BATTLING FOR THE *IS*-POSITION IN THE FIELD OF LAW: THE PROBLEM WITH CASE LAW SAMPLING

Helga Molbæk-Steensig*

It is well-known that the so-called 'empirical turn' in legal scholarship has launched a vicious critique of the scientific credentials of traditional legal scholarship, but the battle for the is-position in the field is far older than that. This article traces how legal scholars have answered and failed to answer empirical legal questions for decades by revisiting the debates between positivism and natural law and between positivism and legal realism. Diving into the specific question of case law sampling, the article assumes that traditional legal scholarship does have a consistent method of sampling but that it is often not explicated because of writing style traditions in the field. It goes on to explore what that method is and addresses its benefits and drawbacks compared with new sampling methods applied in empirical legal scholarship. It finds that much of the apparent epistemological disagreement in the literature is mere methodological critique, which the field has lacked a language to adequately voice, and argues in favour of an eclectic approach.

Keywords: legal theory; empirical legal scholarship; doctrinal legal scholarship; methodology; case law sampling; European Court of Human Rights

* Helga Molbæk-Steensig, Helga.molbaek-steensig@eui.eu, is a researcher afilliated with the European University Institute.

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I. INTRODUCTION: LAYING CLAIM TO THE IS-POSITION

It has been suggested that the field of law is undergoing an empirical turn,[1] raising the question, of course, of what it was before it turned. Some scholars have suggested that the traditional study of law is neither empirical nor, in fact, a science at all:

[1] Patrick Capps and Henrik Palmer Olsen, 'Explaining power and authority in international courts' (2020) Leiden Journal of International Law 1, 2; Mark C Suchman and Elizabeth Mertz, 'Toward a new legal empiricism: empirical legal studies and new legal realism' (2010) 6 Annual Review of Law and Social Science 555, 556; Gareth Davies, 'The Relationship between Empirical Legal Studies and Doctrinal Legal Research' (2020) 13 Erasmus Law Review 3, 5; Ingo Venzke, 'International Law and its Methodology: Introducing a New Leiden Journal of International Law Series' (2015) 28 Leiden Journal of International Law 185, 186; Gregory Shaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) 106 American Journal of International Law 1, 1.

> Doctrinal Legal Research is not a science, except perhaps in the most abstract hermeneutic sense, but rather an adjunct to a professional activity.[2]

Others have lamented that doctrainal research is a science, but a poor science,[3] or simply a scholarly tradition containing both poor and high-quality work without the habit of explaining itself.[4] Along with other social and humanistic scholarship, the field of law made a move towards scientification during the Enlightenment but has since resisted empirification. Waldo G. Morse suggests that 'historically, Science and the Law parted upon the death of Sir Francis Bacon'.[5]

Since then, there has been a lively debate in legal theory on how to make sure legal studies make true observations. From Ehrlich to Llewelyn, legal realists have called for the field of law to adopt some type of empirical methods in order to be able to determine what the law truly is, rather than doctrinal studies of paper laws with little effect on actual outcomes.[6] More recently, the school of European New Legal Realism has reiterated realism's claim to the is-position,[7] cementing that the study of what the law *is*, is an

[2] Davies (n 1) 5.

[3] Lee Epstein and Gary King, 'The Rules of Inference' (2002) 69 University of Chicago Law Review, 1, 1-3.

[4] Eva Brems, 'Methods in Legal Human Rights Research' in Fons Coomans, Fred Grünfeld and Menno T Kamminga (eds), *Methods of Human Rights Research* (Intersentia 2009).

[5] Waldo G. Morse, 'The Law as a Science' (1923) 10 Proceedings of the Academy of Political Science in the City of New York 59, 59.

[6] Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press 2009) 132-33; Karl N Llewellyn, 'Some Realism about Realism – Responding to Dean Pound' (1930) 44 Harvard Law Review 1255; Eugen Erhlich, *Grundlegung der soziologie des Rechts* (Tom Havemann tr, Duncker & Humblot 2013) 89-93.

