METHODOLOGIES OF LEGAL RESEARCH

Until quite recently questions about methodology in legal research have been largely confined to understanding the role of doctrinal research as a scholarly discipline. In turn this has involved asking questions not only about coverage but, fundamentally, questions about the identity of the discipline. Is it (mainly) descriptive, hermeneutical, or normative? Should it also be explanatory? Legal scholarship has been torn between, on the one hand, grasping the expanding reality of law and its context, and, on the other, reducing this complex whole to manageable proportions. The purely internal analysis of a legal system, isolated from any societal context, remains an option, and is still seen in the approach of the French academy, but as law aims at ordering society and influencing human behaviour, this approach is felt by many scholars to be insufficient.

Consequently many attempts have been made to conceive legal research differently. Social scientific and comparative approaches have proven fruitful. However, does the introduction of other approaches leave merely a residue of 'legal doctrine', to which pockets of social sciences can be added, or should legal doctrine be merged with the social sciences? What would such a broad interdisciplinary field look like and what would its methods be? This book is an attempt to answer some of these questions.

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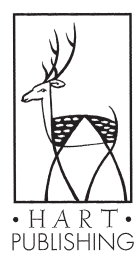

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Preface

In order to develop a suitable methodology of comparative law, one needs a better view on the methodology of legal scholarship within domestic legal systems. Also, within the context of the current debate on the scientific status of legal scholarship, the question arises as to what kind of discipline legal doctrine is (or should be) and which kind of scientific methodology is most appropriate for what kind of legal research. Here, we are faced with diverging traditions of legal scholarship (eg United Kingdom versus Continental Europe) and diverging underlying theories of 'legal science' in the course of history: a 'positive moral science' (natural law tradition), a discipline aiming at discovering the will of the (historical) legislator (exegetic school), an interdisciplinary discipline (law in context), a social science (legal scholarship as an empirical discipline), a conceptual structure (Begriffsjurisprudenz), a normative 'imputation discipline', clearly distinguishing 'is' and 'ought' (Kelsen), etc. All this could lead to the following questions:

In general:

(a) linking specific approaches and specific methods, on the basis of the various types of research and other distinctions mentioned hereafter;
(b) or scrutinising more deeply one of these approaches or methods, as applied to legal research in a domestic or comparative context.

(1) Types of research

- explanatory (explaining the law, for instance by diverging historical backgrounds in comparative research);
- empirical (identification of the valid law; determining the best legal means for reaching a certain goal – the 'best solution' in comparative law);
- hermeneutic (interpretation, argumentation);
- exploring (looking for new, possibly fruitful paths in legal research);
- logical (coherence, structuring concepts, rules, principles, etc – eg the use of the Hohfeldian analysis of the concept of right in domestic legal doctrine or for the purpose of comparing legal systems);
- instrumental (concept-building);
- evaluative (testing whether rules work in practice, or whether they are in accordance with desirable moral, political, economical aims, or, in comparative law, whether a certain harmonisation proposal could work, taking into account other important divergences in the legal systems concerned).

(2) Use of supporting disciplines

- legal history;
- legal sociology;
- legal anthropology;
- legal psychology;
- law and biology; and
- law and economics.

(3) Levels of comparison

- conceptual framework of legal doctrine;
- principles;
- rules; and
- cases.

(4) Levels of research

- description (interpretation); and
- systematisation (theory building).

(5) Schemes of intelligibility[1]

- causal;
- functional;
- structural;
- hermeneutical;
- actional; and
- dialectical.

(6) Ideological perspectives

- individualistic versus communitarian;
- nationalistic versus international;
- positivist versus morally, politically oriented;
- monistic (order) versus multi-layered (pluralistic, disorder); and
- nature versus culture.

Doctrinal legal research ranges between straightforward descriptions of (new) laws, with some incidental interpretative comments, on the one hand, and innovative theory building (systematisation), on the other. The more 'simple' versions of that research are necessary building blocks for the more sophisticated ones. Inevitably, the more descriptive types of research will be, by far, more numerous. Comparative law usually remains at the level of description, combined with some comparison (but mostly at the 'tourist' level). In attempts of (European) harmonisation, however, a clear level of systematisation (theory building) has been established.

[1] See on this J-M Berthelot, L'intelligence du social (Paris, Presses Universitaires de France, 1990) 62–85 and, for an application to legal research, see G Samuel, 'Taking Methods Seriously (Part One)' (2007) 2 Journal of Comparative Law 94, 105ff.

All scientific research, including legal research, starts from assumptions. Most of these assumptions are paradigmatic. This means that they are the generally recognised assumptions ('truths') of legal scholarship within that legal system, or the common assumptions of all the compared legal systems in comparative research. They constitute the paradigmatic framework, which tends not to be debated as such within the discipline itself. Apart from this, researchers may also start from assumptions which are less obvious. In those cases, they have to be made explicit, but not necessarily justified. In some of these cases, the outcome of the research will only be useful to the extent that one accepts its underlying assumptions. Alternatively, a given approach may prove to be more fruitful than research, which (partly) starts from other assumptions. A typical example is the recognised 'legal sources', which are not a matter of discussion within a given legal system (legal scholarship). Sometimes new legal sources (eg 'unwritten general principles of law') or principles (eg priority of European law over domestic law) are accepted as assumptions, as they seem to be more fruitful, eg for keeping law more coherent. A study on such assumptions (and their limits) in domestic legal doctrine and/or in comparative research is another possible topic for research.

The questions and suggestions above were proposed to a number of scholars when inviting them to lecture at a workshop organised, in October 2009, by the Research Group for Methodology of Law and Legal Research at Tilburg University. The current book contains the revised papers presented at that workshop, together with two papers by members of the Tilburg Methodology research group, which are partly a result of the discussions during the workshop and a comment on one or more papers presented there. Other members of the Tilburg Methodology research group who commented during the Conference have been Jan Smits and Koen Van Aeken.

As an introduction to the contributions in this book, some conclusions of the workshop are to be found hereafter.

