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Legal Scholarship in the Built Environment: Epistemological Considerations and Cultural Challenges

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This paper discusses the role of legal scholarship (academic legal research) within the built environment. It examines its epistemological, methodological and cultural nature, as well as that of the prevailing paradigm within the built environment. It concludes that the normative character of legal scholarship creates communication difficulties with the wider research community and suggests that this may explain the low profile of built environment legal scholarship to date. It proposes practical solutions to overcome the methodological communication gap and to integrate legal scholarship more fully into the built environment research culture.

Keywords: academic disciplines, built environment, culture, epistemology, law, methodology, research, scholarship.

INTRODUCTION

Law teaching has always played a significant role in the vocational education of built environment professionals. Most professionally accredited degree programmes in these areas include undergraduate law modules and postgraduate programmes which address a range of introductory and specialist legal subject areas. These are managed and delivered by specialist academics located either within their universities' law or built environment schools. Their particular expertise lies in the application of the law within the context of the built environment and they therefore operate at the interface of the two disciplinary communities.

The interdisciplinary nature of this field (which we will describe as "built environment law") is recognised as a particular strength within a teaching context but its practitioners have historically made little impact within the wider field of built environment research. Academic research in the built environment has developed rapidly in recent years and there are now thriving international built environment research communities within the other specialist fields of management, economics and, to a lesser extent, technology.

Unfortunately these developments have not been matched by equivalent moves within built environment law. Despite their interdisciplinary focus, specialists in the law field are rarely to be found at international built environment conferences. The output of published academic legal research (generally described as legal scholarship) also remains low in comparison to that of the other specialist fields.

This paper suggests that the low profile for legal scholarship within the built environment may be due to the epistemological character of the law subject discipline, and to related methodological and cultural differences between it and the mainstream built environment subject areas. It begins its analysis with an examination of the nature of legal scholarship before considering some of the epistemological, methodological

and cultural features which set it apart from other forms of built environment research. The paper concludes by suggesting some practical means by which the differences can be overcome in order to facilitate a more active engagement by legal specialists in the built environment research community.

NATURE OF LEGAL SCHOLARSHIP

THE ARTHURS MODEL

There is a dearth of theoretical literature on the nature of legal scholarship. This reflects the historic emphasis of the academic legal community which has traditionally been characterised by a lack of intellectualism (Cownie, 2004, p. 69) and what has been described as a "trade school mentality" (Kennedy, 1982, p. 591) to the study of law. Nevertheless, Arthurs (1983, pp. 63 - 71) proposed a useful taxonomy of legal research styles in his report on legal education and research in Canada.

This has informed the analysis in this paper and is represented as a matrix in Figure 1. It will be seen that the vertical axis represents a distinction between pure research which is undertaken for a predominantly academic constituency, and applied work which generally serves the professional needs of practitioners and policy makers. However, the more interesting distinction is that between doctrinal and interdisciplinary research methodologies which is represented by the horizontal axis.
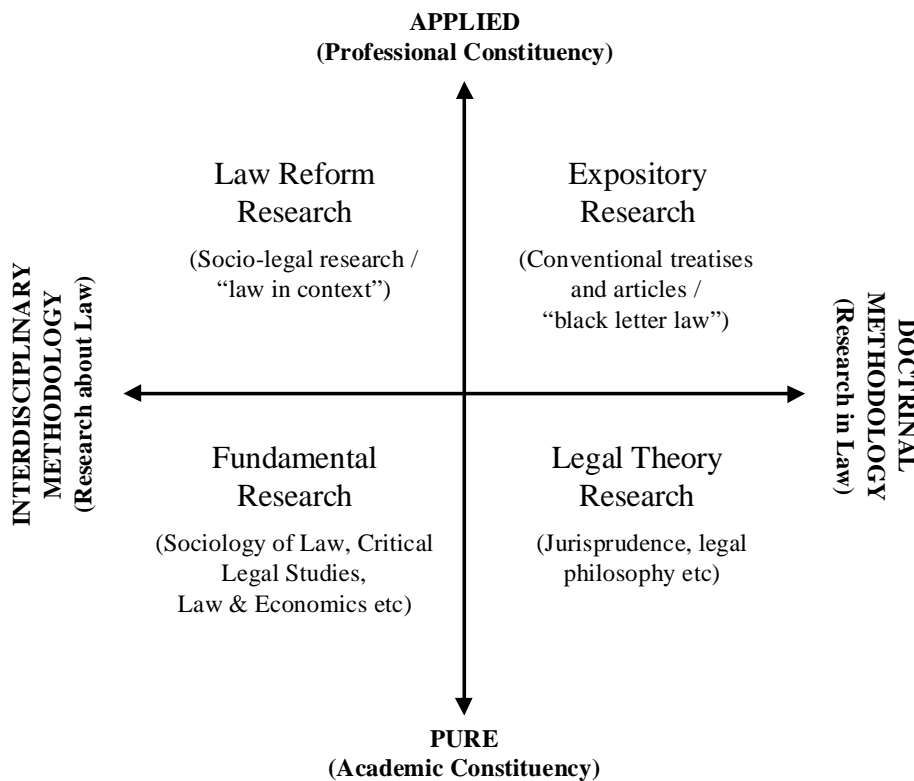
APPLIED
(Professional Constituency)

