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Do methods matter in your PhD?

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Agenda

- What kind of science is law?
- What is the legal method? (or what is it for)
- Why is methodology important?
- A bit of personal experiences... buyer power in EU competition law
- What are YOU trying to do?
- Why is methodology important for your thesis?
- Four methodology trends
- What are YOU trying to do?
- Research trends in Soldstrand
- A few practical tips
- Food for thought

Two texts to keep in mind



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Why Methods Matter in European Legal Scholarship

Rob van Gestel and Hans-Wolfgang Micklitz*

Abstract: Both in the United States and in Europe, there is a debate on methodology in legal research. Doctrinalists and multidisciplinaryists appear to be in different camps fighting over the 'true nature' of legal scholarship. We wonder where this renewed attention for methodology is coming from and what is behind it. Should European legal scholars follow certain colleagues in the United States who believe that doctrinal research is dead and should we all engage in law and . . . research now? If not, does this imply that there is nothing wrong with mainstream European doctrinal legal scholarship? We believe the latter is not the case. Our hypothesis is that an ongoing instrumentalisation of law and legal research decreases the attention for methodology, for theory building, and for keeping enough professional distance to one's object of research. This threatens to result in a creeping process of herd behaviour, in copy pasting the methodology of judicial lawmaking to legal scholarship and in a lack of transparency and methodological justification in scholarly legal publications. What is desperately needed is more reflection on methodology and theory building in European legal scholarship.

1 Is Doctrinal Legal Research Dead in the United States?

Over the last decades legal scholarship in the United States has fundamentally changed and with it the opinions of some of its academic leaders, so it seems. Before the 1980s, most American legal scholarship was doctrinal and descriptive, or theoretical and prescriptive; the ultimate purpose of legal research was usually to prescribe a better outcome to a judge. As judge Posner put it, the task of doctrinal legal scholarship was simply to extract a doctrine from the line of cases or from statutory text and history, restate it, perhaps criticise it or seek to extend it, all the while striving for sensible results in light of legal principles and common sense.¹ According to many, the prescriptions were predominantly based on policy arguments derived from beliefs about the way society should be organised or operated. Posner himself denounced these issues already in the late 1980s and early 1990s by stating that:

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¹ R.A. Posner, 'Legal Scholarship Today', (2002) 115 *Harvard Law Review* 1314, 1316.

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A European Legal Method? On European Private Law and Scientific Method

Martijn Hesselink*

Abstract: This article examines the relationship between European private law and scientific method. It argues that a European legal method is a good idea. Not primarily because it will make European private law scholarship look more scientific, but because a debate on the method of a normative science necessarily has to be a debate on its normative assumptions. In other words, a debate on a European legal method will have much in common with the much desired debate on social justice in European law. Moreover, it submits that, at least after the adoption of the Common Frame of Reference by the European institutions, European contract law can be regarded as a developing multi-level system that can be studied from the inside. Finally, it concludes that the Europeanisation of private law is gradually blurring the dividing line between the internal and external perspectives, with their respective appropriate methods, in two mutually reinforcing ways. First, in the developing multi-level system it is unclear where the external borders of the system lie, in particular the borders between Community law and national law. Second, because of the less formal legal culture the (formerly) external perspectives, such as the economic perspective, have easier access and play an increasing role as policy considerations.