[7] Jakob Holtermann, Mikael Madsen, 'What is Empirical in Empirical Studies of Law? A European New Legal Realist Conception', (2016) 39 RETFÆRD, 3, 4.

endeavour that cannot peacefully be married to traditional or doctrinal legal studies due to the latter's propensity towards normativity.[8]

In addition to this widely publicised battle for the is-position, both positivists and natural law scholars have claimed to be studying the reality of law whilst accusing the other side of merely engaging in politics. Hans Kelsen, when translating his *Reine Rechtslehre* for an American audience in 1941, summarised the nature and purpose of his theory thusly:

> As a theory, [the pure theory of law]'s sole purpose is to know its subject. It answers the question of what the law is, not what it ought to be. The latter question is one of politics, while the pure theory of law is *science*.[9]

Meanwhile, the prominent post-war natural law scholar Gustav Radbruch similarly attacked Kelsen's positivism for not engaging with questions of law but rather with power-politics stating that,

[8] Jakob V. H. Holtermann and Mikael Rask Madsen, 'Toleration, Synthesis or Replacement? The "Empirical Turn" and its Consequences for the Science of International Law' (2016) 29 Leiden Journal of International Law 1001, 1019.

[9] Hans Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1944) 55 Harvard Law Review 44, 44 my emphasis.

> [p]ositivism is […] wholly incapable of establishing the validity of statutes. It claims to have proved the validity of a statute simply by showing that the statute had sufficient power behind it to prevail.[10] There thus appears to be a historical and ongoing struggle for the is-position in legal scholarship across legal theories[11] and not, as sometimes claimed,[12] a favouring of normative questions.

Other branches of legal scholarship, such as Socio-legal Studies and 'Law and…' approaches, borrow and apply empirical methods from other disciplines, and much critical legal scholarship has adopted the tradition of reflecting upon method, methodology, and bias in its analyses.[13] The common trait of all of these traditions, however, is that they aim to answer different questions from what the law *is* on a given topic. It is the scholarship wrestling with that question that is the focus of this article.

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[10] Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law' (1946) 26 Oxford Journal of Legal Studies 1, 6.

[11] Historically the debate goes beyond Radbruch-Kelsen see in particular: Holmes OW, 'The Path of the Law' (1897) 10 Harvard Law Review 457; Ehrlich E, *Grundlegung der soziologie des rechts(Translated by Tom Havemann)* (Duncker & Humblot 1913[2013]); Llewellyn KN, 'Some realism about realism--responding to Dean Pound' (1930) 44 Harv L Rev 1222; Ross A, *On law and justice* (Oxford University Press 2019[1948]). Contemporarily the debate has continued both in the European and the American space. See for example: Suchman MC and Mertz E, 'Toward a new legal empiricism: empirical legal studies and new legal realism' 6 Annual Review of Law and Social Science 555; Holtermann JV and Madsen MR, 'European new legal realism and international law: how to make international law intelligible' 28 Leiden Journal of International Law 211; Epstein L and King G, 'The Rules of Inference' [University of Chicago Law Review] 69 The University of Chicago Law Review 1; Cross F, Heise M and Sisk GC, 'Above the rules: A response to Epstein and King' 69 The University of Chicago Law Review 135;

[12] Jack Goldsmith and Adrian Vermeule, 'Empirical Methodology and Legal Scholarship' (2002) 69 The University of Chicago Law Review 153, 153-154.

[13] See for example Boaventura de Sousa Santos, 'The resilience of abyssal exclusions in our societies: toward a post-abyssal law' (2017) 22 Tilburg Law Review 237, 258.

