

2. Relative Autonomy

A Characterisation of the Discipline of Law

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1. Introduction

Interdisciplinarity does not make sense without the idea of disciplinarity. To say anything sensible about interdisciplinary research into law, it is therefore necessary to have an idea of what the discipline of law is. The term ‘law’ itself is ambiguous, as it can refer not only to the social practice or domain of law but also to the reflection upon that social practice taking place in research. When we speak of the discipline of law, it is the second sense of law that applies: the study of legal phenomena in an academic setting. In this chapter, I will sketch the contours of the discipline of law, and to avoid confusion I will speak of legal scholarship or legal research to refer to the activities taking place within the legal discipline. Law as a social domain or practice is then the subject matter of legal scholarship.¹

The central question of this chapter concerns how to characterise legal scholarship as an academic discipline. My aim is not only to describe the distinctive characteristics that set legal scholarship apart from other academic disciplines but also to relate legal scholarship to other disciplines. My basic descriptive claim is that the specific character of legal scholarship has developed out of two sources – its relationship both to legal practice and to the humanities – but is now under strain primarily because of the growing importance of a social science approach to law.

In the following, I will sketch three central characteristics of legal scholarship: the orientation towards legal practice (Section 2); the internal perspective taken by legal scholars (Section 3); and the hermeneutical method used (Section 4). Each of these central characteristics has recently been challenged or debated, so I will also address the recent discussions. I will conclude the chap-

¹ What I call legal scholarship is sometimes also referred to as legal science. However, because the word ‘science’ in English has the connotation of empirical, natural science, I prefer the more neutral term ‘scholarship’.

ter by relating legal scholarship to the relatively autonomous character of law as a practice.

2. First characteristic: Oriented towards professional practice

Perhaps the most conspicuous feature of legal scholarship is that it has always been wedded to the professional practice of law.² This is, first of all, a consequence of the legal education provided at universities. Law schools, or faculties of law more generally, educate students for careers as lawyers, judges, and notaries: in short, for specific legal professions. Law professors, therefore, need to provide the knowledge and teach the skills demanded by the professions. Not surprisingly, their research interests parallel their course topics. However, this is only part of the explanation, since the close relationship to the professions is broader than the unity of teaching and research. A second, more comprehensive explanation is that the audience for which legal research is written is the professional world in which legal scholars write to be read by practicing lawyers; this means that their criterion of relevance for their research is relevance to professional practice.³ This is reinforced by a third aspect: legal scholarship and the professions are often practiced by the same people. Legal scholars have previous careers as professional lawyers, or hold part-time positions as judges or attorneys; conversely, practicing lawyers write scholarly articles or work towards a PhD.⁴

What emerges from this close relationship between scholarship and practice is a specific type of research, which can be characterised as commentary on positive law.⁵ The starting points for research are the existing or proposed legislation and the decisions by the highest courts, which form the core of the positive law. What scholars do is reconstruct the legal doctrine contained in these rules, meaning that they systematise the rules into a coherent whole and evaluate trends in legislation and adjudication in terms of the doctrine they have reconstructed. Henceforth, I will refer to this type of research as doctrinal research.

² In this chapter, I cannot avoid using the term ‘practice’ in two senses: as professional legal practice (the work of legal practitioners, lawyers, and judges) and as the broader domain of law as a part of society. For an explanation of the second sense, see the first paragraph of Section 3.

³ *Posner* 2002, 1314.

⁴ In this chapter, I try to generalise the argument to cover both the European and Anglo-American situation. There are, however, marked differences. For instance, in the United States there is a distinction between a general PhD and a specifically legal JD as forms of the doctorate. In Europe, a PhD is the general degree covering law as well.

⁵ *Murphy/Roberts* 1987, 677.

Two features of doctrinal legal research merit further discussion: first, the way that it is both descriptive and normative, and second, its practical orientation. First of all, doctrinal legal research combines descriptive and normative research. The bulk of doctrinal research aims at giving an accurate description of the present state of positive law, where the added value of scholarly work is the systematic treatment of the subject and the accuracy of the doctrine as a restatement of the legal subject in question. The scholarly work that reflects this aspect of doctrinal research best is the treatise or handbook: the comprehensive statement with regard to the field, encompassing all the relevant statutes and cases. The success of a handbook can be measured according to the uses made of it in legal practice: the more authoritative it is, the more references to it in cases.

Much doctrinal legal research, however, does more than systematise the existing law: it also evaluates. This normative side of doctrinal research takes a number of different forms, ranging from a critical comment on a judicial decision to an explicit call for law reform. However, it is essential to realise that the normative work done by legal scholars arises out of their descriptive work. A good example is the annotation or case note. In many continental legal cultures, the commentary of a renowned scholar on an important case is a genre in itself; these commentaries can range from very brief characterisations of the decision in relation to existing doctrine to a systematic treatment of the development of case law in the field. Many of these comments, or at least the most influential annotations, also evaluate the decision, either in terms of the basic principles of the doctrine or of its utility for legal practice. In a similar way, scholarly articles make normative comments on new (or proposed) legislation or case law, criticising or praising the direction taken by the legal authorities. These normative conclusions can be said to arise out of the descriptive work, not because they appear naturally or magically from it, but because the groundwork for the normative statement has been laid by the descriptive research.

