

Legal research in the built environment: a methodological framework

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Abstract

The methodological basis of legal research has traditionally not been explained by its practitioners and this has led to misunderstandings between researchers in interdisciplinary fields, including the built environment. The paper therefore develops a methodological framework as a mechanism for communicating the implicit, often subconscious, methodologies employed by legal scholars to other researchers within the built environment. It distinguishes legal research from scientific research and defines it as a normative process which is undertaken within the humanities research tradition. The approaches adopted by researchers are explained primarily in terms of deductive, analogical and inductive reasoning although it is noted that the term “methodology” is more suited to research in the sciences than in the humanities.

Keywords: Disciplines, Epistemology, Jurisprudence, Knowledge, Law, Methodology, Research, Theory.

1. Introduction

Legal research is a comparatively recent phenomenon within the built environment research community. Its academic methods have traditionally been regarded with suspicion by other built environment researchers who have struggled to recognise its outputs as credible research contributions [1]. In particular, legal researchers have arguably been insufficiently reflective as to the methodologies employed in their work and, as a consequence, have found difficulty in explaining these to researchers from other disciplines.

The underlying reasons for this phenomenon are to be found in the traditional approach to legal education which conditions students to “think like a lawyer” [2] without providing any theoretical grounding in the methods actually being employed. As a consequence legal researchers have always struggled to define their work in terms that their academic peers in other disciplines can understand [3].

The present paper therefore reflects on the techniques actually employed by legal researchers at a subconscious level and attempts to make these explicit. It presents these in the form of a methodological framework for possible adoption by the built environment legal community as a mechanism for more effectively describing its work to researchers in other disciplines within the field

2. Epistemological considerations

2.1 The nature of legal scholarship

Before considering the methodologies employed by legal researchers (or legal scholars, as they are more usually described) it is first necessary to understand the epistemological nature of the process being undertaken by them, and to appreciate how this differs from other research in the built environment.

There is a dearth of theoretical literature on the nature of legal scholarship and a consequent lack of awareness about what legal scholars actually do. Nevertheless, Arthurs proposed a useful taxonomy of legal research styles in his report on legal education and research in Canada [4]. This has informed the analysis in this paper and is represented as a matrix in Figure 1.

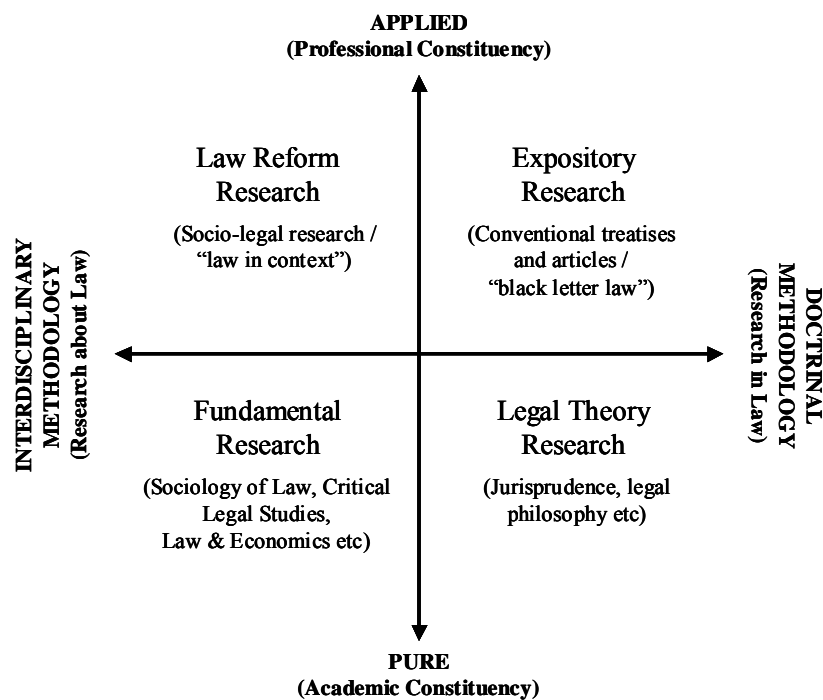


Figure 1: Legal Research Styles (after Arthurs 1983)

It will be seen that the vertical axis of the matrix represents the familiar 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. This has been explored in some detail elsewhere [5]. In the present context, the more interesting distinction is that between doctrinal and interdisciplinary research which is represented by the horizontal axis and the present paper considers only this aspect of Arthurs' model.