This article will develop the argument that much of the apparent contemporary epistemological disagreement in the literature emerges from a lack of a language in doctrinal scholarship to adequately voice foundational methodological concerns. Specifically, it will focus on one particular critique of traditional legal scholarship, namely its implicit approach to sampling and the presentation of its sources, in particular sources of case law.[14] Much doctrinal literature is silent on how it chooses which legal sources to study.[15] For some questions, especially in international law, practice is only just emerging, and it may be possible to consult all relevant jurisdictions, legislation, and case law, but for most legal research, some type of sampling must take place. By sampling, I mean that only some of the available jurisdictions, judgments, and decisions are studied as representing legal sources or court output as a whole. This is no different from any other social sciences study, which surveys only a sample of the population or interviews only a sample of the relevant actors. While case law is, of course, of particular importance to common law jurisdictions, it is by now hardly controversial

[14] A separate and much broader question which is interesting in its own right but beyond the scope of this article, is that of engagement with secondary literature and the choices of jurisdictions in comparative studies: see Philipp Dann, Michael Riegner and Maxim Bönnemann, 'The Southern Turn in Comparative Constitutional Law: An Introduction' in Michael Riegner and others (eds), *The Global South and Comparative Constitutional Law* (Oxford University Press 2020).

[15] Since this is a general feature, it seems unreasonable to provide a long list of authors here engaging in this practice. It would be hypocritical, too, as I have myself published pieces written in this tradition. For my own pieces in the genre, see, for example, Molbæk-Steensig H, 'AI at the European Court of Human Rights: Technological Improvement or Leaving Justice by the Wayside?' (2022) 2022 Ordine Internazionale e Diritti Umani 1254; Molbæk-Steensig H, 'How to Deal with Really Good Bad-Faith Interpreters: MA v Denmark' (2022) 37 Utrecht Journal of International and European Law 59 or Molbæk-Steensig H, 'Who is responsible for the protection of human rights in Kosovo?' (2020) 34 Nordisk østforum 274. For a more general overview of the tendency in the field, see Brems E, 'Methods in legal human rights research' in Fons Coomans FG, Menno T. Kamminga. (ed), *Methods of human rights research* (Intersentia 2009).

to state that it also plays an important role in many civil law jurisdictions and international law.[16]

The rest of the article will proceed as follows: Section II will argue that most doctrinal scholarship is empirical in nature and provide an account of what case law sampling usually looks like in doctrinal studies in different jurisdictions. It will reflect on which types of questions the method can help answer and, on the other hand, where the added value of applying the method is limited. Section III will account for emerging new methods of sampling, taking scholarship on the European Court on Human Rights (ECtHR) as an example. It will also reflect on the promises and pitfalls of these new methods of sampling and the types of questions they are best at answering.

II. Sampling in Doctrinal Legal Scholarship

Some academic legal work which may or may not self-label as doctrinal and/or positivist, is foundationally normative.[17] This article does not challenge that such work may be a worthwhile endeavour. It does, however, assume that those claiming to conduct positivist doctrinal scholarship are, in fact, attempting to discover what the law is on any given topic, thus searching for empirical answers to empirical questions. Therefore, much, possibly most, legal academic work claiming to use 'the legal method' is primarily focused *de lege lata* as opposed to *de lege ferenda.*

[16] Thomas H Reynolds, 'Introduction to Foreign and Comparative Law' in Jeanne Rehberg and Radu D. Popa (eds), *Accidental Tourist on the New Frontier: An Introductory Guide to Global Legal Research* (Cambridge University Press 1998) 47, 58.

[17] Such as trying to discover what Dworkin has referred to as the 'right answer' that exists to any legal question, see: Ronald Dworkin, *Taking Rights Seriously* (A&C Black 2013); or what in Weberian terms might be labelled 'juridical truth', see: Hans Henrik Bruun and Sam Whimster, *Max Weber: Collected Methodological Writings* (Taylor & Francis Group 2012) 218 from Critique of Stammler.