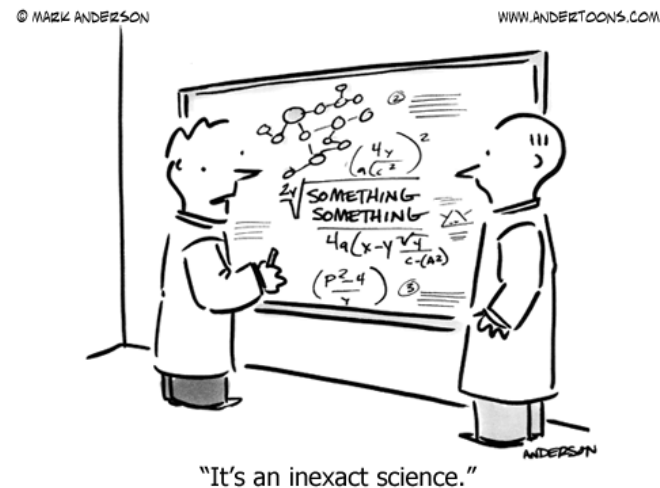
1 Introduction

Within the contexts of national research assessment exercises, of national and European competitions for research funds and of the juries for doctoral theses in law, the question is often raised whether legal scholarship and its methods are sufficiently scientific. Obviously, these general questions also apply to academic research into European law and its methods. With regard to this subject there are even further, more specific questions. For example, whether European legal scholarship is more scientific than national legal scholarship by the mere fact that it is international, or that the social sciences, such as political science and economic analysis, play a greater role therein, as is often suggested. A further specific question is whether we need a common European legal method and, if so, what it should look like.

* Faculty of Law, Centre for the Study of European Contract Law. This article is based on a paper presented at the seminar *Legal Europe—Coherence and/or Fragmentation*, at the Centre of Excellence 'Foundations of European Law and Policy' of the University of Helsinki, on 31 January and 1 February 2008, and at the workshop 'After the Common Frame of Reference—What Future for European Private Law?' on 29 February and 1 March 2008, at the European University Institute at Florence.

What kind of 'science' is law?

- Is a **normative** ('subjective') type of study –
opposition to positive ('fact' based)
 - The '*Metaphysical element?*'
- Law tries to **answer questions about law –
using the law**
 - Subject of study is the source of the answer and
how to reach it
 - ***Internal perspective*** (Hesselink – 2009)
- Is it an **opinion** on something a
fact/knowledge?
 - But even opinions can be better
formed/informed, isn't it?



What kind of 'science' is law

- Is law **sufficiently 'scientific'**?
 - Soft vs hard science
 - No ability to 'test'
 - Normative science
 - Falsifiability of a theory – Popper
 - Failed attempts to falsify make theory stronger
 - But law not alone – history, math, philosophy, etc
 - 'National' science
 - Difference is about the **questions** we make
 - Hard science is also about **recognition**
- Where does it **come** from and who **creates** it: the legislator, judges and the doctrine – The 'Institutional Element'
- What is the **value of law studies** in themselves?

What is (are) the legal method(s)?

- Law as an object of study that is **living and changes**
 - In fact, your PhD might change your subject of study!
- **Legal methodology** is about...
 - How to *answer questions about law – using the law*
 - It is about how answers are reached **within** the legal system (internal perspective)
 - And reach the **correct answer**
- A **legal method**
 - Tells me about the **sources** I am going to use
 - How to **interpret**
 - What to do when there is **no answer** or **more than one**
 - **Fairness?**

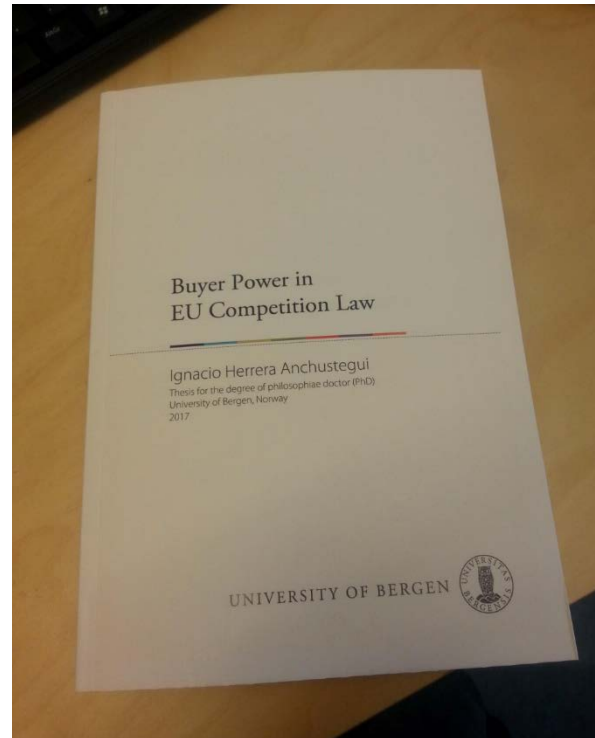
What is (are) the legal method(s)?

