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Methodology of Legal Doctrinal Research: A Comment on Westerman

JAN BM VRANKEN

I. INTRODUCTION

THIS CHAPTER HAS been formed as part of a discussion between Pauline Westerman and I. As she stated in footnote 1 of her chapter in this volume, in 2008 she and her colleague Marc Wissink wrote an article in the Dutch *Nederlands Juristenblad* (NJB) on legal scholarship as an academic discipline.¹ She summarised this article in sections I. and II. of her chapter.

I quite disagreed with the article in the *Nederlands Juristenblad* and I criticised it in a paper entitled ‘Does Legal Scholarship Benefit from a Broad Floodlight?’² The title was inspired by the position Westerman and Wissink took up. They state that in all sciences, the scientific character of the research is determined largely by how and to what extent the data is interpreted within a theoretical framework. This holds true for legal scholarship as well. The only distinction they see is that both the interpretation and the theoretical framework within legal scholarship are viewed differently than in other sciences. They explain these differences through posing two questions: ‘*What* is being interpreted?’ and ‘*What is the purpose* of the interpretation?’. In answering the first question, the legal scholar differs greatly from, for example, the empirical scientist, but there is much similarity with scholars such as researchers in literature, idea historians or biblical exegetes. The latter scholars devote themselves to texts, just as legal scholars do. The researchers in literature, idea historians or biblical exegetes do this to gain a better understanding of the author or period they are studying. Westerman and Wissink maintain that these categories of scholars may use hypothesis and underlying theory in much the same way as empirical scientists, but only to a certain extent. There is a limit: the text has to be interpreted as a

¹ PC Westerman and MJ Wissink, ‘Rechtsgeleerdheid als rechtswetenschap’(2008) *Nederlands Juristenblad*, 503. The title is difficult to translate, but I think (hope that) the translation in the text is comprehensible.

² JBM Vranken, ‘Is de rechtswetenschap gebaat bij een breed strijklicht. Over juridische dogmatiek en methodologie’ (Does Legal Scholarship Benefit from a Broad Floodlight? On Legal Doctrinal Research and Methodology) in P Essers, et al (eds), *Met recht. Liber amicorum Theo Raaijmakers* (Deventer, Kluwer juridisch, 2009) 543.

whole as much as possible, which is at odds with strict hypothesis and theories because, they say, '(t)heorizing degenerates into prejudice'. Also, a little further down, applying this to legal scholars: 'The hermeneutical legal scholar benefits more from a broad floodlight.'³

I do not object to anything up to this point. On the contrary: it would seem to me that most lawyers wholeheartedly agree that a good legal scholar needs to see the full breadth of the theoretical floodlight, and not only that. They will add that the same is true for practical lawyers, such as judges, barristers, solicitors, company lawyers, notary publics and legislative lawyers. I feel that it can be extended even further, and that all scholars need to meet this demand within their field, if not all professionals. Someone with a broad view is able to think associatively and can be creative and innovative, for example when they make connections that others do not see, or shed new light from an unexpected angle on an existing problem. On the other hand, it is far from impossible for a specialist in a specific area of law or another field to present surprising ideas, especially because they have such a full command of the subject.

My fundamental objection against Westerman and Wissink is, therefore, not that they expected a broad view from legal researchers, but that they consider this broad view incompatible with any other theoretical perspective than 'the' legal system. In their article they posit that in legal scholarship only one floodlight, meaning one hypothesis, one theoretical perspective is valid: the consistency and coherence of the legal system. The legal scholar must interpret the rules and principles of law with the aim of integrating new social or legal issues into the existing legal system.

But how is this done? The only way is by using certain basic concepts and principles *within the system itself*. . . . This means nothing less than that the legal system, which is the *subject* of the research, is also the *theoretical* framework. In legal scholarship, object and theoretical perspective are the same.⁴

The way I understood their view, is that they fear another hypothesis, another perspective would fail to encompass the full extent of available texts and therefore the fullness of law and the legal system. Westerman and Wissink do not see the system as static, closed or unchanging, as integrating something into the system is also changing the system to fit a reality that is constantly in motion. This means that legal systems are open and continuously developing.