If doctrinal legal work is assumed, unless it states otherwise, to make empirical statements about what the law is, possibly but not necessarily to predict how it might be applied in court, then it must be able to explain the reach of the study it has conducted. This includes clarifying whether it is making use of a sample of case law, of interviewees, etc. A serious shortcoming in this regard is the silence in much doctrinal legal scholarship on methodological choices made when conducting the research, treating the question of how the answer has been reached as either self-evident or of little importance, including how it has chosen its sample of judgments, decisions and the like.[18] Another problem relates to the practice of referring to 'the legal method' in the singular as if there were only one. The wealth of quite different legal methods-guides from different jurisdictions[19] suggest that there is certainly more than one. Finally, in line with more critical legal developments, it might also be compelled to disclose any limitations of objective observations due to the scholar's prior knowledge, interests, and identity.[20]

Deriving generalisations nonetheless, we might divide the overarching legal-doctrinal method into two main processes that it shares with scientific research in general, the gathering of sources and the interpretation of those sources. While there may be an unavoidable element of subjectivity in the interpretation phase,[21] this ought not to be the case to the same degree for the determination of relevant legal sources. Depending on the field and jurisdiction, the relative weight of legislation, precedence, maxims, and

[18] Brems (n 4) 88.

[19] Schauer (n 6); Mathias Siems, *Comparative Law* (2nd edn, Cambridge University Press 2018); Ian McLeod, *Legal Method* (Macmillan Education UK 1999), Christensen MJ and others (eds), *De juridiske metoder: 10 bud* (Hans Reitzels Forlag 2021)

[20] On this see for example, Davies (n 1) 6, or the Preface to Margaret Davies, *Law unlimited* (Taylor & Francis 2017).

[21] Lon L Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1957) 71 Harvard Law Review 630, Fuller notes that Kelsen himself stated that his system might well rest on a preference for the ideal of order over that of Justice.

principles differ, and many domestic legal traditions have quite rigid spoken or unspoken rules about the hierarchies and subsequently importance of sources, including sources of case law. A particular challenge emerges when taking on topics in international law where neither academia nor practice is yet settled on the relative weight of various sources. Additionally, many treaties are worded vaguely. This results in key sources of law being made up of maxims and principles, which are themselves vague and generalised, as well as binding and unbinding precedence, which is tailored to specific cases, and, of course, customary law, which lacks an agreed upon codified expression.

Different international jurisdictions, too, present different challenges with regards to the determination of legal sources. For studies on the International Court of Justice, case law is often sparse. Still, an important question relates to how to deal with separate opinions which are plentiful and may exert some pull on future case law despite not being binding.[22] For studies dealing with international arbitration or regional human rights questions, case law is instead plentiful and scholars may be faced with a challenge more similar to that faced by scholars of domestic law jurisdictions: having to determine which case law to rely on.

Given the asymmetric nature of the importance of precedent, both due to the hierarchy of courts and because new judgments and decisions can undo old precedence, the field of law has not developed a tradition for random sampling. There is, however, a tradition (or indeed several traditions) of case law sampling in doctrinal legal studies, although it is often not explicated as such.

[22] Ram Prakash Anand, 'The Role of Individual and Dissenting Opinions in International Adjudication' (1965) 14 International & Comparative Law Quarterly 788.

A. Case Law Guides as a Type of Sample

In many jurisdictions, case law guides form a type of sampling. At the ECtHR, for example, the Jurisconsult, in collaboration with the Bureau of the Court, categorises all judgments and decisions into four categories; Key-cases (formerly Case Reports), alongside level 1, 2, and 3 cases. Both Key and level 1 cases are indicated as making a 'contribution to the development, clarification or modification of the Court's case law'.[23] While level 2 and 3 cases should be less important for scholars and practitioners aiming to understand the case law, as they contain repetitive applications of well-established principles derived from the practice in Key- and Level 1 cases. They are however vastly more plentiful and more than 90 percent of all judgments are either level 2 or 3. The Court's registry also provides case law guides for a variety of topics but emphasises that these guides do not bind the Court.[24] Both are aids in creating instructive, if not representative, samples of the case law.

In other jurisdictions, such selected samples are created by private actors rather than by the court itself. Common Law scholars will be intimately familiar with the Blackstone Commentaries from 1765, which became an authoritative work in both English and American jurisdictions despite not deriving from an official source. In the Danish jurisdiction, a sample is curated through the *Ugeskrift for Retsvæsen,* which is owned by a private company, the Karnov Group.[25] The editors employed by this company to

[23] European Court of Human Rights, 'Selection of Cases' (*Council of Europe*, 2021) <https://www.echr.coe.int/Pages/home.aspx?p=caselaw/reports&c=> accessed 30.6.2022.