Legal scholarship is torn between grasping as much as possible the expanding reality of law and its context, on the one hand, and reducing this complex whole to manageable proportions, on the other. In the latter case, a purely internal analysis of the legal system involved, isolated from any societal context, is an option, most notably visible in French legal doctrine.[2] In such an approach, law is largely cut loose from its context, and societal problems are exclusively worded as 'legal' problems, that should be 'solved' without taking into account anything that is not 'law'. Moreover, law in this view means only, for instance, *French state law*, or even more narrowly *French official private law*. Here, 'legal reality' is confined to legislation and case law. There seems to be no other relevant reality for lawyers. In this way, an artificial world is created, in which (sometimes artificial) problems are worded and solved, without any necessary connection to some societal reality. As law aims at ordering society, at influencing human

[2] See Horatia Muir-Watt's chapter, 'The Epistemological Function of "la Doctrine"' (ch seven).

behaviour,[3] such an approach is felt to be largely insufficient by many scholars. More specifically, the failure of doctrinal legal research to build, to structure, to interpret and to apply the law in such a way that it fulfils its obvious function in society, together with a complete lack of any methodology, has led an increasing number of scholars to question its scientific status. In chapter four, Mathias Siems argues that teaching and a low profile 'legal doctrine' may very well be carried out by legal practitioners (as was actually the case in England until about half a century ago). So, 'a world without law professors' would indeed be possible in practice.

As a reaction, many attempts have been made, from the nineteenth century onwards, to broaden legal doctrine, or to conceive it differently. Adding a social science dimension[4] or a comparative dimension[5] has proven fruitful. However, the question then becomes one of demarcating the borders of legal science: is there still some kind of 'legal doctrine' left, to which pockets of social sciences have been added? Or will legal doctrine have to be merged with social sciences? If so, which disciplines should be favoured: just traditional legal sociology, or also law and economics and/or legal history and/or legal psychology and/or legal anthropology, or even more exotic disciplines such as 'behavioural economics'[6] and/or 'evolutionary analysis in law'.[7] How would such a broad interdisciplinary discipline look like? Which methods should it use? How can we educate competent scholars who will be able to carry out such a broad research programme or even parts of it?

The demarcation of 'legal doctrine' is not only a matter of fields to be covered, it is also, and even in the first place, a question of the identity of the discipline. Is it (mainly) descriptive? Or rather hermeneutical? Or perhaps normative? Or should it be explanatory? This question is discussed at length in several papers.[8] The main conclusion to be drawn is that several approaches fit with legal doctrine and that all those approaches can be defended to some extent, as long as one keeps a pluralist approach. Under the heading of 'legal doctrine' or, if one prefers, 'legal science', many types of research may be carried out: descriptive, exploratory, explanatory, wording and/or testing hypotheses and/or theories, or just supporting legal practice (and, in that sense, it becomes normative).

Each of those types of research will involve its own methods and each research question will imply the use of the appropriate method(s) for that kind of research.[9] Maybe this variety of possible approaches and methods explains the confusion in the terminology used. Although Jaap Hage ('Truly normative legal

[3] See Julie De Coninck's chapter, 'Behavioural Economics and Legal Research' (ch 14).

[4] See the chapters by Julie De Coninck (ch 14) and by Bart Du Laing (ch 13).

[5] See the chapters by John Bell (ch nine), by Geoffrey Samuel (ch 10) and by Jaakko Husa (ch 11), and Maurice Adams' comments (ch 12).

[6] See Julie De Coninck's chapter 14.

[7] See Bart Du Laing's chapter 13.

[8] See the chapters by Mark Van Hoecke (ch one), Jaap Hage (ch two), Anne Ruth Mackor (ch three), Pauline Westerman (ch five), Jan Vranken (ch six) and Bert van Roermund (ch 15).

[9] See Jaap Hage's chapter two.

science') and Anne Ruth Mackor ('Explanatory non-normative legal doctrine') use seemingly contradictory titles, they nevertheless appear to largely agree in their view on legal doctrine. Roger Brownsword also points to this implicitly, when asking himself 'what am I doing as a legal scholar in contract law?'

Should we try to implement some ideal type of 'legal science', bearing the risk of being cut loose not only from legal practice but from the large majority of legal academics as well? Or should we rather, pragmatically, aim at adjusting legal doctrine's centuries-old research tradition? In the latter case, legal doctrine could develop as 'law in context', while still emphasising the internal perspective on law. Elements of social sciences could be used more systematically for underpinning doctrinal research, instead of trying to realise the ambition of developing an interdisciplinary super-science, which would integrate everything there is to know about law. Legal doctrine should use those disciplines, but not try to integrate them. Such integration raises problems of epistemology, of methodology and of research skills. It would be very difficult, if not impossible, to demarcate a common epistemological framework, within which common methodologies could be worked out for quite diverging research purposes. Moreover, such methods should be so diverse that it would be extremely difficult to combine all the research skills needed, even in a coherent research team. In practice, the adequate research activities will rather be multi-layered, such as legal doctrine using elements of behavioural economics which, in turn, uses elements of evolutionary analysis in law (see the chapters by De Coninck and by Du Laing).

Four papers in this book have focused on comparative law (Samuel, Husa, Bell and Adams), but with a clear connection to legal doctrine. Indeed, Geoffrey Samuel argues that developing methods in comparative law could be a road to developing the methodology of domestic legal doctrine. Bart Du Laing for his part shows how the evolutionary analysis of law could be helpful in developing the methodology of comparative law: varying adaptation of cultures to local conditions as an element for developing a theory of 'legal families'.

Finally, I would like to thank Caroline Laske for checking the English language for part of the papers, and Dr Antal Szerletics for his help in preparing the manuscript for publication, and Mustapha El Karouni for taking care of indexing the book.

Mark Van Hoecke
11 January 2010

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1

Legal Doctrine: Which Method(s) for What Kind of Discipline?

MARK VAN HOECKE

I. HISTORICAL DEVELOPMENTS

ROMAN LEGAL DOCTRINE developed since the second century before Christ, and reached a very high level as from the third century after Christ. Its rediscovery and renewed study in Bologna in the eleventh century was the start for the creation of universities. During the whole of the Middle-Ages, legal doctrine was highly thought of and considered as a 'scientific discipline', as in those times 'authoritative interpretation', not 'empirical research', was the main criterion for the scientific status of a discipline. Slowly as from the seventeenth century, but mainly as from the nineteenth century, this changed dramatically. The success of the positive sciences altered the conception of 'science' in western societies. Physics became the model. Hence, a combination of empirical data, mathematics, testing of hypotheses, developing theories with a general validity and without geographical limitations, became the ideal for any 'scholarly discipline'. However, where in legal scholarship do we study 'empirical data', handle them with mathematical models, check 'hypotheses' or construe 'theories'? For sure, law and legal doctrine clearly have their geographical limitations, so that there is no claim to 'general validity' outside the geographical borders of the legal system concerned.