They identified three consequences of the identity of object and theoretical perspective in legal scholarship: first, the tight link between legal scholarship and practice; second, the predominantly national orientation, even though the advancing influence of Europe and the international community will result in a more internationally oriented legal scholarship; and third, that the ability to innovate is important, but not the only virtue of good scholarship, because good legal scholars

³ Westerman and Wissink, 'Rechtsgeleerdheid als rechtswetenschap'(2008) 504.

⁴ Westerman and Wissink (n 1) 504 (italics in original).

1 must also be ingenious in finding arguments, they must be able to fit these into a logi-
 2 cal framework, and above all, they must have a *comprehensive view* of a certain field.
 3 A comprehensive view here means that they should be able to encompass the entire
 4 breadth of the theoretical floodlight - the legal system -, which enables them to consist-
 5 ently accommodate the various perspectives.⁵

6 In chapter five of this volume, Pauline Westerman makes crystal clear from the
 7 outset that

- 8
 9 (a) she does not take up a normative position, but merely inquires as to what
 10 legal researchers commonly and actually do, ie conducting legal doctrinal
 11 research^{6 7};
 12 (b) in section I. and II. of her paper she exclusively confines herself to an analy-
 13 sis and description of what she considers the characteristics of that prevail-
 14 ing type of legal scholarship; and
 15 (c) in accordance with the suggestion of the organisers of the Tilburg
 16 Conference, she qualifies other forms of legal scholarship as 'legal science',
 17 distinctive from 'legal doctrine'.

18 The starting point of my comment is that Westerman repeats the key character-
 19 istic of legal doctrine she identified in the NJB article several times: legal doctri-
 20 nal scholars not only use the legal system as their *subject* of inquiry, but also as
 21 their *theoretical framework*.⁸ In this paper she has embedded her central finding
 22 in a new⁹ discussion, which concerns the extent to which a legal system can be
 23

24 ⁵ *ibid.*

25 ⁶ Which is distinguished from various other types of legal scholarship. Without attempting a com-
 26 prehensive listing, I mention inside out and outside in approaches; descriptive, prescriptive, and norma-
 27 tive research; hermeneutic, argumentative, explanatory, axiomatic, logical, designing and normative
 28 legal scholarship; legal doctrinal, multi-disciplinary, socio-legal and empirical research. The differ-
 29 ences between these variations of legal scholarly research are immense. Some of them partly overlap,
 30 for example legal doctrinal and hermeneutic, argumentative, logical or explanatory research. Some
 31 others, such as empirical and multi-disciplinary research, are strongly on the rise and are almost fun-
 32 damentally different from legal doctrinal research, both to nature and method. For references, see n 7.

33 ⁷ A short and incomplete selection: R Brownsword, 'An Introduction to Legal Research' (2006)
 34 (www.welcome.ac.uk/stellent/groups/corporatesite); EL Rubin, 'Legal Scholarship' (2001) *The*
 35 *International Encyclopedia of the Social and Behavioural Sciences*; RA Posner, 'Legal Scholarship
 36 Today' (2001–2002) *Harvard Law Review*, 1314; N Duxbury, *Jurists & Judges, An Essay on Influence*
 37 (Oxford, Hart Publishing, 2001); BH Bix, 'Law as an Autonomous Discipline' in P Cane and
 38 M Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford, Oxford University Press, 2003) 975;
 39 F Cownie, *Legal Academics: Culture and Identities* (Oxford, Hart Publishing, 2004); Chr Crudden,
 40 'Legal Research and the Social Sciences' (2006) *Law Quarterly Review* 632; M Van Hoecke, 'Hoe
 41 wetenschappelijk is de rechtswetenschap? (How Academic is Legal Scholarship?)' (Inaugural lecture,
 42 Gent, 2009); M Van Hoecke, 'Is de rechtswetenschap een empirische wetenschap?' (Is Legal Scholarship
 43 an Empirical Discipline?, inaugural lecture Tilburg (The Hague, Boom Juridische uitgevers, 2010);
 44 Martijn Hesselink, 'A European Legal Method? On European Private Law and Scientific Method'
 (2009) *European Law Journal* 20.