[24] European Court of Human Rights, "Caselaw guides" Council of Europe, <https://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/guides&c> accessed 30.6.2022

[25] Iben Schmidt, 'Domsdatabasen ramt af forsinkelser igen: "Danmark halter voldsomt bagefter"' *Advokatwatch* (Denmark, 5 August) <https://advokatwatch.dk/Advokatnyt/Domstole/article13160440.ece> accessed 30.6.2022.

make the selection include judges, lawyers, professors, and other jurists, but there is no transparency in who chooses which judgments, how, or for what reasons.[26] Furthermore, even though the selection published by the Karnov Group is smaller than the overwhelming output from the judicial system, practitioners and academics still rely on far fewer cases when they make their arguments – and rarely explain why they have picked out the ones they focus on. Since these samples and case law guides are shared by court actors, lawyers, and academics alike, they might well be indicative and helpful in predicting if not the results of the court's deliberations, then at least the premises and precedents it is likely to take into account. Since they are not representative, however, there are some recurring academic questions they cannot be used to answer.

B. Where Traditional Sampling Falls Short

For example, we cannot use case law guides or high-importance cases as indicators that court practice, in general, is heading in a particular direction. This is in part because both a rare and a common type of case could each be represented by a single leading case, and because certain types of cases which may be very common, such as inadmissible cases, are unlikely to be represented in these samples at all. As an example of this problem, the ECtHR case law guide on the right to life under Article 2 refers to more than 300 cases, while the two ECtHR case law guides on the right to a fair trial (criminal and civil limb) list just short of 100 cases regarding length of proceedings. The ECtHR has issued just short of 3,000 judgments and decisions on Article 2, while it has issued more than 6,500 judgments and decisions just on the reasonable time aspect of Article 6.[27] These types of cases are extremely common and roughly a third of all applications to the

[26] Karnov Group, 'Vores specialister' (2021) <https://www.karnovgroup.dk/eksperter> accessed 27.5.2022.

[27] These numbers were taken from the HUDOC database on 19 August 2023.

ECtHR include a complaint about length of proceedings.[28] And yet they are represented in the case law guide by a rather small number of cases compared to much rarer complaints.

As stated above, some research can certainly rely on such samples, but other types of research suffer from the unclear pedigree and lack of representativeness of such practitioner-targeted samples. The lack of clarity on method is particularly problematic when research deals with contentious or politicised topics where there may be vested interests favouring one line of court practice over another. Such lines of research could include questions related to bias at the court, such as whether some litigants or member states are treated differently than others, or whether the court is consistently aiming to increase the reach of its jurisdiction.

In conclusion, doctrinal studies do apply a sampling method when utilising case law guides and relying on famous cases, but the methodological silence of many doctrinal studies means that audiences cannot know for certain if any important cases have been left out, nor whether such leaving out is by chance or on purpose. Readers must either trust the author to have an adequate overview of the case law and not to have cherrypicked among them to present only those supporting their own ideas or must look out for omissions of cases that would raise questions about the author's argument and address it in a response. This type of adversarial dialogue is typical in legal writing and is sometimes referred to as the 'argumentative nature' of law.[29] At its best, it may take the form of a type of combative hermeneutics

[28] Helga Molbæk-Steensig and Alexandre Quemy, 'AI and the Right to a Fair Trial' in Alberto Quintavalla and Jeroen Temperman (eds), *AI and Human Rights* (Oxford University Press 2023) 265.

