current books on law and methodology focus on methods with a small 'm'. They concentrate on how to find out what is the law on a certain topic. Methodological guidelines on how to find relevant sources or how to read case law will not suffice to answer questions as: why is this the law on...or how should the law on... read? These are, however exactly the sort of questions that academics are interested in.

There are of course more specialised books on: empirical legal research methods<sup>81</sup>, socio-legal research methodology<sup>82</sup>, methods of comparative law<sup>83</sup>, and so on. There are at least three sorts of problems with most of these books. The first one is that they usually don't take the perspective of a starting researcher into account, such as an LLM or PhD student who wants to learn something about why methodology is useful and how to apply it to one's own research. Secondly, these books almost never show the bigger picture behind different sorts of research problems or about the relationship between research design, methodology and theory-building. Third, these and other books usually do not show you how to design your own legal research project. That is mostly left to the non-legal literature. Here again there are fine books on how to formulate a research problem and set up a research project but the trouble is that most law students are not used to think in terms of research

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<sup>81</sup> Peter Cane & Herbert Critzer (eds.), *Oxford handbook on Empirical legal research*, Oxford University Press: Oxford 2010 or Robert Lawless, Jennifer Robbennolt, Thomas Uhlen, *Empirical methods in law* Aspen, 2010.

<sup>82</sup> Simon Halliday & Patrick Schmidt, *Conducting Law and Society Research: Reflections on Methods and Practices* Cambridge University Press: Cambridge 2009, Reza Banakar & Mike Travers (ed.), *Theory and Method in Socio-Legal Research*, Hart Publishing: Oxford 2005.

<sup>83</sup> Mathias Reimann & Reinhard Zimmermann, *The Oxford Handbook of Comparative Law*, Oxford University Press: Oxford 2008; David Nelken & Esin Örücü (ed.) *Comparative Law: A Handbook*, Hart Publishing: Oxford 2007, J.M. Smits (ed), *Elgar Encyclopedia of Comparative Law*, Edward Elgar Publishing: Celtenham 2006. Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law*, Oxford University Press: Oxford 1998.

problems, data collection, and research design. They are brought up to think like a (practicing) lawyer. What makes it extra hard is that popular books on research design are often written in a language inspired by the social sciences. The examples that are used do not cover typical legal problems, such as the difficulties that legal researcher are facing with respect to the interplay between facts and norms, rules and principles, or national and transnational legal sources.

Methodology books concentrating on methods with a small ‘m’ are inadmissible for finding out what the law says about... If one, for example, wants to know the state of affairs with respect to liability of hospitals or doctors for wrongful birth cases, it is necessary to know how to find relevant case law, legislation and literature. This does not help us very much, though, if we want to answer questions like: why are there worldwide between five to ten different approaches towards civil liability for wrongful birth, what are the legal consequences of these different approaches, and which approach fits best with our national legal system?<sup>84</sup> These questions imply that there can be fundamentally different perspectives on basically the same legal problem. It allows for an approach that matches best with a particular legal system’s norms, concepts, and principles. Starting from this premise presupposes that the researcher is able to reflect on the system as such.

In the given example comparative law would probably be an appropriate way to deal with the problem. Suppose, however, that the case of wrongful birth was still relatively new and not well-documented. It would immediately raise questions like: what do we mean by wrongful birth, how can we define the phenomenon in such a way that it does not beforehand exclude other relevant interpretations, how are we going to select the countries we want to study to get an overview of the most common approaches towards wrongful birth and wrongful life cases<sup>85</sup>, and what are the most relevant cases we need to study? In that case we are talking about methodology with a big ‘M’. These sorts of questions drive us towards explanation of the essential characteristics of what constitutes wrongful birth, of the reasons behind the different choices that courts make in various countries and it can lead to a comparison between different legal systems and doctrines in order to look for general principles.