A description of the present state of law has value because it classifies and systematises legal materials that are not necessarily well organised in themselves. Because these legal materials contain normative statements, meaning they prescribe conduct, classifying them entails formulating the normative principles that underlie the field in question. These principles in turn can form the basis of an evaluation of a particular piece of legislation or set of cases, because they can be judged as being in accordance or out of accordance with these principles. Of course, this is not the whole story about the basis for normative work. Nevertheless, it is a vital component, because it shows how closely connected description and evaluation can be.

Often, however, the normative position in doctrinal research is more clearly stated, and also more radical. This type of research advocates law reform: that is,

it criticises explicitly the present state of law and recommends specific changes. Recommended changes usually concern specific points of law, such as the adaptation of a statutory rule, but are sometimes as radical as the proposition to abolish a whole field of law.⁶ Although such research is not simply legal commentary, because its main goal is to suggest changes, it is usually a form of doctrinal research in the sense that it arises out of the study of the doctrines and principles of the legal system under consideration, and recommends improvements in the legal system to legal decision-makers.⁷ The basis for the recommendations is usually not elaborately theorised; scholars use the principles of the legal field they have reconstructed or they use pragmatic arguments, such as that the existing rules no longer answer practical concerns. Suggestions for law reform often involve taking a particular legal principle to its logical conclusion. Many European countries have opened the institution of marriage to homosexual couples on the basis of arguments of sexual equality and non-discrimination. After a number of reforms in family law based on equality, such as equalising the positions of men and women in marriage and abolishing distinctions between legitimate and illegitimate children, treating heterosexual and homosexual relationships as equal was argued to be, and adopted as, a logical next step.⁸ The goal of law reform research is practical: namely, to influence legal decision-makers and thereby to improve the legal system and its administration. That practical goal brings us to the second typical feature of doctrinal research.

The second typical feature is its symbiosis with legal practice. At the beginning of this section, I described the institutional side of the close connection between scholarship and practice. Here, my point is a different one: the content of doctrinal research is both influenced by and has an influence on legal practice. The influence of legal practice on doctrinal research is most obvious in the stage of problem setting: the research problems of doctrinal research are shaped by the problems encountered in the practice of law. This can be quite literally the case, when scholars take up a problem raised by the legislature or professional organisations. However, it is also true in a more general sense. As Murphy

⁶ A well-known example is the call for the abolition of criminal law, made for instance by the Dutch criminal law scholar Hulsman.

⁷ What this implies for the perspective of legal research is the topic of the next section.

⁸ See *Lahey/Anderson* 2004, 35–45. On this topic, it is interesting to read Supreme Court Justice Scalia's dissent in *Lawrence v. Texas* 539 U.S. 558 (2003); he used a similar argument with opposite intentions – namely, as a slippery slope argument against the majority decision that invalidated a discriminatory statute. Once homosexual relationships are treated equally in one instance (consensual sex in this case) that will lead to homosexuals being allowed to marry, so do not embark on this path. Of course, the equality argument is only this radical if there is no good reason to make a distinction, and what counts as such a reason depends mostly on the particular legal culture.

and Roberts point out, legal research is research *a posteriori*, after the fact of new legal texts being created.⁹ It is the work of the legislature and the judiciary that creates the material for legal researchers to work with and, as a consequence, also the problems that their research tackles. This has the peculiar effect that research results can be made obsolete by a new statute or a new judgment: that is, the value of a recommendation to change the law in a certain way is reduced to zero once the legislature makes a policy choice in the form of a statute on the issue. Similarly, descriptive work loses its relevance once the law changes. In other fields of scholarship, such influence exerted by the field of research is rare. It happens regularly that the research of one scholar is made superfluous because another scholar publishes results on the same issue earlier, but in that case it is the competition within the community of researchers that makes the results obsolete, not the practice studied.

Doctrinal research also exerts an influence on the professional practice of law. The results of doctrinal research are absorbed by legal practice, so that the research in effect shapes the practice it is describing. An innovation of legal doctrine that is recognised as a useful improvement becomes part of new legislation or of a change in case law. Of course, this is the point, as relevance to legal practice is a central criterion for the value of the research. As I described in relation to law reform, the goals of doctrinal research include the improvement of the body of legal rules and their interpretation and application. The line between scholarship and practice is close to disappearing when scholars take it upon themselves to draft new legislation. There are plenty of examples: for instance, legal theorist Karl N. Llewellyn participated in the drafting of the Uniform Commercial Code in the United States.¹⁰ The UCC was not itself a statute but a recommendation for harmonisation of commercial law, but has been turned into statutory law in some form in all 50 states of the US. In the Dutch civil code, one can recognise the doctrinal views of E.M. Meijers, who designed its structure and was its first draftsman.¹¹ In such cases, scholars become practitioners themselves, merging the academic and the professional perspective.