Law Reform Research	Expository Research
(Socio-legal research / "law in context")	(Conventional treatises and articles / "black letter law")

INTERDISCIPLINARY METHODOLOGY (Research about Law) ← → DOCTRINAL METHODOLOGY (Research in Law)

Fundamental Research	Legal Theory Research
(Sociology of Law, Critical Legal Studies, Law & Economics etc)	(Jurisprudence, legal philosophy etc)

PURE
(Academic Constituency)

Fig. 1: Legal Research Styles (after Arthurs).

DOCTRINAL LEGAL RESEARCH

Doctrinal research is concerned with the formulation of legal doctrines through the analysis of legal rules. Within the common law jurisdictions, legal rules are to be found within statutes and cases (the sources of law) but it is important to appreciate that they

cannot, in themselves, provide a complete statement of the law in any given situation. This can only be ascertained by applying the relevant legal rules to the particular facts of the situation under consideration.

Deciding on which rules to apply in a particular situation is made easier by the existence of legal doctrines (for example, the doctrine of consideration within the law of contract). These are systematic formulations of the law in particular contexts. They clarify ambiguities within rules, place them in a logical and coherent structure and describe their relationship to other rules.

NORMATIVE CHARACTER OF DOCTRINAL RESEARCH

Doctrinal legal research is concerned with the discovery and development of legal doctrines and its research questions take the form of asking "what is the law?" in particular contexts. At both an epistemological and methodological level, this differs from the questions asked by empirical investigations in most other areas of built environment research.

This is perhaps most obvious in a comparison with research in the natural sciences, which typically seeks to explain natural phenomena through studying the causal relationships between variables. Epistemologically, this is clearly very different from the interpretive, qualitative analysis required by doctrinal research. Although the interpretive nature of the process bears a superficial resemblance to the *verstehen* tradition of the social sciences (Schwandt, 2000), there are actually fundamental epistemological differences between doctrinal analysis and all styles of scientific research.

Scientific research, in both the natural and social sciences, relies on the collection of empirical data, either as a basis for its theories or as a means of testing them. In either case therefore, the validity of the research findings is determined by a process of empirical investigation. In contrast, the validity of doctrinal research findings is unaffected by the empirical world.

Legal rules are normative in character as they dictate how individuals ought to behave. They make no attempt either to explain, predict, or even to understand human behaviour. Their sole function is to prescribe it. In short, doctrinal research is not therefore research *about* law at all. In asking "what is the law?" it takes an internal, participant-orientated epistemological approach to its object of study (Hart, 1994) and, for this reason, is sometimes described as research *in* law (Arthurs, 1983).

The actual process of analysis by which doctrines are formulated owes more to the subjective, argument-based methodologies of the humanities than to the more detached, data-based analysis of the natural and social sciences. The normative character of the law means that the validity of doctrinal research must inevitably rest upon a consensus theory of truth, rather than on an appeal to an external reality.

The underlying moral or theoretical basis for the consensus is a matter of considerable philosophical debate and must remain beyond the scope of this paper. Nevertheless, for present purposes, this could probably best be summarised as being informed by prevailing policy demands but being driven by a search for internal coherence within the existing body of legal rules.