As from the mid-nineteenth century, those conclusions have repeatedly led to the statement that 'legal doctrine' misses basic characteristics in order to be considered a 'legal science', whereas until then legal doctrine had largely been seen to be the model 'science'.[1] More recently, it is particularly the research assessment

[1] In 1859, the American legal scholar David Dudley Finn wrote about legal doctrine: 'Compare this science with any of the other sciences; with those which are esteemed the greatest in extent, and the most exalted in subject. Take even astronomy, that noble science which weighs the sun and the planets, measures their distances, traces their orbits, and penetrates the secrets of that great law which governs their motions. Sublime as this science is, it is but the science of inanimate matter, and a few natural laws; while the science which is the subject of our discourse governs the action of human beings, intelligent and immortal, penetrates into the secrets of their souls, subdues their wills, and adapts itself to the endless variety of their wants, motives and conditions.' See DD Finn

procedures and the repartition of public money among 'scientists' that have put this topic into the centre of the scholarly debate. Lawyers have reacted in different ways to this pressure. A large majority of them have pointed to the practical utility, and even necessity, of their publications for legal practice and emphasised the importance of law in society, or they have benignly ignored that criticism. Others have accepted the criticism, taking over the narrow empiricist view on 'science' and tried to make legal scholarship fit that model.[2] In the nineteenth century, this kind of reaction gave birth to 'legal theory' in the sense of a 'positive science of law', a kind of empirical 'natural law', a search for legal concepts, legal rules and legal principles that the whole of mankind would share.[3] There has been some research in legal anthropology (Maine, Post),[4] but largely this remained at the stage of a research programme, which has been forgotten as from the First World War. Somewhat similar to this reaction, we have seen, as from the end of the nineteenth century, and mainly in the course of the twentieth century, the birth and development of other social sciences focusing on law: legal sociology, legal psychology, law and economics. All of those disciplines offer empirical research and theory building in legal matters. However, they never aimed at replacing legal doctrine, but just wanted to supply legal scholars, legal practitioners and policymakers with useful information on legal reality. Unfortunately, their impact has remained quite limited. So, today, there is a somewhat schizophrenic situation in which one discipline, legal doctrine, is basically studying law as a normative system, limiting its 'empirical data' to legal texts and court decisions, whereas other disciplines study legal reality, law as it is. The outcomes of these two strands of disciplines are not

'Magnitude and Importance of Legal Science' (1859) in SB Presser and JS Zainaldin (eds), Law and Jurisprudence in American History, 3rd edn (St Paul, Minnesota, West Publishing C°, 1995) 712. From a different perspective, Ivanhoe Tebaldeschi could, in 1979, argue that legal doctrine is the most complete discipline, and, hence, the model science, as it combines deductive reasoning with inductive reasoning and value thinking: I Tebaldeschi, Rechtswissenschaft als Modellwissenschaft (Vienna, Springer Verlag, 1979) 156.

[2] 'Welcher Abstand zeigt sich hier für die Jurisprudenz gegen die Naturwissenschaften' in J von Kirchmann, *Die Werthlosigkeit der Jurisprudenz als Wissenschaft* (Berlin, Julius Springer, 1848) 14; S van Houten, *Das Causalitätsgesetz in der Socialwissenschaft* (Haarlem, HD Tjeenk Willink and Leipzig, FA Brockhaus, 1888), arguing in favour of the use of the methods of physics in legal scholarship, mainly by focusing on causal relations: 'Der Grundstein der Socialwissenschaft, wie überhaupt aller Wissenschaft, ist die volle, unbedingte Anerkennung des Causalitätsgesetzes' (p 5). See also: AV Lundstedt, *Die Unwissenschaftlichkeit der Rechtswissenschaft* (Berlin-Grunewald, W Rothschild, 1932) vol 1; T Mulder, *Ik beschuldig de rechtsgeleerde faculteit van onwetenschappelijkheid* (Leiden, 1937); G de Geest, 'Hoe maken we van de rechtswetenschap een volwaardige wetenschap?' (2004) *Nederlands Juristenblad* 58–66.

[3] AH Post, *Einleitung in eine Naturwissenschaft des Rechts* (Oldenburg, Verlag der Schulzchen Buchhandlung, 1872). For a short introduction to Post and to his legal anthropological research, see: A Lyall, 'Early German Legal Anthropology: Albert Hermann Post and His Questionnaire (2008) 52 *Journal of African Law* 114–24 (with the questionnaire as an appendix on pages 124–38).

[4] GA Wilken, *De vrucht van de beoefening der ethnologie voor de vergelijkende rechtswetenschap*, inaugural lecture Rijksuniversiteit Leiden (Leiden, EJ Brill, 1885); SR Steinmetz, *Ethnologische Studien zur ersten Entwicklung der Strafe*, 2nd edn, 2 vols (Groningen, P Noordhoff, 1928) (1st edn, Leiden 1894); SR Steinmetz, *Rechtsverhältnisse von eingeborenen Völkern in Afrika und Ozeanien. Beantwortungen des Fragebogens der Internationalen Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre zu Berlin* (Berlin, Julius Springer, 1903).

brought together in any systematic way, nor are they combined or integrated at the level of legal scholarship.

Today, in different countries, research assessment and the financial means connected with it have made the empiricist view on science even more influential. This has been to such an extent that it has made lawyers and policymakers in universities think that legal doctrine can only become 'scientific' if it turns into an empirical social science (de Geest). In other words, the aim is to put an end to a tradition of more than two millennia and to imitate the empirical sciences that have a different goal. Instead of concluding that the monist view on science, based on physics, is wrong, 'falsified' in their terminology, because it does not fit with disciplines such as legal doctrine, some have concluded that legal doctrine is (completely) wrong, and has always been so. This is a dangerous development, which, starting from false assumptions (unity and similarity of all scientific disciplines) is jeopardising the future of human sciences in general and legal doctrine in particular.

Of course, the criticism of legal doctrine is partly founded: it is often too descriptive, too autopoietic, without taking the context of the law sufficiently into account; it lacks a clear methodology and the methods of legal doctrine seem to be identical to those of legal practice; it is too parochial, limited to very small scientific communities, because of specialisation and geographical limits; there is not much difference between publications of legal practitioners and of legal scholars. All this may be correct, but as such it does not disqualify legal doctrine as a discipline in its own right, with its own, appropriate, methods.