- Adopting a **legal method** is about (Hesselink, 2009)
 - Adopting a **theory of law** (what is/should be law)
 - Adopting a **theory of adjudication**
 - Adopting a **theory of justice**
- How many **'correct' answers** to a legal question?
 - Is it **just** one (Dworkin)? Correct application of laws gives a sole answer
 - More than one?
 - Are we always looking for answers – or looking to show what exists?
- Law and its methods **should not be pure logical deduction?**
 - Remember Robert's talk? – The Deep Structure!
 - There are **value judgments** included here (normative)
 - As well as 'power/politic' choices

Why is methodology important? Theory and Practice

- The aim of methodology is to “make law less messy” (Hesselink – 2009)
 - Develop **interpretation standards**
 - Application of *current law vs creation of new law*
 - What to do when law ‘runs out’
- Your methodology impacts your **research design**
 - And will define your **questions** as well!
- Allows your committee to ‘**properly evaluate**’
 - Lets the reader know why and how you chose your questions and reached your answers
 - Even if they do not agree with your choices

A bit of personal experience



A bit of personal experience

- First was **'law and economics'**
 - ... but I am no economist – it would not be good enough
- So I used **'economically informed legal analysis'**
 - It worked better – but economists would not be pleased
 - And I ended up with 60 pages on buyer power economics
- **Policy choices** in competition law - Why I chose a 'set of competition values'
 - Allowed me write a paper on **Ordoliberalism** of some 40 pages
 - And made my defense a discussion about it and less about buyer power
 - But it was fun!
- Made me have a **LONG methodology** chapter!
 - Which sources, why economics, how economics, which policy school
- And my **methodology opened my eyes**: de lege lata NOT de lege ferenda – no clear view on buyer power law = hard to change, isn't it?

What are YOU trying to do?

- Is the labor of the **legal scientist** the same as the **judge**?
 - Judge is the ‘oracle’
 - Internal perspective to tell what an answer to an issue is
 - The ‘descriptive’ role of legal science – US before 1990s (and still)
 - What is the role of the scientist? – **Dworkin’s Hercules**
 - Is it to be like the judge?
 - **Adjudication vs Research**
 - Do we have to go forth?
 - How to go forth? What is behind the rules and why?
 - But judge/attorney **schism** to scholar?
 - No – they add value to each other



Why is methodology important in your thesis?

- Tell me **WHAT** you are doing –
- And **HOW** you are doing it
- Gives **robustness** to the piece
- The used methodology has a **direct impact** on **end product**
 - It will define your **'style'**
 - Impact formulation of **research questions**
 - And how you **carry out** research
- Think of **WHY** that method
 - Keep in mind the herd behavior – 'sexy' topics

Four methodology trends – a bit like wine



And yes, there is a better wine for a specific food – just like there is a better methodology for a topic...

Four methodology trends – Part I

- **Doctrinal work**

- Studying the system from the **inside** - within the law system
- Traditional legal scholarship
 - *Less 'sexy'?*
- 'Isolated from the real world' – but don't over do it either!
 - Tends to be '**theoretical**'
 - Legal concepts are not '**neutral**' – their content is filled with something
- Seen as 'rigid, inflexible, formalistic and inward looking' (van Gestel and Micklitz, 2014) – true?
- **More common in Europe** – and also valuable for developing EU/EEA law
 - But shifting – no longer devoid of context and *Deep Structure of Law*
- Doctrinal work heavily influenced by interpretation and argumentation methods by EU/EEA Courts?