INTERDISCIPLINARY RESEARCH

In practice, even doctrinal analysis usually makes at least some reference to other matters as well as seeking answers that are consistent with the existing body of rules.

For example, an uncertain or ambiguous legal ruling can often be more easily interpreted when viewed in its proper historical or social context, or when the interpreter has an adequate understanding of the industry or technology to which it relates. As the researcher begins to take these extraneous matters into account the enquiry begins to move leftwards along the horizontal axis in Figure 1, in the direction of interdisciplinary research.

There comes a point, towards the left hand side of the matrix, when the epistemological nature of the research changes from that of internal enquiry into the meaning of the law, to that of external enquiry into the law as a social entity. This might involve, for example, an evaluation of the effectiveness of a particular piece of legislation in achieving particular social goals, or an examination of the extent to which it is being complied with.

In taking an external view of the law, each of these examples could be described as research *about* law rather than research *in* law. As one continues to move leftwards along the axis one encounters a greater willingness to embrace the epistemologies and methodologies of the social sciences.

PURE AND APPLIED LEGAL RESEARCH

Finally, let us return to the distinction between pure and applied legal research represented by the vertical axis in Figure 1.

Within the context of interdisciplinary legal research the distinction, in one sense, simply represents that between pure academic knowledge about the operation of the law, and knowledge of the same kind which has been produced with a particular purpose in mind. That purpose will generally be to facilitate a future change, either in the law itself, or in the manner of its administration. Arthurs (1983) therefore describes the latter category of research as law reform research and distinguishes this from the production of pure knowledge, which he refers to as fundamental research.

In fact, there is also a strong correlation between fundamental research and the willingness (indeed, the motivation) of researchers to question not simply the operation of law, but its underlying philosophical, moral, economic and political assumptions as well. Research of this nature takes many forms but would include the sociology of law as well as the Critical Legal Studies (CLS) and Law and Economics movements. Although there is no rigid division between the two categories, these forms of fundamental research can usefully be distinguished from socio-legal research (sometimes described as law in context) which is more accurately described as law reform research within Arthurs' taxonomy.

The applied form of doctrinal research is concerned with the systematic presentation and explanation of particular legal doctrines and is therefore referred to as the expository tradition in legal research. This form of scholarship has always been the dominant form of academic legal research (Card, 2002) and has an important role to play in the development of legal doctrines through the publication of conventional legal treatises and articles.

When doctrinal research is undertaken in its pure form it is variously described as legal theory, jurisprudence, or legal philosophy. Although aspects of the present paper draw on conceptual research within this tradition, the other three categories of legal research will undoubtedly be of greater practical relevance in the context of research in the built environment.

EPISTEMOLOGICAL ASPECTS

LAW AS A HUMANITIES DISCIPLINE

The dominance of the expository doctrinal tradition in legal scholarship has already been noted. However, it is important to understand that this is not simply a single, isolated category of scholarship. Some element of doctrinal analysis will be found in all but the most radical forms of legal research.

For example, although law reform research appears as a separate category within Figure 1, its practitioners emphasise the importance of traditional legal analysis within their work (Cownie, 2004, p. 55). Indeed, even within socio-legal studies, it was once suggested that social scientists are regarded as "intellectual sub-contractors" (Campbell and Wiles, 1976) who should be kept "on tap, not on top" (Willcock, 1974). Despite the growth of socio-legal research in recent years, concerns remain as to the extent to which lawyers have fully engaged with methodologies from beyond the familiar doctrinal stable (Witherspoon, 2002, p.1; Partington, 2002, p. 5; Salter, 2005, p. 6). Doctrinal research therefore remains the defining characteristic of the law as an academic discipline.