After this characterisation of doctrinal research as the traditional form of legal research, the outline of legal research now needs to be complicated. Over the last forty years, starting in the United States, the scope of legal research has expanded to include interdisciplinary approaches. Because it was discussed in Chapter 1, I will not go into the nature of interdisciplinary research as such, but I will discuss the implications of interdisciplinary research for the links with the

⁹ *Murphy/Roberts* 1987, 678.

¹⁰ *Maggs* 2000.

¹¹ Meijers made his first drafts between 1947 and 1954; the new code was not adopted until 1992 (see *Hartkamp* 2002, 1–2).

professional practice of law. Generally, interdisciplinarity in legal research makes it less oriented towards legal practice.¹² The move away from practice can also be attributed to a trend towards specialisation, both in the academic world and in the professions.¹³

It is hard to tell which of the trends, specialisation or interdisciplinarity, comes first, because they emerged at the same time. Professional specialisation is most remarkable in law firms, as most professional lawyers no longer cover all legal fields; they specialise in one legal field such as criminal law or commercial law, and more often even in a smaller field, like mergers and acquisitions. Similarly, academic specialisation forces scholars to restrict themselves to one particular field of law, either administrative or international environmental. One of the reasons for specialisation in the legal academic world is the orientation towards the model of scholarship of the sciences: namely, being focused on publication in peer-reviewed journals,¹⁴ viewing citation as a measure of success, and, in general, seeing the scholarly community as the audience for one's writing.¹⁵ A scholar's standing in the community depends on recognition of his expertise, to which specialisation contributes, as the focus on one topic or sub-field the accumulation of knowledge.

At the same time, there is a move towards interdisciplinarity. At first glance, this may seem contrary to specialisation, because interdisciplinarity involves the mastery of two different disciplines, which considerably broadens the field of study. However, once an interdisciplinary topic becomes entrenched as a recognisable field, those engaging in it identify with it as their specialisation: for instance, the field of law and economics has become institutionalised with its own journals, professorships, and research centres. As described in the first chapter, interdisciplinarity often leads to the formation of a subdiscipline, like legal history and sociology of law, which are also areas of specialisation. One might say that specialisation without interdisciplinarity is easier to achieve than interdisciplinarity without specialisation. Although a scholar can easily narrow his focus to a particular field of law while still doing purely doctrinal legal research, it is very difficult to undertake high-level research in an interdisciplinary field while retaining a broad focus on law. Mastering two disciplines broadly is currently next to impossible in the academic world.

These two trends of interdisciplinarity and specialisation move the academic scholar away from professional practice, because it becomes increasingly diffi-

¹² *Luban* 2001, 169.

¹³ *Posner* 2002, 1318.

¹⁴ Peer-reviewed journals only publish articles after they have been reviewed anonymously by one or more other scholars.

¹⁵ *Posner* 2002, 1320.

cult for anyone not familiar with the field in question to follow what goes on there. Many interdisciplinary specialisations require knowledge of the two disciplines and of the particular concepts and terminology of the specialisation. This is only feasible for those that do work in the same area of specialisation. As Posner points out, such specialisation carries the risk of communities of scholars becoming closed off from the rest of the academic world and from practical life.¹⁶ This of course does not mean that these risks necessarily materialise, as there are always scholars who specialise but manage to remain connected to a broader circle of scholars or practitioners.

However, these trends do not signal the end of doctrinal research. Its biggest asset is that it can demonstrate its practical relevance through its connection with the professional practice of law. Becoming specialised in one area of academic legal scholarship only diminishes a scholar's relevance to practice when scholars no longer communicate their findings to professionals. In addition, it is clear that doctrinal research can incorporate some aspects of interdisciplinarity without aiming at a complete integration of disciplines, as we have shown in Chapter 1. In this way, doctrinal research can use insights from other disciplines to innovate without giving up its particular character.

3. Second characteristic: An internal perspective

The close relationship between scholarship and practice has one particularly profound consequence for the nature of legal scholarship: its perspective is internal to the practice of law. Using an internal perspective means that scholars regard the subject matter of their research from the same point of view as the people who engage in the subject. An internal perspective on law means sharing the perspective of judges, lawyers, legislators, or citizens who engage in legal practice.¹⁷ Of course, a more particular characterisation of the perspective of scholars specifies which group of those practising the law is taken as the point of reference; I will return to this issue shortly. First, it is important to explain the differences between an internal and an external perspective.

I use the idea of a 'practice' here in a broadened sense, compared to the professional practice of law that was the focus of the previous paragraph. A professional practice is defined by the professionals who work in law, which includes attorneys, judges, and legislators; all these lawyers form a similarly educated

¹⁶ Posner 2002, 1325.