2.2 The meaning of ‘doctrinal’ research

Doctrinal research (on the right in Figure 1) 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.

As will be discussed below, 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. The methods of doctrinal research are characterised by the study of legal texts and, for this reason, it is often described colloquially as “black-letter law”.

2.3 Contrast with scientific research

Doctrinal research is therefore concerned with the discovery and development of legal doctrines for publication in textbooks or journal articles and its research questions take the form of asking “what is the law?” in particular contexts. This form of scholarship has always been the dominant form of academic legal research [6].

At an epistemological level it differs from the questions asked by empirical investigators in most other areas of built environment 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 [7]. 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 [8] and, for this reason, is sometimes described as research *in* law [4].

As will be described below, 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 also means that the validity of doctrinal research must inevitably rest upon developing a consensus within the scholastic community, rather than on an appeal to any external reality.

2.4 External factors and interdisciplinary research

In practice, even doctrinal analysis usually makes at least some reference to other, external, factors 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.

3. Methodological framework

3.1 Dominance of the doctrinal tradition

The dominance of the doctrinal tradition in legal scholarship has already been noted [6]. 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 and it was once suggested within a socio-legal studies context, that social scientists should be regarded as “intellectual sub-contractors” who should be kept “on tap, not on top” [9]. Doctrinal analysis therefore remains the defining characteristics of academic legal research and the account which follows represents an attempt to describe the nature of the methodologies employed within it.

3.2 Role of deductive reasoning

The starting point is to recognise that there is no fundamental distinction between the process of academic doctrinal analysis and the legal analysis undertaken by practising lawyers or judges. As already described, the aim, in each case, is to answer the question “what is the law?” in a particular situation. In the case of practising lawyers or judges this will be a real and well-defined situation requiring an immediate answer to the question. For the legal scholar, the situation, or more likely the class of situations being considered, will be hypothetical and the purpose is to undertake a more in depth analysis which is capable of informing the deliberations of practitioners and judges in future cases.

In either case, the initial process of applying a rule of law to a factual situation can be understood as an exercise in deductive logic. Most readers will need no explanation of this form of reasoning which, of course, also forms the basis of the scientific method. However, in a legal

context, the familiar syllogism, comprising major premise, minor premise and conclusion, takes the following form:

- Major premise – identifies a general rule of law which requires a specified legal outcome when particular facts are present in a situation.
- Minor premise – describes a particular factual situation.
- Conclusion – states whether the rule in the major premise therefore applies to the facts in the minor premise, and whether the specified legal outcome therefore takes effect.

By way of example, in English law, section 108 of the Housing Grants, Construction and Regeneration Act 1996 contains a general rule of law (the major premise) that a party to a construction contract is entitled to refer a dispute under the contract to adjudication. Therefore, where a particular dispute arises in a particular construction contract between a particular employer and a particular contractor (the minor premise) we can conclude, as a matter of deductive logic, that either party is entitled to refer that dispute to adjudication (conclusion).

3.3 Dealing with the hard cases

This, of course, is an idealised account of the process of legal reasoning. If the process were as simple, and as mechanistic as this, society would have no need for lawyers, and still less for legal scholarship. In reality, in almost all cases, the deductive model will fail, without further analysis, to produce a definitive answer to the question of what the law is in a given situation.

Legal rules, of necessity, have to be expressed in general terms and were famously described by Hart [8] as having an “open texture”, and therefore capable of interpretation in more than one sense. In the context of the above example, there has, for instance, been considerable judicial and academic discussion over the meaning of “dispute” in relation to construction adjudication. There will, therefore, often be an element of doubt as to whether a rule applies to a particular factual situation and this characteristic will, of course, be manipulated by the opposing parties and their lawyers in an attempt to achieve the outcome that is most favourable to their interests.

Although Hart [8] concluded that judges exercise discretion in these so-called “hard cases”, their decisions are actually based on recognised patterns of reasoning employed within the legal community which are used to supplement the deductive model described above. Lawyers and legal scholars are therefore often able to predict the outcomes of future cases by employing, however subconsciously, the same patterns of reasoning that will eventually be used by the judiciary.