## ***7.2 From National to Transnational and From the Role Model of the Judiciary to Other Role-Models in Legal Research***

Existing books on methodology tell us little about the methodology of our wrongful birth/life example. Why is comparative law the best way to approach this problem? Are there other competing methodologies; if so, what are their advantages and disadvantages? If we decide in favour of comparative law; how do we come up with a good research question? What would be a matching research design to answer the question, taking into account certain limits in terms of time, availability of recourses, language barriers etcetera? Some argue that this strengthens the call for comparative lawyers to be trained in interdisciplinary research methods since one needs to be able to learn more of the socio-economic, cultural, and political background of various legal systems.<sup>86</sup>

While the example of wrongful birth could still be regarded as national legal problem in the field of private law (tort law), there are numerous legal problems that go beyond the traditional borders of the nation state. Just think of examples such as: anti-doping issues in sports law, conflicts of laws between countries about same sex marriages, or identity theft via the Internet. Finding answers to the legal problems related to these types of problems will be even more complex. Our hypothesis is that the

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<sup>84</sup> See for an overview: I. Giesen, *Of Wrongful Birth, Wrongful Life, Comparative Law and the Politics of Tort Law Systems*, *Tydskrif vir Heedendaagse Romeins-Hollandse Reg (THRHR)*, Vol. 72, p. 257, 2009. Available at SSRN: <<http://ssrn.com/abstract=1424901>>.

<sup>85</sup> I. Giesen, *The Use and Influence of Comparative Law in ‘Wrongful Life’ Cases*, *Utrecht Law Review* Vol. 8, no 2, 2012, also available at SSRN: <http://ssrn.com/abstract=1695379>.

<sup>86</sup> Esin Öricü, *Looking at convergence through the eyes of a comparative lawyer*, *EJCL*, Vol. 9.2 2005, p. 11.

need to look for more and other methods of legal research is influenced by the growing number of cases where legal problems cannot be labelled so easily as either national or international. Add to this a shift in the dominant role model in law and legal research from the judicial perspective to the world of legislation, regulation and (multi-level) governance and it becomes clear that legal researchers will have to be trained in more and other methods of research.

Let us give one typical example of this regulatory perspective that has been virtually absent in the curriculum of most law schools until today to show that we can no longer rely solely on the role model of the judiciary in legal education and legal research: the OECD is promoting better regulation initiatives all over the world. One of the better regulation tools they try to 'sell' are so-called regulatory impact assessments (RIA's). Important arguments in favour of the introduction of RIA's are the need for deregulation and consideration of alternatives to traditional legislation, such as self-regulation and co-regulation. Experiences with RIA's on the EU-level and in several member states have, however, shown that there is no empirical evidence that the introduction of impact assessments has actually led to a significant deregulation or a more frequent choice for 'lighter' alternatives.<sup>87</sup> Economists and political scientists are trying to explain the relative success of RIA's and investigate the different functions impact assessments are fulfilling. Legal scholars, in turn, seem to have difficulties making normative sense of RIA's.<sup>88</sup> What is their legal status, what are the legal consequences if they are not carried out (properly), may courts use RIA's in a way comparable to *travaux préparatoires* or is that a dangerous road to follow, should there be independent external oversight and, if so, what does independency and/or impartiality require in this case? How can legal research perhaps help to avoid that evidence-based policy-making turns into policy-based evidence making?<sup>89</sup>

The example shows not only how the law of nation states is influenced by international organisations, such as the OECD, but also that we need more and other methods than we are used to in legal dogmatics. We believe in this case a legal scholar who wants to make normative sense of RIA's can hardly do this without taking the literature on regulation and *ex ante* evaluation of law and policy by social scientists and economists into account. One needs to have at least some basic understanding of the different functions that impact assessments fulfil, of their institutional embedding, and of the interplay between law, economics, and politics in which RIA's have to operate. This implies that one takes another perspective than that of traditional judicial law-making.