[29] Ingo Venzke, 'What Makes for a Valid Legal Argument?' (2014) 27 Leiden Journal of International Law 811, 811; Urška Šadl and Henrik Palmer Olsen, 'Can Quantitative Methods Complement Doctrinal Legal Studies? Using Citation Network and Corpus Linguistic Analysis to Understand International Courts' (2017) 30 Leiden Journal of International Law 327, 330; Jan M. Smits, 'Redefining

which improves collective knowledge over time; but it also carries risks. Popular interpretations may not be questioned,[30] and without a reference point of agreement about the population[31] scholars are attempting to say something about, there is a risk that rhetoric and distraction rather than thorough empirical analysis and deduction emerge as successful and accepted – if not accurate – interpretations.[32]

In many instances, relying on famous cases and guides assumed to be used by scholars, judges, lawyers and other practitioners does not therefore represent a problem in itself, although scholars ought to explain their sampling technique. There are also situations, however, where this traditional method falls short. This includes studies of contentious topics where there is no general agreement on which case law is most important and situations where it matters how often a specific type of argumentation is used or case outcome happens, such as studies of bias at the court. In the following, I will therefore not propose, as other empirical critiques of legal scholarship have done,[33] to abduct sampling methods from the other social sciences. This is because techniques such as random sampling are unlikely to function well in the field of law, because in legal practice not all cases are of equal importance and cases can lose importance over time. Additionally, due

Normative Legal Science: Towards an Argumentative Discipline' in Fons Coomans, Fred Grünfeld and Menno T Kamminga (eds), *Methods of Human Rights Research* (Intersentia 2009), 45.

[30] Fons Coomans, Fred Grünfeld and Menno T Kamminga, *Methods of human rights research* (Intersentia Antwerp 2009) 13; Bård A Andreassen, Hans-Otto Sano and Siobhán McInerney-Lankford, *Research Methods in Human Rights: A handbook* (Edward Elgar Publishing 2017) 2.

[31] Population here is used in the statistical sense where the 'sample' is to represent the 'population'.

[32] The differentiation between successful and truthful is borrowed from Venzke (n 29) 812.

[33] Lee Epstein and Andrew D. Martin, *An Introduction to Empirical Legal Research* (Oxford University Press 2014); Epstein and King (n 3) 132-133.

to the pull of precedence, a single judgment can cancel out a whole body of previous case law.

III. An Emerging New Way of Sampling

For certain contentious topics, a couple of new ways of sampling case law are emerging. To an extent, these ways of sampling are part of the empirical turn in legal scholarship, but many authors are not abandoning doctrinal analysis as a method but conduct it on samples obtained in a more structured manner. Since literature on the ECtHR, which has become ripe with contentious topics in recent years, has been particularly rich with regards to this type of innovation, it will form the basis of this review of new methods for case law sampling. In this section, I will zero in on three methods in particular: A) citation networks, B) the use of limited and multiple samples, and C) quantitative studies.

A. Citation Networks as Samples

One solution is reliance on citation networks. This has been suggested by Šadl and Olsen in the study of case law on specific articles – in their example Article 14.[34] The benefit of the citation network approach to sampling is that it eliminates the author's own, often subconscious, bias in the initial sampling phase. Instead of studying a sample of cases that the author happens to remember, whether for reasons of preference (the Court's interpretation is in harmony with the author's values), frustration (the Court's interpretation is *not* in harmony with the author's values), familiarity (we might tend to view cases pertaining to our own jurisdictions as more memorable and important), narrative (interesting stories are easier to remember), or any other bias, it creates a sample of cases which the Court itself tends to view as important.

[34] Šadl and Olsen (n 29) 344ff.

The drawbacks of using citation networks are twofold. First, they require either an army of research assistants or some technological prowess that most legal scholars lack. In some jurisdictions, the data needed to create a judgment-level citation network will be available in the metadata in case law databases such as the HUDOC database of the ECtHR. However, this requires scraping, ordering, and organizing with the use of various software tools before it is usable as a sample. Other jurisdictions may not have digitalised case law and metadata on case law to the same degree. For studies on specific doctrines or types of argumentation, or concerning a particular category of applicants, the situation is even more complex, as the data is not provided in the database outright. Machine Learning or Natural Language Processing may prove helpful in creating networks for these types of studies. Unfortunately, this method once again requires technical expertise far beyond that of most lawyers, and is prone to errors if citations are heterogenous in form, if the formatting of the cases is inconsistent, or when textual searches pick up false positives. There are at present only a few projects moving towards making this kind of research possible.[35]