3.4 Role of analogical reasoning

The most widely used technique is undoubtedly the process of analogical reasoning. In contrast to deductive reasoning, which entails reasoning from a general rule to a specific case, analogy involves a process of reasoning from one specific case to another specific case. In those many situations where it is unclear whether a particular factual situation falls within the ambit of a

rule, it can often be helpful to examine apparently similar cases which have previously come before the courts. If, upon examination, the facts of these cases are found to be sufficiently similar to the facts of the subject case then it can be concluded that the facts of the subject case should be treated by the courts in the same way. Most readers will be familiar with this process in the context of the operation of the common law doctrine of precedent.

The decision as to whether a case is sufficiently similar to another is ultimately a subjective one as no two cases are ever completely identical. Judges therefore have considerable scope to distinguish the facts of a subject case from those in an established precedent if they choose not to follow it. Nevertheless, this scope is not unlimited and Bell [10] has highlighted how judicial decision making in these circumstances is constrained by social conventions within the legal community which he describes as the “rules of legal discourse”. He describes how these “provide a framework lying outside the power of the reasoner within which he has to operate if his arguments are to count as legal justifications”. Judges are subject to these rules but so, of course, are lawyers and legal scholars who all participate in the same legal discourse, and who all desire their arguments to be taken seriously.

3.5 Role of inductive reasoning

A third technique involves the use of inductive reasoning which can be described as the reasoning from specific cases to a general rule. This can be of particular assistance when a particular factual situation does not appear to be addressed directly by a legal rule at all and it therefore becomes necessary to “fill the gap” in the law. As with inductive reasoning in the sciences a general proposition can sometimes be derived from a number of specific instances.

In the case of legal reasoning this involves the recognition of a new general rule which emerges from a number of earlier authorities which are then regarded simply as particular instances of the new rule. *Donoghue v Stevenson* [1932] AC 562 is the best known example of this technique. Particular instances of negligence had been recognised by the courts for years before the famous snail in the ginger beer case came before the courts. However, it was not until Lord Atkin proposed his now well-known neighbour principle in this case that the tort of negligence was recognised as a more general rule, capable of being applied to novel fact situations which were not already described in the individual authorities then available. Once again, the capacity for developing new rules in this way will be regulated and limited by the recognised rules of legal discourse described above.

A variety of other techniques is available which, like those already described, also allow the available body of legal rules to be marshalled into coherent patterns (or “doctrines”) and applied to new factual situations in an apparently logical and consistent manner. Indeed most legal discourse revolves around the verbal manipulation of the available sources of law in the belief that the answer to most legal problems can be found in the underlying logic and structure of the rules if only this can be discovered [11]. This approach is usually described as legal formalism [2] and, despite numerous academic criticisms of its assumptions (for example, Fitzpatrick &

Hunt [12]), continues to represent the dominant paradigm within legal practice and within legal scholarship, at least in terms of external appearances.

3.6 Role of policy judgments

Nevertheless, there is now a widespread recognition that, in some cases, the law cannot be determined with certainty from an analysis of the rules alone. Although judges will justify their decisions by reference to the existing rules [13] there is a growing realisation that the rules (in the so-called “hard cases”) can sometimes be used to justify a number of possible, and opposing, legal outcomes. This is, once again, a function of the open texture of legal rules and, where this occurs, the law is said to be indeterminate [14].

If law is indeterminate, and some cases are decided according to a value judgment made by the judge on the day, there are of course implications for democracy, and for the rule of law. This has unsurprisingly generated criticisms of the political role of the judiciary (for example, Griffith [15]) which remains beyond the scope of this chapter. However, the judges’ political role is usually described more charitably in terms of making decisions according to “policy considerations” and this is now widely accepted as a legitimate part of the judicial function.