While legal research has moved beyond the copy/pasting of judicial methods of interpretation, the methodology of judge-made law still seems to be haunting us. Even for doctrinal legal scholarship, however, this identification is increasingly hard to defend due to, among others, the blurring of boundaries between national, European and international law, the growing plurality of legal sources, the constitutionalisation of private law (e.g. the influence of human rights law on private law) and the privatisation of public law (e.g. the rise of self-regulation, co-regulation and other non-state rules and the way these rules influence legislation and public policy).

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<sup>87</sup> R. van Gestel & M. Menting, *Ex Ante Evaluation and Alternatives to Legislation* Statute: Going Dutch, *Statute Law Review*, Volume 32, Number 3, 5 October 2011, pp. 209-226.

<sup>88</sup> In particular with regard to the role and function of impact assessments in the drafting of the Commission proposal on consumer rights, see H.W. Micklitz, *The Targeted Full Harmonisation Approach: Looking Behind the Curtain*, in: Howells and Schulze (eds), *Modernizing and Harmonizing Consumer Contract Law*, 47-86 (2009).

<sup>89</sup> House of Commons Science and Technology Committee, *Scientific advice, risk and evidence based policy making*, (Seventh report of session 2005-2006), published by authority of the House of Commons, London: November 2006, p. 47.

### **7.3 Making the implicit explicit**

This brings us back to the role model of the legal scholar. We believe there is no longer room for only one dominant role model for scholarly legal research. Doctrinalists, empiricists, comparatists, legal historians, law and economists and others co-exist in the new legal world and the quality of their work should be judged according to the rules of the discipline and not be determined by preferences for a particular type of research that is en vogue at the time. What all legal scholars should have in common, though, is a scientific attitude. This means keeping open the option that one could be wrong, being committed to work in methodologically sound way, showing openness about one's assumptions and preconceptions and about alternative outcomes of one's research. A scientific attitude is something that teachers can try to spark and stimulate but it is not something that can be taught like how to carry out a regression analysis.

How to formulate a proper legal research problem, how to conduct a literature review, how to discover which methods are best suited to answer the research questions, and so on, is something that can and should be trained and discussed. This should be done alongside with research ethics, some basics in philosophy of science in order to make students aware of what legal *scholarship* is about. Probably the most important characteristic of a scholarly approach towards legal research, however, is a willingness to be criticized, which means that one is prepared to put all cards on the table. This will of course reveal some vulnerabilities (e.g. the choice of countries in comparative legal research is not only determined by the question that is raised but also limited by the languages one masters) but we are convinced that it will also reveal its strengths.

As far as the vulnerabilities are concerned growing methodological awareness is an important counterweight against the instrumentalisation of much of today's legal research. By instrumentalisation we mean that legal research is first and foremost seen a tool to solve societal problems and not as something that has a value in itself. Putting too much emphasis on the use-value of research underestimates the importance of serendipity in science (one starts off looking for an answer to a certain problem but accidentally finds an answer to another problem). Instrumentalisation also runs the risk of resulting in 'herd behaviour' of legal scholars. This behaviour has to do with the fact that we can see a growing tendency to follow 'hot topics' and trends in law research, initiated by policymakers and organisations responsible for research funding reinforced by the endogamic culture that still prevails in many European law schools in which the choice of methodology is often determined by certain customs, cultures, or steady practices.

Herd behaviour describes how individuals in a group can act together without planned direction. The term pertains to the behaviour of animals in herds, flocks and schools, and to human conduct during activities such as stock market bubbles and crashes, and so on. It is caused by the fact that B follows A, even though B may have information that A could be wrong. C, D, E then follow B because they think that A and B have made a well-considered and well-informed decision. With the growing emphasis on valorisation and societal relevance of (legal) research by research foundations and other funding bodies, it becomes more and more complicated for starting researchers to develop their own research interest and long term research agenda. A certain amount of herd behaviour is probably unavoidable and certainly not new but as we all know the best research is characterised by the fact that it deviates from mainstream thinking. So if we could ever go on a voyage with the 'starship legal enterprise' the only possible course could be to boldly go where no man has gone before!