In this chapter, I will define legal doctrine as an 'empirical-hermeneutical discipline'. Indeed, it has empirical aspects, which make it perfectly comparable with all empirical disciplines, but the core business of legal doctrine is interpretation, which it has also in common with some other disciplines (theology, study of literature).

How can we describe the methodology of legal doctrine in a terminology which is largely used in the scientific community, without narrowing it in such a way that we lose essential characteristics of this discipline?

Legal doctrine has, in the course of history, been practised and conceived in varying ways, emphasising, and sometimes overemphasising, diverging characteristics of this discipline. Below, we will discuss the different angles from which legal doctrine has been presented and the extent to which they give a true picture of this discipline. It will be followed by an analysis of the methodology of legal research in terms of hypotheses and theory building.

II. WHAT KIND OF DISCIPLINE IS LEGAL DOCTRINE?

A. A Hermeneutic Discipline

It can hardly be denied that legal scholars are often interpreting texts and arguing about a choice among diverging interpretations. In this way, legal doctrine is a *hermeneutic discipline*, in the same way as is, for example, the study of literature, or to a somewhat lesser extent, history. Interpreting texts has been the core business of legal doctrine since it started in the Roman Empire.[5]

In a hermeneutic discipline, texts and documents are the main research object and their interpretation, according to standard methods, is the main activity of the researcher. This is clearly the case with legal doctrine.

Often legal scholarship has been presented as another type of 'science', in which the hermeneutic dimension is minimised, or at least made less important. This was done, for instance, when scholars tried to distinguish legal scholarship from legal practice, or to separate the description of the law more clearly from its evaluation, or when legal scholarship was modelled along the lines of the methodology of other disciplines and more specifically of the positive sciences.

B. An Argumentative Discipline

Close to the conception of legal doctrine as a hermeneutic discipline is the conception of an *argumentative discipline*. Here, it is the argumentation to support some legal interpretation or solution that is emphasised, rather than the interpretation as such.[6] The argumentative view has the advantage of putting things into a broader perspective. It allows us to take a step back from the interpreted text or any other document. A concrete legal question can be answered, or a case solved, on the basis of generally accepted, or at least acceptable, views.

[5] 'L'oeuvre doctrinale, dans la tradition historique française et, plus largement, européenne, est au premier chef d'interprétation de « lois » écrites . . . Et à cela ne s'est pas borné son rôle. Face à des sources diverses et hétérogènes, elle s'est trouvé aussi pour fonction d'unifier, de créer un ordre juridique cohérent et même, à partir du XVIème siècle, systématique, préparant ainsi les voies de la codification.' See J-L Thireau, 'La doctrine civiliste avant le Code civil' in Y Poirmeur et al, *La doctrine juridique* (Paris, Presses Universitaires de France, 1993) 13–51, 16f.

[6] Argumentation theory has always been at the core of jurisprudential writings. That is why the conception of legal scholarship as an argumentative discipline often acts as an implicit background (see eg Ch Perelman, *Logique juridique. Nouvelle rhétorique* (Paris, Dalloz, 1976); R Alexy, *A Theory of Legal Argumentation*, translated by R Adler and N MacCormick (Oxford, Clarendon Press, 1989); R Dworkin, *Law's Empire* (London, Fontana Press, 1986) 1314, where this is said rather explicitly). Sometimes this conception of legal doctrine as an argumentative discipline is argued for explicitly: J Smits, 'Redefining Normative Legal Science: Towards an Argumentative Discipline' in F Grünfeld et al and F Coomans (eds), *Methods of Human Rights Research* (Antwerp, Intersentia 2009); C Smith et al, 'Criteria voor goed rechtswetenschappelijk onderzoek' (2008) *Nederlands Juristenblad* 685–90 at 690, where, following Ronald Dworkin, the work of the legal scholar and of the judge are rather called an 'argumentative practice' than a 'normative discipline'.

In traditional argumentation theory they are called 'topoi'[7]. In many cases the argumentation will support some interpretation of one or more texts, but in other cases the argumentation may only loosely be related to such texts, eg when based on unwritten legal principles, or when filling gaps in the law, or when a text is simply put aside in favour of an interest or value that is considered to be more important.

From the Middle-Ages until the seventeenth century legal doctrine has developed as an argumentative discipline, which determined what kind of arguments were acceptable in which cases, with whole catalogues of arguments.[8] Actually, interpretation and argumentation cannot be separated from each other, both in legal doctrine and in legal practice. Each text interpretation needs arguments when diverging interpretations could reasonably be sustained, and a legal argumentation will almost always be based on interpreted texts. So, legal doctrine and legal practice are both hermeneutic and argumentative, but interpretation and argumentation appear to be roughly two sides of the same activity, in which interpretation is the goal and argumentation the means for sustaining that interpretation. Hence, if one has to choose it would seem more appropriate to label legal doctrine a 'hermeneutic discipline' rather than an argumentative one.

C. An Empirical Discipline

As already mentioned above, since the nineteenth century and under the influence of the success of the positive sciences, attempts have been made to develop legal scholarship as an empirical discipline.[9] This has been quite explicitly worded by Alf Ross:

> The interpretation of the doctrinal study of law presented in this book rests upon the postulate that the principle of verification must apply also to this field of cognition – that the doctrinal study of law must be recognised as an empirical social science.[10]

According to Ross, this empirical verification takes place by checking statements in legal doctrine against judicial practice: 'Our interpretation, based on the preceding analysis, is that the real content of doctrinal propositions refers to the actions of the courts under certain conditions.'[11]

[7] T Viehweg, *Topik und Jurisprudenz: ein Beitrag zur Rechtswissenschaftlichen Grundlagenforschung*, 5th ed (München, Beck Vergag 1974); G Struck, *Topische Jurisprudenz*, (Frankfurt, Athenäum Verlag 1971).

[8] GCCJ van den Bergh, *Geleerd recht. Een geschiedenis van de Europese rechtswetenschap in vogelvlucht,* 2nd edn (Deventer, Kluwer, 1985) 6.

[9] And not only legal scholarship: 'Occasionally, scholars in the "lower" disciplines aspiring to the status of natural scientists have attempted to import an empirical or "scientific" method into their work. In the nineteenth century, for example, such efforts redefined many of the social science disciplines and gave them many of their distinguishing characteristics today.' See DW Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31 *Journal of Law and Society* 163–93, 172.