The challenge for the legal scholar (or practising lawyer) trying to predict the likely outcome of future cases is to understand the nature of the policy considerations that are likely to influence the judiciary. Dworkin’s [16] influential writings provide a wealth of guidance in this respect and remind us that policy decisions are far from the arbitrary and unpredictable exercise of judicial power that some would suggest. Rather, he argues that legal systems consist of underlying principles, as well as rules, and that judges are bound to follow these when deciding the outcomes of hard cases. As with Bell’s [10] rules of legal discourse described above, these can be seen to provide a constraint on judicial action, and at least some assistance in attempting to anticipate the likely outcome of cases. Bell’s [17] empirical work on policy matters also identifies the particular forms of policy argument used by the courts and this can also assist the scholar in trying to anticipate judicial decision making in this context.

3.7 Summary

In summary, therefore, it is probably incorrect to describe the process of legal analysis as being dictated by a “methodology”, at least in the sense in which that term is used in the sciences. The process involves an exercise in reasoning and a variety of techniques are used, often at a subconscious level, with the aim of constructing an argument which is convincing according to accepted, and instinctive, conventions of discourse within the discipline.

Although the discourse is apparently conducted according to formalistic conventions it is also influenced by shared value (or policy) judgments which often remain unspoken. The “methods” employed in legal scholarship are therefore neither consciously learned, nor consciously employed as is the case with scientific methods. The skills and conventions of legal analysis are instead learned at an instinctive level through exposure to the process, and they are then

employed on the same basis in the development of legal argument. In much the same way that the use of an explicit methodology confers legitimacy in scientific research, credibility within legal scholarship is therefore dependent on the researcher's work demonstrating an understanding and adherence to the accepted conventions and norms of its discourse.

4. Relationship of law to other disciplines

This lack of a formal research methodology, and the reliance on analysis and the development of argument within a prevailing academic discourse, is of course a particular feature of the arts and humanities family of disciplines to which law belongs. This places law at the "soft" end of the familiar disciplinary spectrum and (in common with design), law therefore differs from the dominant built environment research specialisms in this respect. Unlike law and design, the other built environment disciplines of technology, economics and management all belong either to the natural, or to the social sciences.

The science / arts & humanities distinction reflects genuine epistemological and methodological differences between the families of disciplines about the nature of knowledge, and about the manner of its production. Becher [18] has described 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. He contrasts this with humanities disciplines like law. These, he describes, as being concerned with the organic development of knowledge through an ongoing process of reiterative enquiry. They address multifaceted, rather than discrete, problems and attempt, not to explain the individual components of phenomena, but to develop a holistic understanding of their overall complexity.

The dominance of the scientific disciplines within the built environment inevitably influences prevailing views about knowledge and knowledge production within the field. Indeed, the language of built environment research is often dominated by the rhetoric of the social sciences in particular. This is characterised by a concern with the traditional social science methodologies (see, for example, Fellows & Liu [19]) and with an emphasis on empirical investigations rather than the development of theoretical perspectives (Betts & Lansley [20]; Brandon [21]).

5. Conclusion

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

In common with other humanities disciplines most legal scholarship is not concerned with empirical investigation, but with the analysis and manipulation of theoretical concepts. The

methodologies employed therefore differ from those of the sciences and are probably more accurately categorised, in social science terms, as techniques of qualitative analysis. As has been seen, deductive and inductive logic, the use of analogical reasoning and policy analysis all feature strongly within this process.

Crucially however, as the process is one of analysis rather than data collection, no purpose would be served by including a methodology section within a doctrinal research publication and one is never likely to find one. This is perhaps the most striking difference between the appearance of research outputs in the two traditions, and the one which has historically caused most difficulty for legal scholars when subject to peer review by other built environment researchers.

This paper began by highlighting the failure of the legal research community to adequately explain itself to its peers in other disciplines and in this sense it can hardly complain if those peers then judge it by standards other than its own. Communication between disciplines is one of the great challenges to achieving genuine interdisciplinary and that challenge is never greater than when trying to bridge the gulf between the humanities and the sciences.

Nevertheless, it is surely incumbent on all of us within the built environment research community to do precisely that. This involves developing at least an awareness of practices within the field's various disciplines. But it also involves a willingness to reflect upon our own previously unquestioned assumptions about the practices in our own discipline, and to articulate these for the benefit of others within the field. It is hoped that the methodological framework presented in this paper might provide a vehicle for communicating the nature of legal research to other built environment researchers, and thereby assist the process of communication within the wider discipline.

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