¹⁷ There is some debate about who should be included in the internal perspective: only legal professionals or citizens as well. The answer depends on the conception of law that is adopted; here, I use the broadest characterisation.

professional group that we call legal practitioners. The theoretical idea of a practice does not depend on professional participants, although in the field of law most participants are professionals. A practice in this broader sense is a complex cooperative social activity governed by a particular set of values and norms.¹⁸ Law is just such a practice, and so is morality, medicine, or politics. The idea of an internal or external perspective on law thus means internal or external to the social practice of law.

Traditionally, the distinction between internal and external perspectives is used to distinguish between legal scholarship and a social science of law.¹⁹ Social scientists are supposed to regard law as a practice to be described from the outside; as an observer of behaviour, a social scientist aims to explain the behavioural patterns he has observed. Such social scientists use their own concepts and methodologies without relating these to the self-understanding of the people studied. Thus, a social scientist may study legal conflict resolution with a sociological set of concepts to define conflict and its resolution in terms of people's behaviour. By contrast, the internal perspective of legal scholarship will use the legal definition of conflict in terms of the kinds of claims recognised by law, and its resolution in terms of the goals and values of the legal field. It will be apparent that the distinction between an external and an internal perspective parallels the distinction between *Erklären* (Explaining) and *Verstehen* (Understanding) discussed in Chapter 1. For the purposes of this book, the external-internal distinction is important to clarify how a legal scholar can understand his own position in relation to the practice of law. In the discussions about the distinction, external-internal distinction is interpreted in a variety of ways, which I will touch upon but not examine in depth.²⁰

However, the distinction as just drawn marks the extremes of a more nuanced range of perspectives. The precise meaning of the internal-external distinction has been debated extensively, both in socio-legal studies and in legal philosophy, leading to a more refined middle ground. In legal philosophy, the distinction between the external and the internal perspective is used by H. L. A. Hart to distinguish the position of the observer of the legal system from that of the participant who follows the legal system's rules. Confusingly, for Hart, the external point of view is both that of the observer and that of people who do not accept the rules but merely obey them because they fear punishment.²¹ This means that

¹⁸ See Taekema 2003, 173–177 for an explanation of the idea of a practice. See also Tamanaha 1997, 167–175.

¹⁹ Tamanaha 1997, 156.

²⁰ Tamanaha 2006 is an attempt to clarify the different meanings and dimensions of the external-internal distinction.

²¹ Hart 1994, 89.

in legal philosophy we have to distinguish two meanings with regard to the distinction between the internal and external perspectives. In the first, we see two ways in which people relate to legal rules. In the second, however, the two perspectives are used to distinguish theories of law – those that describe law from the outside, such as Hart's legal positivism, and those that identify with the internal viewpoint of the judge, such as Ronald Dworkin's interpretivism.²² Legal positivism's external perspective is moderately external, because it takes into account that there are people who take the internal perspective.

In socio-legal studies, criticism of behaviouristic research from the extremely external perspective has led to the development of viewpoints that are not easily described as either external or internal.²³ Behaviourism is only concerned with regularities of behaviour, observed from the outside, and with the causes of that behaviour.²⁴ The criticism is that behaviourism, by ignoring the reasons people give for their actions, gives flawed explanations of these actions. People do not behave as causally determined machines but as reason-giving persons. In the context of law, this means people cite rules and values as reasons for their actions: namely, normative reasons that remain invisible in a behaviouristic research setting. Including these normative aspects of the practice, however, does not mean that the research perspective becomes a completely internal one; the basic outlook is still observation, but observation is taken to include finding out what normative propositions people subscribe to without subscribing to these norms oneself. By contrast, the internal perspective means that the researcher engages in the practice as a participant, giving similar reasons and subscribing to the same values. The researcher takes part in the practice and reflects upon it in the same terms as the other participants. This does not mean that he needs to accept the practice uncritically, but it does mean that he needs to explain his criticisms in terms that the participants of the practice understand.²⁵ Taking the position of the researcher as the key factor means that these less extreme views are also moderately external: that is, the researcher is an observer, not a participant.

Both in the socio-legal and the jurisprudential context, the external/internal distinction can be taken to reflect the aim of the research: namely, that an external perspective fits descriptive research while an internal perspective fits normative research. Although this is basically correct, again the differences are more nuanced. From the external point of view, it is also possible to make normative

²² *Dworkin* 1986, 14.

²³ The term 'moderately external' is used primarily in the jurisprudential debate (compare Hart's discussion above). In the socio-legal debate, the basic distinction between external and internal concerns how to approach the observed practice.

²⁴ And is thus an extreme form of positivism in the terms of Chapter 3.

²⁵ An example is the legal sociology of Philip Selznick (e.g. *Selznick* 1961).

claims about the practice studied, but the normative reasons for these claims are then not taken from the practice itself. In Hart's legal positivism, standards of criticism are taken from morality, not from law. The descriptive and the normative parts of research are kept separate, and description is seen as the main task of the research. From the internal point of view, descriptive work and normative claims are made on the basis of the same practice; they can be distinguished but not separated. In Dworkin's interpretivism, the standards of criticism derive from the political morality that is part of the legal practice.²⁶ A correct description of the practice involves a determination of its normative consequences. A judge makes a normative judgment on the basis of the best description of the norms of the positive law. A legal scholar using an internal perspective engages in a debate with the other participants in the practice, and criticises the practice in terms of standards that are acceptable to other participants.