For the reasons already discussed, the normative character of doctrinal analysis places academic law at the 'soft' (arts and humanities) end of the familiar disciplinary spectrum. Using the well-known Biglan (1973) disciplinary model (see Figure 2), it can be seen that this makes the subject untypical of most other specialisms within the built environment research community. Although design falls to the right of law on the spectrum, perhaps significantly, this is also an area which has failed to develop a research presence within the field.
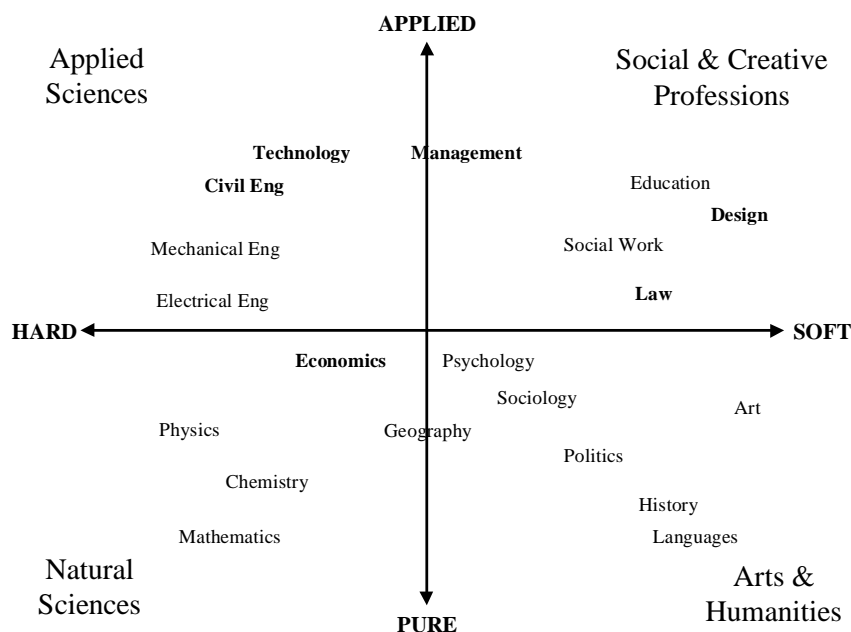
Fig. 2: Disciplinary Model (after Biglan).

CONTRASTS WITH OTHER BUILT ENVIRONMENT DISCIPLINES

The technology and engineering specialisms, of course, fall within the natural sciences. However, the built environment field's more dominant specialisms of management and economics also operate within a scientific paradigm. Indeed the language of built environment research as a whole tends to be dominated by the rhetoric of the social sciences. This is characterised by a concern with the traditional social science methodologies and, in particular, with an emphasis on empirical investigation (see, for example, Fellows and Liu, 2002) at the expense of the development of theoretical perspectives by individual researchers (Betts and Lansley, 1993; Loosemore, 1997; Brandon 2002).

The epistemological differences between (humanities-based) academic law and the majority of other (science-based) disciplines within built environment research are therefore significant. These reflect fundamental differences in attitudes to knowledge, and in the cognitive nature of the knowledge being studied in the different fields.

Becher (1987) has described the humanities as being concerned with the organic development of knowledge through an ongoing process of reiterative enquiry which addresses multifaceted problems in order to develop a holistic understanding of their complexity. This might be seen as a fair representation of the expository tradition in legal scholarship. By way of contrast, he describes knowledge production in the sciences in terms of the cumulative and piecemeal accumulation of individual segments of knowledge which, over time, contribute to a comprehensive explanation of particular phenomena.

METHODOLOGICAL AND CULTURAL ASPECTS

THE METHODOLOGICAL COMMUNICATION GAP

The underlying epistemological differences between legal scholarship and most other built environment research styles also generate methodological and cultural differences between the two. These produce expectations regarding the external appearance of academic research within the field which can often be quite alien to legal scholars. These may relate to expectations about the actual nature of research outputs, about the process which is undertaken in generating the research, or about the more general behavioural characteristics of researchers within the field.

Most fundamentally, the academic merits of doctrinal work can often be something of a mystery to those who have not been inculcated into the thought conventions of legal analysis, typically through a prolonged period of legal education. As a consequence, peer review of legal work by non-legal specialists within the built environment field can often lead to difficulties. The legal scholar's work can all too easily be dismissed as lacking a methodology, as being based only on opinion, or even as being "not research" by peers who have (typically) served their own apprenticeships within a social science research community.