[10] A Ross, *On Law and Justice* (London, Stevens & Sons, 1958) 40. This view is explicitly rejected in G Samuel, 'Is Law Really a Social Science? A View from Comparative Law' (2008) 67 *Cambridge Law Journal* 288–321, among others at 319.

[11] ibid.

This view is typical for the realist movements. Ross was the last important representative of Scandinavian realism, but here Ross comes quite close to American realism: 'The prophecies of what courts will do in fact, and nothing more pretentious, are what I mean by the law', in the well known wording by Oliver Wendell Holmes.[12] Ross' conception of legal doctrine as an empirical discipline only fits in such a 'realistic' approach. Today, this realistic movement is not very popular in Europe, not even in Scandinavia. Hence, this conception of legal doctrine cannot be considered to be a workable model as such.

Others have argued that the phenomena which are observed and studied by legal scholars are in fact their empirical data and amount to 'legal rules'.[13] It is, however, to be questioned whether 'legal rules' can be observed empirically. If not, where and how do we find them? For Gerrit De Geest they are found through the reading of published judicial decisions. This view suggests that those rules only 'exist' to the extent that they have been applied by judges. In this way, De Geest is following Alf Ross and American realism. However, De Geest partly contradicts himself when defining the 'empirical truth' in interpreting the law as 'what the legislator or judge really meant'.[14] As methods used in this context, he mentions:

(a) text analysis;
(b) logic (eg syllogism);
(c) field research (including interviews);
(d) statistics; and
(e) methods of historical research.[15]

It is interesting to note that no psychological methods are mentioned as a possible means to discover what a judge or legislator 'really meant'. Without further discussing De Geest's position here, it is obvious that his label 'empirical research' covers a large variety of elements, which show (also according to De Geest) that legal doctrine is partly a hermeneutic discipline (text analysis), an axiomatic discipline (logic) and a historical discipline. Indeed, legal doctrine cannot be reduced to one single type of discipline, but is a combination of several of them. Of course, some may be considered to be more important, or decisive, or typical than others, but, unlike some other disciplines, such as mathematics, it is not one-dimensional.

In Hans Albert's view, the object of an empirical legal doctrine is broader than just legal rules. It also includes the influence of those rules on the members of the society in question.[16] This means a combination of traditional legal doctrine with legal sociology. There are good reasons for such an approach, but putting

[12] OW Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457–78, 461.

[13] G De Geest, 'Hoe maken we van de rechtswetenschap een volwaardige wetenschap?' (2004) *Nederlands Juristenblad* 58–66, 59.

[14] ibid 59.

[15] ibid 61.

[16] H Albert, 'Kennis en Recht' in FD Heyt (ed), *Rationaliteit in wetenschap en samenleving* (Alphen aan de Rijn, Samsom, 1976) 183.

it into practice seems to be very difficult in most cases. Moreover, one may also have to include other disciplines, such as economics, psychology and the like. However, including all this in legal doctrine raises even more questions as to its feasibility.

For the Historical School in nineteenth century Germany[17] and a somewhat comparable movement in the United States in the same period,[18] historical elements constituted the most important empirical data:

> Man is to be studied in every period of his social existence, from the savage to the civilized state, in order to perceive the great truth, that in every condition of freedom, of intelligence, of commerce, and of wealth, his habits, his virtues, his vices, the objects of his desires, and hence the laws necessary for his government, are essentially the same.[19]

This approach clearly represents a belief in a kind of 'natural law' which could be retrieved empirically. This idea used to be quite popular in Europe and in the United States in the nineteenth century, but seems to have almost completely disappeared today.

For others, the object of the empirical research is sociological, economical or socio-psychological data, or more generally 'human behaviour'.[20]

Empirical research is most notably useful in disciplines such as physics, where a reality is studied which exists independently of this discipline. In disciplines such as mathematics or theology, empirical research does not seem to be quite relevant. Mathematical models and theological views create their own reality, which, by definition, cannot be checked empirically. The same is largely true for legal doctrine as well. Whether a certain law 'exists' may be checked 'empirically', but what legal doctrine is mainly about is the *interpretation* of that law or its balancing with other laws or legal principles.

Interpretations are underpinned with arguments and these arguments may partly refer to an 'objective' reality. To this extent the correctness of arguments may be checked empirically. However, most arguments in legal reasoning are not 'true' or 'false' but more or less convincing. They do not qualify for an empirical verification.

[17] See A Brockmöller, *Die Entstehung der Rechtstheorie im 19. Jahrhundert in Deutschland* (Baden-Baden, Nomos Verlag, 1997) especially 64 ff (Hugo) and 83 ff (Savigny).

[18] See H Schweber, 'Law and the Natural Sciences in Nineteenth-Century American Universities' in SS Silbey (ed), *Law and Science*, The International Library of Essays in Law and Society (Aldershot, Ashgate, 2008) 3–23.

[19] S Greenleaf, *A Discourse Pronounced at the Inauguration of the Author as Royall Professor of Law in Harvard University* (Cambridge, Massachusetts, James Munroe, 1834) 14.

[20] MA Loth, 'Regel-geleid gedrag; over het object van empirische rechtswetenschap' (1983) 3 *Rechtsfilosofie & Rechtstheorie. Netherlands Journal for Legal Philosophy and Jurisprudence* 213–28, 213.

D. An Explanatory Discipline

A fourth conception of legal doctrine considers it to be an *explanatory discipline*. According to this view, legal doctrine explains why a rule is a valid legal rule in a given society. This explanation may be historical, sociological, psychological, economical and the like, but it may also be based on an internal logic. In this approach, the existence of a rule will be 'explained' by the existence of a higher norm, from which that rule is derived,[21] or the existence of underlying values or principles, or of a larger network of legal rules and principles.

The first kind of explanation reduces legal doctrine to one or more of the social sciences involved. The second, internal, 'explanation' largely reduces this concept to something which is not even a main part of legal scholarly activity, and which does not really fit into our common understanding of what it means to 'explain' something. As Aleksander Peczenik wrote, we are rather faced with a veiled strategy in which presenting legal doctrine as an 'explanatory' discipline would allow us to consider it an 'objective science', and to conceal the legitimation of a rule behind a façade of 'explanation'.[22] In fact, nothing is 'explained' here, rather values or principles are postulated, or some interpretation of a higher rule is posited, which should legitimate the rule one derives from them.