It is clear that legal researchers usually take the internal perspective, justifying and criticising research in terms of the internal standards of the legal practice. As I demonstrated in my description of doctrinal research in Section 2, the standards commonly used to judge legal research results are the substantive principles of the legal system and its underlying values such as coherence, legal certainty, and the rule of law. The internal perspective is described as a participant's view of the practice of law. However, we can distinguish a number of different types of participants: lawyers, judges, legislators, and citizens. All of their perspectives differ slightly. Which internal perspective is taken up by legal scholarship? More particularly, which professional perspective do legal scholars identify with, or can we perhaps distinguish a distinct scholar's perspective?

Most commonly, legal scholars take the perspective of a judge by focusing on the consequences of research results for decisions in specific cases. In the perspective of the judge, the constraints of the legal system in which he works are squarely in place; a judge cannot question the system as a whole, because his role commits him to upholding that system.²⁷ So we can see that the use of the internal principles and values of the legal system as the standards for legal research follow from the judge's perspective. Although the judge's perspective is the most common one for legal researchers, there is a degree of pluralism in perspectives. The second important perspective for legal research is that of the legislature. We encountered the legislature's perspective when we discussed law reform in the previous paragraph: proposals for legal change involve taking the point of view of the decision-maker who has the power to change the law. Of course, this is

²⁶ Dworkin 1986, 255–256.

²⁷ This is, of course, a very general statement. Judges can very well be critical of elements of the legal system, or can use the system instrumentally. In their decisions, however, they cannot reject the legal system as a whole.

not only the legislature; depending on the legal system, legal change is to a greater or lesser extent a co-production of legislators and judges. What these perspectives – which can be expanded to include other institutions that have law-making powers, such as the executive branch of government – have in common is that they are the perspectives of a decision-maker. One of the key elements of the internal legal perspective is that participants have to decide, whether on a new law or rule, or on a case, and that these decisions have practical consequences. Taking the internal perspective involves acknowledgement both of the need to decide and of the importance of a decision.

Thus far, I have taken professional perspectives as the model for legal scholarship. However, legal scholars do not always identify completely with the decision-making perspective of a judge or legislator. We can also distinguish a more detached point of view, in which the legal researcher gives advice to the decision-makers without necessarily taking a stand on the decision itself. The legal researcher may offer considerations to the decision-makers to take into account without an opinion about the right decision. Such a perspective is still an internal one, because it is framed by the same constraints as that of the decision-maker. The advisory role entails presenting research results in such a way that they can be used by decision-makers. In order to do that, the perspective of the primary decision-makers always needs to be taken into account. We can recognise this perspective in the approach of the handbook, which points out the disputed areas of doctrine and formulates possible directions to resolve these disputes.

Taking this first step to distance legal researchers from the practical decision-maker raises more difficult questions about the perspective of legal scholars; for instance, is it possible for a legal scholar to take an external perspective while still working within the discipline of law? Or to phrase it differently, does engaging in *legal* research necessarily entail the taking of an internal perspective? This brings us to the contested boundaries of the discipline. In the narrow view of the discipline, only doctrinal research with its internal perspective and the accompanying legal theory that studies the presuppositions of the doctrinal research counts as legal research. Others engaging in research concerning law do not fall into the same category; they do philosophy, or history, or sociology, not law. In the broad view, however, these other types of research are indeed legal: they are legal philosophy, legal history, and legal sociology as sub-disciplines of law, distinct from philosophy, history, or sociology in general. In the second part of this book, it is shown that the debate is still going on in each of these disciplines and inter-disciplines. There is no easy answer to this question, other than saying that the majority of legal research is done from the internal perspective, and that it depends on one's definition of the discipline of law as to whether legal research is restricted to that internal perspective.

Here I want to pursue a slightly different question; given the internal perspective of doctrinal legal research, how does that type relate to research from an external perspective? The reason for posing this question is the continuous challenging of the legal perspective from the outside, especially from the perspective of social sciences and economics. A frequent criticism of legal research is that its results are less scientific and not as well supported as the results of other disciplines studying the field of law. Sometimes this takes the form of a criticism of specific legal practices. For example, legal psychologists claim that lawyers' standards for evidence in court cases are too relaxed.²⁸ At other times it takes the form of rejecting basic assumptions of legal scholarship. For instance, legal economists claim that lawyers work on the basis of the wrong framework of values, and they should subordinate standards of fairness to the standard of welfare.²⁹ Legal sociologists claim that official legal norms often do not have the expected effects.³⁰ The gist of such criticism is usually that legal scholars need to accept the insights of these empirical studies.³¹