Becher's (1981) account of how academic law is regarded by the rest of the academic community provides an indication of the communication gap which exists in this context. Academic lawyers were described by their colleagues as: "not really academic….arcane, distant and alien: an appendage to the academic world…vociferous, untrustworthy, immoral, narrow and arrogant". Their work was seen as "….unexciting, uncreative, and comprising a series of intellectual puzzles scattered among large areas of description."

URBAN AND RURAL RESEARCH STYLES

In their seminal work, *Academic Tribes and Territories*, Becher & Trowler (2001) have also demonstrated how individual academic communities (tribes) develop cultural norms which are closely associated with the particular knowledge areas (territories) which they inhabit. In particular, they demonstrate a close correlation between Biglan's hard / soft continuum of knowledge types and a corresponding continuum between urban and rural research styles. Scientific research culture (including the prevailing culture within the built environment) conforms to an urban research pattern, whilst the humanities (including law) typically exhibit the characteristics of a rural research community.

The concept of urban and rural styles reflects the different population densities (the "people to problem" ratio) of researchers in particular fields. Urban (predominantly scientific) research communities are characterised by a small number of research issues at any one time, all being pursued by a substantial number of researchers. In rural (predominantly humanities-based) communities, researchers have a virtually unlimited number of research areas to choose from. Hence a profusion of individual research specialisms tends to develop with small numbers of researchers developing long-term expertise in each of them. This latter model is, of course, characteristic of the legal specialist within a particular legal subject area.

CULTURAL DISTINCTIONS

The different methodological approaches within scientific and humanities-based subjects, and the corresponding urban and rural research styles produce a large range of further cultural phenomena which are explored in detail by Becher and Trowler (2001).

They find, for example, that urban research communities focus on narrower and more short-term research topics, are more competitive and are more influenced by fashions and the availability of external funding than their rural counterparts. They also describe a greater tendency for urban areas to be dominated by charismatic research leaders (the so-called 'research stars') than urban areas. Urban research is faster moving and more gregarious than that within rural environments and is therefore characterised by more networks, a higher level of conference attendance and an increased incidence of team working than in rural settings.

The different patterns of working are reflected in publication patterns and styles. Rural communities produce large numbers of short articles, often by multiple authors, whilst the outputs from rural communities are likely to be more substantial, less frequent, and authored by a single researcher.

CONCLUSIONS AND RECOMMENDATIONS

The paper has shown that the normative process of doctrinal analysis is the defining characteristic of most legal scholarship. It has argued that this places it within the humanities tradition with corresponding methodologies and cultural norms. As the built environment research community operates within a scientific paradigm, it embraces different methodologies and cultural norms than those traditionally associated with legal scholarship.

The paper has argued that the resulting communication difficulties and the consequent lack of understanding of legal scholarship may help to explain why it has so far failed to make a significant impact within the wider built environment research community. The proposed solutions are practical ones. They require an understanding, by all parties,

that the built environment is an interdisciplinary field which draws on a wide range of epistemological, methodological and cultural academic traditions (Chynoweth, 2006).

This inevitably calls for all built environment researchers to develop at least an awareness of the practices employed by disciplines within the field other than their own. It also demands a willingness to articulate their own methodological practices more fully within their own work so that these can be more fully understood by those from different disciplinary traditions. In the context of legal scholarship this means that some explanation should always be provided about the nature and purpose of doctrinal analysis if this is being employed in a particular research publication.

The methodological communication gap can be narrowed but it can never be completely closed. Wherever possible it must therefore always be preferable for legal scholarship to be peer reviewed by others with relevant subject expertise. This can only occur if the built environment legal community is more research active, more coherent and more willing to develop its own distinctive identity within built environment research than has hitherto been the case. By coming forward and engaging in this way, legal specialists will be able to influence decisions and norms within the wider research community.

Many of the cultural divisions are easily addressed. Although Becher and Trowler (2001) have shown that academic culture is related to disciplinary epistemology, it is not entirely dependent on it. To a great extent legal scholarship can therefore increase its visibility and influence within the wider community by simply adopting more of its established cultural norms. This might include more active engagement with research networks, an increased level of attendance at conferences and a greater willingness to collaborate with other researchers, whether from the legal specialism or from one of the related disciplines. In short, if legal scholars wish to be taken more seriously within the built environment research community, they have to become more gregarious.

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