Another view considers it the aim of legal scholarship to explain rule-determined behaviour,[23] in interaction with other actors.[24] However, this is rather the aim of legal sociology than of legal doctrine. Legal scholarship, in this approach, becomes a social technology.[25]

Explaining the whys and wherefores of legal concepts, rules, principles and constructions is indeed not an unimportant part of legal doctrinal research as it is necessary for interpreting them correctly. However, explanation is not the main content of research in legal doctrine, except maybe during some time following large-scale codifications. The hermeneutical and explanatory research activities are closely linked to each other, but explanation is at the service of interpretation, not the other way around. Hence, legal doctrine is not mainly an explanatory discipline.

[21] M Van Quickenborne, 'Rechtsstudie als wetenschap' in *Actori incumbit probatio* (Antwerp, Kluwer 1975) 223.

[22] A Peczenik, *Scientia Juris. Legal Doctrine as Knowledge of Law and as a Source of Law* in E Pattaro (ed), *A Treatise of Legal Philosophy and General Jurisprudence* (Dordrecht, Springer 2005) vol 4, 4.

[23] H Albert, *Traktat über rationale Praxis* (Tübingen, JCB Mohr, 1978) 79–80: 'Wer den *Sinn* des Gesetzes bestimmen möchte, muss sich *eo ipso* Gedanken über die mit ihm intendierten *Wirkungen* und die damit angestrebte *Ordnung* machen. Solche Überlegungen machen die Verwendung *nomologischen Wissens* erforderlich, denn die *Steuerungswirkungen* von Gesetzen und Auslegungen sind *nicht* einfach *logische Konsequenzen* der betreffenden Aussagen.'

[24] MA Loth, 'Regel-geleid gedrag; over het object van empirische rechtswetenschap' (1983) 3 *Rechtsfilosofie & Rechtstheorie. Netherlands Journal for Legal Philosophy and Jurisprudence* 221.

[25] ibid 215.

E. An Axiomatic Discipline

Legal doctrine has sometimes been seen in continental Europe as an *axiomatic discipline*, like mathematics. Gustav Hugo, one of the founders of the Historical School in nineteenth century Germany, worded it as follows:

> Jurisprudenz und Mathematik grenzen auch näher an einander als mancher, der weder Jurist noch Mathematiker ist, weiss. . . . Auch die Jurisprudenz beruht in der Theorie auf einer Art von Construction und auch die Jurisprudenz ist in der Theorie eine exacte Wissenschaft.[26]

For Hugo, legal doctrine was an applied exact science, with also some empirical dimension. This approach to legal doctrine culminated in Germany at the end of the nineteenth century in the '*Begriffsjurisprudenz*' movement, which saw law as an algebra of legal concepts.

In the second half of the twentieth century, this approach to legal doctrine had a revival, which, however, did not last long. Some optimists hoped to encompass the whole of law in a formal logic and/or in computer programmes which, up to now, did not prove to be very successful.

F. A Logical Discipline

The view on legal doctrine as a *logical discipline* is a somewhat more moderate version of the pure axiomatic model:

> In der *Rechtsordnung* spielt das Logische nur eine sekundäre Rolle neben den alogischen Momenten. In der *Rechtsanwendung* spielen diese alogische Momente die sekundäre Rolle neben dem Logischen. In der *Rechtswissenschaft* endlich herrschen ausschliesslich die logische Funktionen: die Jurisprudenz dient mit logischen Mitteln dem logischen Zwecke der Systematisierung. [27]

So, even if law is not always logical in practice, for Julius Moór legal doctrine should be exclusively logical in view of systematising the law. Most scholars with other views on legal doctrine as a discipline have also emphasised the importance of logic in legal reasoning and in the scientific structuring of legal data. However, (the contents of) legal data are too indefinite to enable us to conceive legal doctrine as a purely logical discipline. Too much depends on the interpretation of legal principles, rules and concepts. Hence, even if logic is quite important in law and in legal research, interpretation is even more important. Anyway, logical coherence is a characteristic of scientific research in any discipline and not just typical for the legal sciences.

[26] G Hugo, *Lehrbuch eines civilistischen Cursus*, *Philosophische Encyclopedie für Juristen* (Berlin, 1799) vol 5, 10 §8.

[27] J Moór, 'Das Logische im Recht' (1927–28) *Revue Internationale de la Théorie du Droit / Internationale Zeitschrift für Theorie des Rechts,* 157–203 at 203. See also, be it less explicitly: R Kranenburg, *De Grondslagen der Rechtswetenschap. Juridische kennisleer en methodologie*, 5th edn (Haarlem, HD Tjeenk Willink, 1955) 30f.

G. A Normative Discipline

Legal doctrine is often called a *normative discipline*, which is not only describing and systematising norms (a discipline *about* norms), but also and to a large extent, a discipline which takes normative positions and makes choices among values and interests. This, indeed, is inevitable when, for example, some interpretation is preferred over alternative ones. Ultimately this choice will be determined by giving more weight to some values or interests than to competing ones. For some, legal doctrine is primarily looking for 'better law'.[28] This refers to elements which are external to law and to legal doctrine: philosophy, morals, history, sociology, economy and politics. Hence, looking for 'better law' may require empirical research, especially when 'better' means better from an economic or sociological point of view, or when reference is made to the 'prevailing moral (or political) convictions'.

This normative approach bears the risk of subjectivity, when a legal scholar is trying to present very personal views and convictions as 'the law'. It should be obvious that such a normative approach can only have a scientific status if it looks for an intersubjective consensus, for the prevailing opinion among legal scholars or among lawyers in general (especially judges and academics who made their views public through judicial decisions or other types of publications). It can be checked empirically as to whether an opinion is (largely) prevailing among those professionals or in society.

For Hans Kelsen, legal doctrine as a normative discipline is a matter of internal logic, not linked to some external criterion for making the law 'better'. He considered the distinction between 'descriptive disciplines' and 'normative disciplines' to be the basic division among sciences. Descriptive disciplines, such as the exact sciences, look for causal relations, whereas normative sciences, such as legal doctrine and ethics, use 'imputation' as a method.[29] 'Imputation' means determining the existence of some obligation (in its broadest sense) and/or a breach of it. This obligation will be derived, through an internal legal logic, from elements of the legal system. Kelsen strongly underestimated the importance of interpretation in law and the influence of non-legal elements through such interpretation. The main reason for this unrealistic view is Kelsen's theory of 'meaning', which he limits to the psychological sender-meaning, that is to the intention of those having issued a rule or a command.[30] By this assumption

[28] JAI Wendt, *De methode der rechtswetenschap vanuit kritisch-rationeel perspectief* (Zutphen, Paris, 2008) 141.