The other problem is that such a sampling technique, even though it should provide a more accurate picture of the types of argument the court finds important, is still not representative. It can tell us nothing about the direction of case law over time or the prevalence of different types of cases. Furthermore, it is at risk of favouring older cases for the simple reason that important new cases have not yet had time enough to get widely cited. In short, citation networks carry great promise but remain inaccessible to many

[35] Such as the ECHR-OD project as described in Alexandre Quemy and Robert Wrembel, 'On Integrating and Classifying Legal Text Documents' *Database and Expert Systems Applications*, vol 12391 (Springer 2020) and available at: European Court of Human Rights OpenData project 2023/11/14 <https://echr-opendata.eu/> accessed on 24 November 2023. See also: Arthur Dyevre, 'Exploring and Searching Judicial Opinions with Top2Vec' in Paul Verbruggen (ed), *Methoden van systematische rechtspraakanalyse: Tussen juridische dogmatiek en data science* (Boom Juridisch 2021).

scholars and practitioners and can still only be used to answer some types of questions.

B. Limited and Multiple Samples

Another emerging technique for sampling in the field of law is a systematic analysis of a certain group of cases from a particular period in time and/or pertaining to a particular state. For example, Janneke Gerards' article on the ECtHR's use of the margin of appreciation and incrementalism analyses 350 randomly selected level 1 and 2 cases from two periods in the Court's case law, namely between 1 May 2012 and 1 May 2013 and from 1 May 2016 to 1 May 2017.[36] This gives her two comparable samples from two different years in a period where political pressure on the Court was rising. The sample is not representative of the Court's case law as a whole, since most cases are level 3, but the structure limits the risk of personal bias of the author in case selection and makes it very clear to readers what the scope of the analysis is. Jan Kratochvil similarly created his taxonomy of the usage and mis-usage of the margin of appreciation based on a sample of all level 1 cases between January and June 2009 which mention the margin of appreciation – a total of 108 cases.[37] In both cases the inclusion of information about the sample allows the reader to consider the scope of the conclusions reached, and to read the articles together, now having information on three different periods. Oddný Mjöll Arnardóttir is another author who has developed a structured approach to case law analysis, providing in her 2016 article a new taxonomy of the margin based on an analysis of all level 1 cases mentioning either the margin of appreciation or 'require strong reasons to substitute' between January 2006 and April 2015, supplemented with older cases

[36] Janneke Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights' (2018) 18 Human Rights Law Review 495, 497.

[37] Jan Kratochvil, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29 Netherlands Quarterly of Human Rights 324, 327.

recognised as central in the literature.[38] None of these samples are representative of the Court's case law output as a whole, but then they are not presented as such. In stark contrast to the wealth of articles basing their analysis on case law without explicating how their sample is chosen, the reader in these cases can gauge the reach of the arguments and supplement where relevant. This is fundamental when studying a contested topic, such as the margin of appreciation.

The three examples above are, to a large extent, traditional doctrinal studies where interpretation inevitably plays an important role and adds an element of subjectivity. They do not rely on the social science methodologies of qualitative coding or quantitative studies, but they have still provided their readers with much greater clarity on where their knowledge comes from and enabled them to see the limitations of the analysis to a much greater degree. The techniques applied can, of course, say nothing about the populations not studied – such as level 3 cases, inadmissible cases, or cases that have been struck out. Another element that is missing from all three studies is an explication of *why* these particular samples have been chosen. This is likely due to the traditional absence of such methodological explanations in legal literature, and in fact, in each of these examples, information about the sample has been delegated to a footnote rather than a methods section.