How should legal researchers who work within the legal perspective respond to these challenges? To my mind, it would be a mistake to give up the specifically legal perspective and simply surrender to these outside views. However, this does not mean that nothing should be done with their results. Parallel to the moderately external point of view of legal sociology, we can construct what I would call a moderately internal point of view.³² By this I mean that the knowledge generated by other disciplines needs to be incorporated into research by lawyers *without* giving up the specifically legal point of view. This entails maintaining a clear focus on the aims of one's own legal research, but acknowledging that knowledge from other disciplines is often essential to do fruitful research in law. For example, a legal scholar doing research on a reform of the law of evidence in civil procedure cannot ignore psychological research on the dubious quality of human memory, and needs to incorporate these results in the assessment of witness testimony. However, this can still be done by maintaining an internal point of view in which the legal values of procedural law remain the central standard of assessment. For many legal scholars, the interdisciplinary challenge will cause them to conclude that the internal point of view can no longer be maintained in isolation. For some, it means that they become more

²⁸ *Wagenaar/Van Koppen/Crombag* 1993.

²⁹ *Kaplow/Shavell* 2002.

³⁰ Classic studies are *Moore* 1973; *Aubert* 1967; *Macaulay* 1963.

³¹ Compare the discussion of the danger of subordination to a different discipline at the end of Chapter 1, Section 2.

³² The term 'moderately internal' is not common, although the claims I make for it are not new. Compare *Dworkin* 1986, 13–14, and *Wintgens* 2005, 20–21.

aware of the specific internal perspective of their legal research without concluding that they must do interdisciplinary work themselves. Just as external views of law need to consider the reasons given by participants in legal practice, internal views of law must take into account outside empirical studies.

4. Third characteristic: The method of the humanities

Historically, the study of law has always been at the core of the university. The earliest subjects taught at the university were law, theology, medicine, and the arts.³³ These had much in common methodologically, as the study of primarily ancient texts was central to each. In a sense, the discipline of law has never left the methods of the mediaeval university behind. Central to the way a legal scholar operates is the study of authoritative texts as a hermeneutical and argumentative enterprise. In order to understand what legal scholars do methodologically, it is therefore more fruitful to look to the humanities than to the social sciences. The central method of the humanities is hermeneutics, which is also the methodological basis for legal scholarship. However, hermeneutics, both generally as the method of the humanities and more specifically as legal hermeneutics, is not easily described.

The central feature of hermeneutics in general is that it was developed as a method for interpreting texts. How do you uncover the meaning of, for instance, a Biblical text? Within law, the classical hermeneutical question is how to determine the meaning of a statutory rule or a court ruling. Over time, the focus on texts has been broadened to include human actions and other forms of human expression, and the idea of a method to approach texts has been broadened to a philosophy of interpretation.³⁴ All human action has meaning and is therefore subject to hermeneutical interpretation. Describing hermeneutics as a method is therefore to be understood broadly. For this reason, hermeneutics is also closely related to those social sciences that aim at understanding what people do. In legal research, the textual basis of hermeneutics is still highly relevant, because almost all of the materials legal scholars work with are text-based. Although legal cases arise out of the conflicts of social practice, a legal scholar uses them in the form of textual sources. All standard sources for lawyers are texts.³⁵

³³ For an overview of the relationship between law and the medieval university, see *Berman* 1983, 120–164.

³⁴ The most important author in this regard is the philosopher Gadamer, who developed a general philosophical theory of hermeneutics (*Gadamer* 1990).

³⁵ Because of this feature of legal research, I will focus the discussion of the hermeneutical

Legal hermeneutics as commonly understood is not primarily a method for scholarly research, but is the starting point for a method of interpretation in practical legal reasoning. A judge or lawyer also needs to interpret the texts of statutes and cases, for which he needs tools. Standard texts on legal method are therefore to a large extent texts about the interpretive tools for practical legal purposes.³⁶ Again, we encounter the close connection between legal research and professional practice. What distinguishes legal hermeneutics from hermeneutics in general is its practical orientation: understanding a text is not an end in itself; it is done for the purpose of using it properly in a case or a legal argument. In the previous section, we saw that legal scholars have a slightly different perspective from that of professional decision-makers such as judges, but there are important continuities methodologically. Some of these continuities are due to the fact that practical lawyers and legal scholars work with the same primary materials, and scholars are used to the same interpretive approach as practitioners. Most importantly, the continuities are due to the general features of the hermeneutical method, which even if they are not addressed in texts about legal method are still presupposed in the way legal scholars and lawyers work.³⁷

What are the general features of the hermeneutical method? The method starts with the recognition that there are always at least three elements to be considered in interpretation: the text itself, the author of the text, and the reader of the text. All of these elements are potentially problematic. The need for interpretation arises because the meaning of a text is not immediately clear to the reader. What modern hermeneutical theory makes clear is that clarification is dependent on the relationship between the text and the reader. Every reader approaches a text with his own pre-existing judgments³⁸, which are challenged in the confrontation with the text. These judgments are a given, but they are not immutable. The text you interpret adds something new to your existing horizon of judgments. Interpretation is therefore a circular process in which the reader creates new meaning and thereby also changes his own understanding.³⁹

method on working with texts. To apply the method more broadly, modifications of the central features are needed, although the general line of argument remains the same.