[29] H Kelsen, *General Theory of Norms* (Oxford, Clarendon Press, 1991) 22–25.

[30] 'Someone who issues a command *intends* something. He expects the other person to *understand* this something. By his command he intends that the other person is to behave in a certain way. That is the *meaning* of his act or will.' (ibid 32). Hence, according to Kelsen, 'it is more correct to say "a norm *is* a meaning" than "a norm *has* a meaning"' (ibid 26). This view is completely untenable. See my comments on this issue in M Van Hoecke, *Law as Communication* (Oxford, Hart Publishing, 2002) 128–30.

he can minimise the hermeneutic element in legal research and emphasise the normative characteristic of law.

III. WHICH METHODOLOGY FOR LEGAL RESEARCH?

It will be obvious that varying conceptions of legal doctrine imply quite different methodologies. If we accept that legal doctrine is mainly a hermeneutical discipline, which fits best in any case with the way legal doctrine has been conceived most of the time in most legal systems, we may describe its methodology as follows.

Legal scholars collect empirical data (statutes, cases, etc), word hypotheses on their meaning and scope, which they test, using the classic canons of interpretation. In a next stage, they build theories (eg the direct binding force of European Union (EU) law), which they test and from which they derive new hypotheses (eg on the validity, meaning or scope of a domestic rule which conflicts with EU law). Described in this way, doctrinal legal scholarship fits perfectly with the methodology of other disciplines: 'Scientific inquiry, seen in a very broad perspective, may be said to present two main aspects. One is the ascertaining and discovery of facts, the other the construction of hypotheses and theories.'[31]

A. Empirical Data Used in Legal Doctrine

In a first stage, legal doctrine collects all relevant material, notably:

(a) normative sources, such as statutory texts, treaties, general principles of law, customary law, binding precedents, and the like; and
(b) authoritative sources, such as case law, if they are not binding precedents, and scholarly legal writings.

The last category has a somewhat ambivalent position, as it is not external to legal doctrine, even if it will generally be external to the individual researcher. Here, we are faced with a mixture of scholarly legal writings as an authoritative source of law, on the one hand, and legal doctrine as the scientific community which discusses, accepts or rejects positions taken by colleagues and the theories they propose on the other.

In general, the discussion about legal sources will be one of *relevance*. If, for instance, a statutory text has been declared unconstitutional by the Constitutional Court, it will become an irrelevant part of the empirical data on which the legal researcher will build his or her hypotheses or theories. A binding precedent will be more relevant than a non binding one. A (non binding) decision of the Supreme Court will be more relevant than one taken by a lower court.

[31] GH von Wright, *Explanation and Understanding* (Ithaca, Cornell University Press, 1971) 1.

A publication by a law professor who is generally considered to be an authority in his or her field will have more weight than the first publication of a young academic. A well underpinned argumentation will be more relevant than just positing the same position, without further argument.

For normative sources, the relevance will be a matter of *validity* in the first instance: is this rule currently part of our legal system or not? This is a binary choice between validity and non-validity.

At the level of *interpretation*, however, it may become a matter of degree: when weighing and balancing the normative force of equally valid rules and principles, one of them may be considered to be more relevant than the other one, even if this higher relevance may be limited to the very case in question.

The relevance of authoritative sources will always be a matter of degree. Even the most famous professor may have a weak moment and the very first publication of a promising young scholar may be brilliant. Sometimes decisions of a supreme court are widely rejected by lower judges and by legal doctrine and, hence, lose a large part of their relevance. Decisions taken, for instance by the American Supreme Court, with a majority of five to four, will be less authoritative than unanimous decisions.

Anyway, all those sources have at least some relevance and the researcher will have to take them into account in her or his research.

A delicate point is the representativeness of the published case law. Actual publication of judicial decisions represents only small percentage of all decisions made (in Belgium one or two per cent). However, a higher percentage has been made accessible through the internet. It is well known that anecdotic motives sometimes play a stronger role than scientific ones when deciding whether to publish.[32] Controversial decisions will be published more easily than those which simply confirm earlier ones. Even the supreme courts' decisions are not all published. Adequate electronic storage of all judicial decisions and appropriate computer programmes and databases should allow a systematic study of all judicial decisions taken in some field or on some legal problem, including statistical analyses. However, up to now this is still not operational in many legal systems.

B. Wording and Checking Research Hypotheses

Every type of scientific research starts from a problem, from some question or series of questions. Sometimes a simple observation of facts leads rather spontaneously to a research question. For example, when there are two conflicting views within case law and legal doctrine, or between higher and lower judges, or between case law on the one hand and legal doctrine on the other, the researcher

[32] For example, a claim to obtaining the right to visit one's dog after divorce, when the animal stayed with the ex-partner.

will automatically look for an explanation for these diverging positions and look for arguments which would allow a decisive choice in favour of one of them or that would rather lead to a more convincing third alternative.

In other cases, the research question will be worded on the basis of prior observation in another context, and the empirical data will consciously be selected in view of the research question. This is not specific to law, but common to all disciplines: 'It is therefore clear that facts must be selected on the basis of assumptions as to which ones are *relevant* for resolving a given problem.'[33]

If one wants, for instance, to inquire to what extent some legal fields in private law, in some continental European legal system, could be rearranged, inspired by the English concept of 'trust', one will probably collect data around adoption and bankruptcy law but not from all areas of private law.

Anyway, scientific 'observation' is not a neutral perception of facts that would present themselves spontaneously. We are always faced with a specific reading of selected facts, steered by the research question. The reading of a purely descriptive overview of case law in a certain field and period may lead to the formulation of a legal problem, in view of which additional material will be collected.

As in all disciplines, the observation of empirical data is theory-guided. A problem is formulated within some theoretical framework. Apart from the aim of solving that problem, the outcome of the research will also confirm, refine or falsify those theoretical assumptions. The selection of relevant legal data will be based on a theory of legal sources: which legal sources are relevant in this legal system today, and what are their hierarchical relations? This may, of course, lead to a research question such as, for example: does European law have priority over the national constitutional order?