Four methodology trends – Part II

- **De Lege lata**

- It is about **finding what is the law**
 - Research questions tend to be descriptive
 - Indiana Jones style – ‘finding secrets’
- **Traditional legal research** – what most of us were trained to do at law school
- **Normative science**
 - Based on legal sources
- For the PhD candidate appears as *safe, but ‘boring’*?
- Do stay away from **‘case law journalism’**



Four methodology trends – Part III

- **‘Law and...’**
 - *Is it more scientific?*
 - *Is it more balanced?*
 - Does have **more viewpoints**
 - Is it more **‘universal’**?
 - Asks **positive questions** and not normative
 - Traditional doctrinal questions are not answered here
 - Can ask: i) how is **law in action** (‘law and sociology’); ii) how should **law be constructed** as (‘law and economics’)
 - But to start you *need to find what law is* – ***you need dogmatics as well***
 - Law as **data – experimentation field?**
 - Difference between **‘law and’** and **“informed legal analysis by...”**

Four methodology trends – Part III

- **‘Law and...’**
 - **Assumptions, assumptions, assumptions** – particularly if to answer a legal question (i.e.: how to regulate competition)
 - These are also **normative judgments** - opinions
 - *Law from the outside*
 - Karl Larenz
 - But do they/we really know law from the inside?
 - **Empirical methods** often employed
 - What do you use ‘law and’ for? **How to integrate** it into the legal method?
 - Do I have the **‘... and’ tools** for that?
 - Shift in practice towards **more openness and less formality**

Four methodology trends – Part IV

- **De Lege ferenda / Policy driven**

- Anchored on the idea of '**social engineering**' through law
- Legal instrumentalism?
- Focuses on **criticizing the system** – current legal rules
- Proposes a '**new way**' – solutionism (van Gestel & Micklitz, 2014)
 - But do we properly *understand the problem*?
 - Is there **even a problem**?
 - Is there a even **legal** problem?
 - Do I have the *tools to do policy*?
 - Do you have *sufficient time* in your PhD to: i) find a legal problem; ii) solve the legal problem; iii) present ideas for new/better laws?
- Are you doing **legal research** or **political campaigning**?

What are YOU trying to do?

- **Ingrid Barlund:** How to optimize leniency in its interaction with fines and damages actions- Legal parameters and alternative solutions ('Law and economics' – 'law and behaviors'? Different legal levels? Policy/de lege ferenda?)
- **Esmeralda Colombo:** Access to Justice Reloaded. The Judicial Enforcement of International Law in Climate Change Cases ('Law in context'? – mixture of legal disciplines/environmental focus; de lege lata?)
- **Lill Haukanes:** Legal parenthood ('Legal sociology'; New legal challenges?; ethical issues? Both de lege lata and de lege ferenda?)
- **Marie Holm:** Civil judgments' finality when the circumstances of the case have changed after the judgment became final (Doctrinal work – de lege lata?)
- **Malin Johansen:** Private investigations of white-collar crime suspicions: The legal framework (Case studies? Data gathering? Doctrinal work – de lege lata?)
- **John Nilsen:** The principle of legality requirements for law regulation of, and as a legal limit for the police admission to use force during the performance of their duties ('Law in action'; de lege lata – doctrinal work?)

What are YOU trying to do?

- **Mari Nilssen:** Criteria for Residency for Companies for Tax Purposes under the Norwegian Tax Act and the Tax Conventions (Doctrinal and de lege lata?)
- **Hanna Ahlström:** Regulatory dynamics of sustainability: Policy coherence in EU business and financial market law (Different legal levels? 'law in context'; different legal disciplines? Policy/de lege ferenda?)
- **Ankler Sørensen:** Control decoupling – implications for understanding modern corporate groups (Different legal disciplines? Different legal levels? De lege lata and/or ferenda?)
- **Yulia Chernykh:** Contract interpretation in investment treaty arbitration (doctrinal work, data gathering, de lege lata?)
- **Ludovica Chiussi:** Corporate Liability and Human Rights under General Principles of Law (Different legal levels? 'Law and fairness/ethics?' Different legal disciplines? De lege lata?)