³⁶ For example *McLeod* 2007; *Larenz/Canaris* 1995.

³⁷ The most extensive treatments of legal method as a hermeneutical enterprise can be found in German scholarship (e.g. *Larenz/Canaris* 1995). The most relevant Dutch text is *Scholten* 1974. Most English language texts about legal methods do not explicitly address the idea of hermeneutics.

³⁸ Sometimes the term 'prejudice' is used here, and should be read as a neutral term meaning one's existing beliefs and opinions, which are not necessarily negative. In German, the word '*Vorverständnis*' is often used (*Esser* 1972), which could be described as pre-existing understanding.

³⁹ An accessible sketch of philosophical hermeneutics in connection to law is *Mootz* 1988.

The most common starting point for resolving unclarity of meaning is to look at the author's intention. However, reference to the intention of the author of the text is not always decisive. Moreover, often the only access to the author's intention is by way of the text itself. In law, the most commonly discussed problem in this respect is the meaning of a statutory or constitutional provision. A statute is adopted by a legislature consisting of the members of parliament, sometimes proposed by members of the government. Who is the author of such a statute, and what is the common intention of these people? And even if we can reconstruct the common intention of the historical legislature, what is the relevance of that intention for the problem of interpreting the statute today, possibly a hundred years later?

The problematic nature of the author of a text has led hermeneutics to turn to other leads for interpretation. Most importantly, there is the insight that no text exists in isolation, and that the meaning of a text depends on its context, the way it relates to a tradition of other texts. Textual interpretation therefore also involves reading a text in the light of a larger whole. In law, we do this continually when we interpret specific legal rules in the light of a whole statute, or of the line of case law, or of the doctrine of the field of law. This entails that we try to achieve coherence in interpretation, as the best one is that which fits optimally within the larger whole.

However, the larger whole of which the text is part also does not usually generate an uncontroversial conclusion. There are often many contradictory lines of argument to be found in one body of work. The method of hermeneutics does not have a solution for this problem. It is more correct to say that hermeneutical theory has insistently brought the problem to our attention. The possibility of more than one correct interpretation and the lack of an uncontroversial answer do point to an important characteristic of legal scholarship: it is necessarily argumentative.

The most important consequence of the argumentative character of legal scholarship is that there is no final closure to any scholarly dispute; in other words, there are more or less convincing arguments but no incontrovertible proof that a certain argument is correct. This entails that the standard for judging the quality of an argument is intersubjective: for instance, is the reasoning acceptable to the larger community of scholars? This is a characteristic of the humanities in general, and it is particularly noticeable in law. Disputes about key principles and concepts are found in all legal cultures. What is the meaning of human dignity? What is the correct legal conception of causality? What is the ultimate goal served by the punishment of crimes? Disputes about more specific issues often involve such fundamental questions. Should compensation for wrongful birth be awarded to a healthy child that was unwanted, or is this con-

trary to human dignity? The answer depends on the appreciation of fundamental moral principles – and a theory of the human person – that remain controversial. The best we can achieve is to make our arguments as explicit and sophisticated as possible, which includes making clear the theoretical underpinnings of the arguments. Although there is no standard methodology for doing this, good starting points can be found in the interpretive approach of Ronald Dworkin and the reflective equilibrium method of John Rawls.⁴⁰

One of the reasons legal argument is often seen as unsatisfactory by non-lawyers is its reliance on authority. In doctrinal research, there are very good reasons to rely on the authority of primary sources, because coherence with the authoritative sources of legislation and precedent is an important aim. However, the practice of relying on the authority of other legal scholars is less self-evident. Why should anyone accept an argument because it can be found in Blackstone's Commentaries? Reference to scholarly authorities is acceptable if the opinion is shared by a great number of scholars; in that case, it is not an argument from authority per se but an indicator of consensus. It is also acceptable if the opinion is supported by good arguments; again, it is not the authority itself that is convincing but an additional reason, the quality of the argument. Criticism of legal methods can therefore in part be countered if authority arguments are used more sparingly.

Is that enough? Especially because of the confrontation with other disciplines and their methodologies, there is a widespread discussion on the quality of legal research methodology. Does our traditional hermeneutical method suffice to make our research results as good as those of social sciences like economics or psychology, which seem much surer of their methodologies? Compared to the social sciences, legal methodology seems imprecise and underdeveloped. This has led some to turn to the social sciences as a model for legal methodology.^{41,42} Empirical social science research seems to be based on a much clearer sense of research design and the appropriate methodology than does legal research. To some extent this is true. In most of the social sciences, there are standard ways of setting up and conducting research in which every student of, say, psychology or political science is trained. However, the similarities in research method are

⁴⁰ Dworkin works with two dimensions: one of fit and one of justification (*Dworkin* 1986, 230–31). Reflective equilibrium aims at making particular judgments, principles, and theories coherent with each other. Good introductions to reflective equilibrium are *Daniels* 1996 and *Van der Burg/Van Willigenburg* 1998.