Neither the selection of empirical data nor their descriptions are neutral activities. When the American Law Institute started, in 1923, the 'Restatements' of the American Common Law, it presented it as a neutral, apolitical activity. The Institute was strongly criticised because it implicitly started from the false assumptions 'that it is possible to describe the law as it is in neutral terms' (pointing to the intertwinement of description and interpretation), 'that it is possible to make meaningful statements of legal rules without references to their rationales' (the aim of the law as interpretation context), or 'without reference to the practical context of their operation' (concrete application as interpretation context).[34]

Indeed, when wording legal rules, as they appear from the valid legal sources, the texts in question are *interpreted*. Often, there is no interpretation problem, as there is an implicit consensus on the precise meaning of the text, but in other cases we are faced with diverging readings of the same text, or the researcher has to determine the exact meaning and scope of a newly enacted statute or a recent

[33] E Nagel, 'The Nature and Aim of Science' in S Morgenbesser (ed), *Philosophy of Science Today* (New York, Basic Books, 1967) 3–13, 10.

[34] See on this: W Twining, *Blackstone's Tower: The English Law School* (London, Sweet & Maxwell, 1994) 134.

court decision. In these cases it appears clear that the legal scholar is *wording a hypothesis as to the validity and the precise meaning of a legally relevant text* (relevant within the given legal system at the time of the research).[35] In other words, interpretation is at the core of the whole activity of legal scholarship. Research questions in legal doctrine are, indeed, very often linked to the precise meaning and scope of legal concepts, legal rules, legal principles and/or legal constructions.

Every description of the law includes a whole series of interpretations and offers, in this way, just as many hypotheses about the meaning and scope of legal concepts, rules, principles and the like, that may be confirmed or falsified through scientific research. Explicit interpretation questions are not a marginal phenomenon in law. They arise when texts are unclear, but also when the result of a literal interpretation leads to unreasonable, inequitable or even absurd results. The confrontation of this result with the meaning given to the text, in a way, 'falsifies' the implicit, prima facie meaning of the text. This will then lead to the wording of a new hypothesis about the meaning of a text, which will be checked with a more conscious, methodological interpretation by the researcher.

A hypothesis about the exact meaning of a legal concept, rule, principle and the like, does not only refer to finding out what their authors had in mind. The normative context today and the socially desirable result also co-determine that meaning. Hence, this meaning is evolving and may change in the course of the years, without any change in the texts. A unanimity today as to the meaning of a legal text does not prevent scholars in the future wording new hypotheses as to a slightly or even completely different meaning.

The wording of research questions is free. There are no rules which would limit them. Of course, they should make sense and fit with the paradigmatic theories that act as a framework for the legal doctrinal research in the legal system concerned (the theory of legal sources, for instance, or the theory about the acceptable interpretation methods), unless the researcher aims at questioning this paradigmatic framework as such.

C. Theory Building in Legal Doctrine

A scientific 'theory' is defined as 'a system of coherent, notably non contradictory assertions, views and concepts concerning some area of reality, which are worded in such a way that it is possible to deduct testable hypotheses from them.'[36]

[35] See, eg: A André, 'Was heisst rechtswissenschaftliche Forschung?' (1970) *Juristenzeitung* 396–401, 400; H Albert, *Traktat über rationale Praxis* (Tübingen, JCB Mohr, 1978) 80; A Aarnio, *Philosophical Perspectives in Jurisprudence*, Acta Philosophica Fennica no 36 (Helsinki, Academic Bookstore, 1983) 163–84 (On the Truth and Validity of Interpretative Statements in Legal Dogmatics). Compare: 'Seen in the perspective of time all statements of the law, whether by the legislature, or by judges, or by jurists, are no more than working hypotheses.' Lord Goff of Chieveley, 'Judge, Jurist and Legislature' (1987) 2 *Denning Law Journal* 79–95, 80.

[36] AD De Groot, *Methodologie*, 3rd edn (The Hague, Mouton, 1966) 42.

In legal doctrine this would mean:

> 'A theory in law is a system of coherent, non contradictory assertions, views and concepts concerning some legal system or part of it, which are worded in such a way that it is possible to deduct from them testable hypotheses about the existence (validity) and interpretation of legal concepts, rules or principles.'

For instance, from the theory of direct effect of EU law one may deduct hypotheses about the (in)validity and (re)interpretation of legislative rules in one's own domestic legal system within the EU.

Such theories are, in their turn, based on generally accepted assumptions that create the paradigmatic framework of legal doctrine. These shared assumptions include: a shared understanding of what 'law' is and of its role in society; a theory of valid legal sources and their hierarchy; a methodology of law; an argumentation theory; a legitimation theory and a shared world view (common basic values and norms). Within legal doctrine these are 'meta theories', for which the definition of 'theory' given above is also valid. Such paradigmatic assumptions are deeply rooted in tradition, but may evolve, and sometimes also revolve. Examples are, within the theory of legal sources: the acceptance of the priority of European Union law over domestic law, or the acceptance of 'unwritten general principles of law' as a valid source of law; within the methodology of law: the acceptance of a more active role for the judge in interpreting the law; as to the shared world view: changed views on marriage, family, homosexuality, abortion, euthanasia. In each period, the paradigmatic assumptions of that time are to constitute the framework within which more concrete theories about law may be elaborated, tested, and discussed within the scientific community of legal scholars.

The strength of scientific theories lies in their capacity to cover a domain as large as possible, with a simple framework of concepts, rules and principles and with a capacity to generate a large amount of testable hypotheses. For explanatory disciplines, the explanatory capacity of a theory is another element for judging its strength.

In a first stage, concepts are construed for ordering reality. This implies abstraction, logical coherence and, as far as possible, simplicity. One may, for instance, assume that in primitive societies animals were originally classified according to their size and colour and/or according to their capacity to fly, to swim or to run. Later on, however, when more advanced theoretical knowledge became available, the classification was based on other divisions: mammals/non mammals or similarities and differences as to their DNA structure. In the same way, the development of law and legal doctrine shows an increasing level of abstraction. As, in more primitive societies, rules developed on the basis of concrete cases, there were originally different rules, for instance, for the theft of a horse, a cow or a sheep. In a later stage, a more abstract concept of (theft of) 'cattle' was introduced. In a next stage of abstraction this became (theft of) 'movables'. Concepts like 'cow', 'sheep' or 'horse' directly refer to visible objects