C. Quantitative Studies

Currently, the only way attempts are made to provide an overview of the entirety of the ECtHR's case law is with quantitative methods in studies such as those conducted by political scientists and data scientists, sometimes in

[38] Oddný Mjöll Arnardóttir, 'Rethinking the Two Margins of Appreciation' (2016) 12 European Constitutional Law Review 27, 29.

cooperation with lawyers.[39] Such articles can provide an important addition and perspective to legal analyses, but they also tend to a large extent to ignore legal interpretation, and, in some cases, make methodological choices that do not sit well with most lawyers. As an example, the work of Nikolaos Aletras et al. with a sample of fair trial cases where they have artificially made the number of violation cases equal to non-violation cases by randomly excluding a large portion of the violation cases.[40] Another example of unease is the strong response from legal scholars Alec Stone Sweet, Wayne Sandholz, and Mads Andenas to Laurence Helfer and Erik Voeten's piece on walking back dissents, questioning the objectivity of their coding considering it a type of interpretation without argumentation.[41]

[39] Such as: Laurence R Helfer and Erik Voeten, 'Walking Back Human Rights in Europe?' (2020) 31 European Journal of International Law 797; Øyvind Stiansen and Erik Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights' (2020) 64 International Studies Quarterly, 770; Mikael Rask Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (2018) 9 Journal of International Dispute Settlement 199; Nikolaos Aletras and others, 'Predicting Judicial Decisions of the European Court of Human Rights: A Natural Language Processing Perspective' (2016) PeerJ Computer Science 2:e93 <https://doi.org/10.7717/peerj-cs.93>; Helga Molbæk-Steensig, 'Subsidiarity Does Not Win Cases: A Mixed Methods Study of the Relationship Between Margin of Appreciation Language and Deference at the European Court of Human Rights' (2023) 36 Leiden Journal of International Law 83.

[40] Aletras N and others, 'Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective' (2016) 2e93 PeerJ Computer Science

[41] Alec Stone Sweet, Wayne Sandholtz and Mads Andenas, 'Dissenting Opinions and Rights Protection in the European Court: A Reply to Laurence Helfer and Erik Voeten' (2021) 32 European Journal of International Law 897; Helfer and Voeten *supra*.

IV. Conclusions: In Defence of Eclecticism

My suggestion for a new framework for sampling is to build upon the work done by both these legal scholars and social scientists and to embrace eclecticism and the use of multiple samples. There would remain a space in the field of law for the case-note. There would also remain a case for relying on famous judgments, or judgments labelled by formal authorities as being of high importance, since these are also likely to be on the forefront of the mind of the judge, but it is paramount to be clear about what such a sample can tell us and what it cannot.

These suggestions emerge from the fact that although legal scholarship does have a sampling methodology despite accusations stating otherwise, much such sampling is based on the logic of practitioners rather than of scholars. Much legal scholarship is, therefore, based on the judgments and decisions that lawyers and judges are likely to value without reflection as to why that might be the case or what might have been left out. In many cases, such practitioner-aimed samples may provide a good foundation for predicting what key actors think the law is and thus potentially how future cases might be adjudicated, but there are also situations where this may not be the case. Additionally, legal scholars have other questions than what practitioners think the law is, and for many of these, traditional methods fall short. Foremost, traditional sampling methods cannot tell us very much about the direction of case law, whether certain arguments are in vogue, nor whether the court is developing or addressing undue biases or other tendencies. This is particularly important when contentious topics or court legitimacy is at stake.

This article also found, however, that random sampling, which is often applied in other social sciences, cannot be directly abducted for case law studies because of the differences in case- and court-importance and the power of precedent, including when new case law undoes the pull of old precedent. The field of law is, therefore, bound to develop its own case law sampling methods and is, in fact, already moving in that direction.

The article Suggested that the field might benefit from a synthesis of the different approaches already being developed namely: 1) the use of citation networks potentially with the help of Artificial Intelligence; 2) the use of multiple samples (both temporal, hierarchial/importance based and thematic); and 3) the combination with quantitative methods. This list is, of course, far from exhaustive, and many other methods might be applied as well, depending on the research question.

First and foremost, however, the article suggests that scholars must be clearer about what sample has been chosen and why it is adequate to answer the question asked. If such care is taken, doctrinal or positivist legal scholarship may continue to lay claim to the is-position rather than losing such a position definitively to realist or non-legal scholarship.