⁴¹ For example *McConville/Chui* 2007.

⁴² In the Netherlands, a debate on legal methodology has been raging on the pages of the general legal journal, *Nederlands Juristenblad*. The discussion started in 2003 with an article by the Dean of Leiden Law School (*Stolker* 2003). Many of the contributors turn to social science methodology for guidance on how to improve Dutch legal methods.

largely superficial: they concern the formulation of a central research question or hypothesis, references to existing literature, and explaining the set-up of the research. There is much less consensus about the research goals and the value of specific research methodologies. This is not the place to debate method in the social sciences, but it is important to note that the methodological pluralism of the social sciences makes it impossible to hold up a standard social science methodology as the model for legal methodology. Moreover, the more basic question is whether the general methodological outlook of the empirical social sciences fits legal scholarship better than the hermeneutical approach. One strong argument to the contrary is the frequent adoption of a hermeneutical approach within the social sciences.⁴³

I want to focus on a basic issue that is problematic in this regard: the notions with regard to data and theory that are current in empirical research. Much of the research design in social sciences is premised on the idea that the researcher himself will be engaged in the gathering of data. Research methods are then methods of collecting and processing data. In empirical social sciences, data in the research design form a component that is different from theories. Theoretical input is necessary for the formulation of the research question, while data comprise the information needed to answer the question. In legal research, it is difficult to think of the research material in terms of data, especially when contrasted with theories; there is no strict separation between data, as the information to work with, and theory. What is the difference between an opinion of a court about wrongful birth and that of a legal scholar? Both can be viewed as contributions to a debate about a difficult legal question. Both primary sources, such as legislation and case law, and scholarly literature are sources of arguments, not merely sources of information. A legal scholar can use case law as a source of information about the way a legal question is commonly answered in a legal system, but also as a source for different kinds of arguments about that question. Only in the first case does a distinction between data and theory make sense. The argumentative character of legal scholarship is therefore the most significant reason not to apply an empirical social science method. An empirical method does not help one to understand the arguments made in legal texts. In many ways, legal scholarship is more like an art than a science. It seems more profitable to increase one's awareness of the possibilities and drawbacks of the method we already use – hermeneutics – than to turn to a different method that does not fit our scholarly categories and practices.

⁴³ Discussed under the heading of interpretivism in Chapter 3.

5. Characterising legal scholarship in relation to law: Relative autonomy

In the description of legal scholarship in the previous sections, we encountered a number of relationships with the domain of law as a social practice. In this final section, I want to draw some conclusions about the nature of legal scholarship from the distinctive characteristics of the practice of law. I think we can best sum up the character of law as being relatively autonomous. Law is autonomous in the sense that it has its specific orientation on a system of rules and principles, specific core values, and its own language and institutions. Because of these distinct characteristics, we can point to law as a separate domain in society. However, law is also closely connected to other social practices, not only because it regulates activities in all kinds of other practices but also because law's values and principles always refer to the values of other practices.⁴⁴

The relative autonomy of the practical domain of law has important consequences for the enterprise of legal scholarship. If we want to gain a meaningful understanding of what law is, we need to take the connections between law and other social practices into account in our research. Of course, it is possible to bracket these connections in order to keep one's individual research manageable, but in most cases the interesting research questions do require paying attention to the intertwinement with other domains.

This leads to the first sense in which legal scholarship itself is relatively autonomous: it depends on input from other disciplines, both empirically, in order to get straight the facts that law deals with, and theoretically, in order to fully understand both the normative principles and the theories and concepts of law that are connected to values and theories related to other practices. Good legal research at least makes some use of insights from other disciplines.⁴⁵

The second sense in which legal scholarship is relatively autonomous is in relation to the practice of law. Accepting that the perspective of legal scholarship is internal to that of the practice of law means that the relevance of legal scholarship is always measured to some extent by the contribution it makes to the purposes of law in a practical sense. This by no means implies that legal scholarship should be uncritical of practice; on the contrary, well-argued criticism is one of the most valuable contributions legal scholarship can make to practical concerns. However, it does mean that legal scholarship needs to present its arguments in a way that they can be understood, and responded to, by participants in the legal practice.

⁴⁴ *Taekema* 2003, 189–191.

⁴⁵ I will not repeat here the arguments about the different kinds of interdisciplinarity; see Chapter 1, section 2.

Because both the relationships with other disciplines and with legal practice can be characterised as relatively autonomous, there is a wide range of positions on legal scholarship to choose from. A legal scholar can concentrate on doctrinal research with a strong focus on legal practice, emphasising the autonomy from other disciplines and the openness towards practice. A legal scholar can also focus on purely academic work in which interdisciplinary themes are prominent, open to other disciplines but not primarily aimed at informing practice. All such positions are defensible as long as one is aware of the choices one makes.

Good legal scholarship requires awareness of one's limitations as a legal researcher coupled with the willingness to try to overcome them when necessary. An open mind towards everything that may be relevant to one's own research is the first step.

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