What are YOU trying to do?

- **Dorina Damsa:** The embodied experience of criminalization and precarity: the case of unwanted migrants in Scandinavia (Law in context – legal sociology? Case studies/empirical? Different legal regimes and jurisdictions? Ethical issues? Policy study?)
- **Josefin Engström:** Constitutionalizing International Investment Law - the contemporary constitutionalization process in light of the system's commercial legacy and contractual rationale (Different legal regimes? Different legal levels? Legal traditions? De lege lata?)
- **Guri Eriksen:** A comparative analysis of the Norwegian fisheries and aquaculture legislation – with special emphasis on guarantee of due process of law, legitimacy, environmental concerns and efficiency ('law in context', mixture of legal disciplines/environmental focus, 'law and biology'? De lege lata?)
- **Samson Esayas:** Data Privacy and Competition Law in the Age of Big Data ('law and technology', 'law and economics', different legal regimes? New legal challenges? De lege ferenda?)

What are YOU trying to do?

- **Anna Føllesdal:** Taxation of income from immovable property – An analysis of the OECD Model Tax Convention (Different legal levels? Comparative law? Doctrinal/lege lata?)
- **Sofie Høgestøl:** Selecting Cases at International Criminal Courts: who bears the most or greatest responsibility for atrocity crimes? (Data gathering, policy choices, 'law and power', de lege lata?)
- **Kalterborn:** Disclosure of evidence from BigData-investigation of Economic Crime ('law and technology', different legal disciplines, new legal challenges? De lege lata and ferenda?)
- **Anja Kruse:** Sexual violations in close relationships – perpetrator perspectives ('Legal sociology'; case studies? Ethical issues? Both de lege lata and de lege ferenda?)
- **Ingrid Lund:** Anti-Hybrid Rules and Tax Avoidance: Taxation of Cross-Border Transactions (different legal jurisdictions, doctrinal work, de lege lata?)

What are YOU trying to do?

- **Rosa Manzo:** The principle of equity in the context of new climate change regime ('Law in context'? – mixture of legal disciplines/environmental focus; 'law and power'? De lege ferenda/policy?)
- **Karl Rohde:** Judicial precedents as a source of law – some central issues regarding the Norwegian courts' contributions to clarity, unity and development of law (doctrinal work, de lege lata)
- **Julius Rumpf:** Bridging the Gap – the Role of Interconnectors in an Emerging European Energy Union ('law and technology', 'law and engineering', different legal levels and disciplines? De lege ferenda?)
- **Thomas Rønning:** Restitutionary claims (doctrinal work, de lege lata)
- **Kai Spurkland:** Military and Police Corporation – The Legal Framework for Military Assistance to the Police (doctrinal work, different legal regimes? de lege lata?)

What are YOU trying to do?

- **Sørensen:** The Correctional Service In Norway After 22/7-11 (case study?, law in action- as reaction?; description of system? de lege lata and ferenda?)
- **Luca Tosoni:** Regulating Cybersecurity: Challenges, Limits and Regulatory Options ('law and technology', different legal disciplines, new legal challenges? De lege lata and ferenda?)
- **Worku Urgessa:** The Role of intergovernmental Organizations (IGOs) in Securing Cyberspace ('law and technology', different legal disciplines and regimes?, new legal challenges? De lege lata and ferenda?)
- **Siri Venemyr:** The legal consequences of administrative errors and the impact of EEA-law (different legal levels, adjudication, doctrinal work, de lege lata?)
- **Natalia Torres:** Democratic Legitimacy of the Inter American Court of Human Rights to control democratic decisions of Latin American States ('law and power', case studies? 'law in context'? description of system? de lege lata and ferenda?)

What are YOU trying to do?

- **Linda Finska:** How could international environmental law better address the problem of marine plastic pollution? ('Law in context'? –environmental focus; 'law and biology'? de lege ferenda?)
- **Kristine Kraabel:** The Conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction - a legal analytical model for determining the necessary institutional arrangements (Different legal regimes; 'Law in context'? – mixture of legal disciplines/environmental focus; 'law and biology'? de lege ferenda/policy?)
- **Iva Parlov:** Developing International Law on Coastal State Jurisdiction over Maritime Casualties and Shipwrecks (Different legal regimes, doctrinal work? De lege ferenda/policy?)
- **Lena Schøning:** Integrated Ocean Management (Different legal regimes; 'Law in context'? – environmental focus; 'law and biology'? de lege ferenda/policy?)
- **Jan Solski:** Russian Coastal State Jurisdiction over Commercial Vessels Navigating the Northern Sea Route
- **Hilde Woker:** The Role of Science in the Law of the Sea ('Law in context'? – environmental focus; 'law and biology'? De lege lata? Legal theory?)

Research and methodology trends in Solstrand?

- A large group of you (us) tend to go for '**less doctrinal/traditional**' PhDs
- A **handful** are doing '**hard core**' legal dogmatics
 - Yet, few are doing pure 'hard core single discipline law'
 - *Descriptive/case journalism?*
- **Law and technology** & **law and environment** are a thing
 - In Oslo and Tromsø – sexy topics/herd behavior?
- Some are doing '**law in context**' and '**law and power** (political sciences)'
 - Be careful here with assumptions and value judgments!
 - Robert's '**Institutional element**'
- Yet all of us are in a **complex legal system**
 - **Multiple sources** from **different levels** and places (yes, even in Norwegian tax law!)
 - Robert's '**Systemic and Institutional** elements'
- Most of you will **focus the research** one way or another **DEPENDING** on the methodology choice
 - There are avenues to explore and YOU make that choice

A few practical tips...

- Write your methodology draft **early**
 - And **WRITE AGAIN** at the end
 - Chicken and the egg...?
- **Avoid** expressions such as: “I resort to EU Law Methodology” or “I use traditional Norwegian legal method”
 - Aha, and *what on earth is that?!*
- Make your **assumptions EXPLICIT!**
 - Even if it means your PhD defense will be about Ordoliberalism when you wrote about buyer power
 - Be aware of the ‘**Metaphysical Element!**’
- **Justify** your choices

A few practical tips...

- Even if you do hard core doctrinal de lege lata **YOU HAVE** to face methodological issues
 - Modern legal systems are complex, go beyond logical deduction and there are multi-sourced
- **Don't mix** normative with positive questions
 - Unless you know what and how you will answer them!
- Explain the **theoretical and practical relevance** of your study
- Definitely **do not underestimate** the value of your methodology
 - Have seen quite a few defences where method is brought up
 - And not to say 'how great and novel it was'

Some food for thought

- It is fine that **law is a 'sui generis'** science. It is not hard science for sure!
 - Complex topics are complex – and that is fine
- Are **legal answers universal or depending** on a specific time and place?
 - For Hesselink, legal findings have no universality claims
 - Even if the answers look very similar
 - Nor that there is no convergence – globalization – EU/EEA
 - This creates that within national law there are two methods
 - » Directives integrated into civil code
 - Towards a European/Western legal culture
- Are you a real **researcher** or a legal **commentator**?
 - You are learning to be a researcher – act like that

Some food for thought

- Key: “*solid research design, with special attention for the formulation of a good research question/hypothesis*” (van Gestel & Micklitz, 2014)
- Legal methodology (and methodology in general) is **not neutral**
 - But... you try to make it as **objective** as possible
 - i.e.: so others can reach same conclusion as you did
 - Yet, don't be afraid to recognize: i) **assumptions**; ii) **limitations**
 - So it is *'ok' to make your 'own' method*
 - Because in the end this is a **normative science**
 - But **tell me which one is it!**
 - And particularly important for those working on an 'international topic'
 - There is a less consolidated method vis-à-vis, e.g. “the Norwegian legal method”

Best of luck – *enjoy the pain*

Remember the PhD – and writing it (including the methodology) is not a 100m race – it is a marathon

... all about resistance and choices