⁸ The consequences Westerman identifies in her paper are slightly, but not fundamentally,
 different from those in the *Nederlands Juristenblad* article: practical orientation, the importance
 of overview as a paramount virtue of a legal scholar, normativity of the legal research (aiming at
 finding good solutions), national orientation and innovation on the basis of the existing legal system.

⁹ New, not in the sense of a discussion on a topic that was not discussed before, but new in the
 sense that the *Nederlands Juristenblad* article had a different context.

considered as autonomous, and the extent to which the legal system *should* (her italics) be open to political, economical, financial, social and cultural considerations and influences from outside the legal system. She uses her analysis and description of legal doctrinal research and its central finding as one extreme position on legal scholarship, which she compares with other approaches. Her line of argument is, in short, that different views on legal research (what should be done?) lead to different legal methodologies, but that in the end both are reflections on what one considers to be law.

II. THE IDENTITY OF SUBJECT AND THEORETICAL FRAMEWORK: FOUR OBJECTIONS

The *first* objection against the central finding is that it is often far from clear which system shapes the perspective of the researcher, or should shape it. In many cases the researcher first needs to select the appropriate system before they can start. In contract and tort law alone, there are hundreds of systems (and subsystems, but I will ignore that complication).

This can be illustrated with some examples. Rent law, labour law and financial law each constitute their own system. However, they can be connected by general contract and tort law, which would lead to a different systematisation and possibly to different answers to questions. It would also be possible to class them, together with purchasing and misleading advertising, for example, as part of consumer law, an area of law with accents that partly differ from general contract and tort law. Another example is cyber law, a relatively new field. The question is whether it is comparable to offline law, or whether it has its own concepts, rules and principles. For now, this question remains unanswered.¹⁰ So what should be done? The same is true for private law that originated in Europe. Is this a separate system, distinct from national systems, because it is primarily aimed towards the internal market and protecting consumers, while national private law strives to serve a wider range of interests? If one assumes this to be the case, which is the most common opinion, both systems need to be tailored to each other, which means that European private law needs to be integrated in national systems. This is often a painful process, because the two systems are incompatible in many ways. In this approach, researchers remain focused on their own legal system and the orientation is primarily national. A newer, and more difficult, approach is to view private law in Europe as a single, multi-layered system, in which elements of public and private law, procedural law and substantive law, national law and European law, state and non-state law must be forged into a new whole.¹¹

¹⁰ Compare, among others, the overview in R Dunne, *Computers and the Law* (Cambridge, Cambridge University Press, 2009). More on contract law alone can be found in, for example, L Trakman, 'The Boundaries of Contract Law in Cyberspace' (2009) *University of New South Wales Law Journal* 159 (<http://law.bepress.com/unswwps/flrps09/art13>).

¹¹ Hesselink, 'A European Legal Method?' (2009) 39–43.

1 In all these examples, the answers to legal questions depend on the system
2 from which the researcher tries to find them, in order: from rent law, general
3 contract and tort law, consumer law, cyber law or European law as a single,
4 multi-layered system. How can they determine their choice, meaning how can
5 they choose what floodlight to use, the system that must be the starting and
6 ending point of all legal doctrinal research as Westerman analysis describes it?
7 It is as clear as day that this choice needs to be made first. This holds true on
8 a micro-level as well. Here, we no longer speak of systems, but rather of doc-
9 trines. Does the case fall under the reversal of the burden of proof, or under the
10 duty to provide prima facie evidence? Should the legal question be placed within
11 the framework of dissolution of contracts, or in the wider perspective of reme-
12 dies (dissolution, cancellation, annulment and adaptation of contracts)? Does
13 it concern kindness among friends without legally binding force, or a binding
14 contract? Should it fall under the rule of unlawful enrichment, contract or tort?
15 Sometimes doctrines disappear, such as acceptance of risk, or new ones develop,
16 such as duties to inform and, of late, duties of care. It would be easy to provide
17 dozens of examples, but my point is made.

18 The *second* reason why I disagree with the key characteristic of legal doc-
19 trinal research Westerman identifies – the identity of subject and theoretical
20 perspective – is that, even when the applicable system is certain or has been
21 chosen, it is often not clear which viewpoints fall within that system and which
22 do not. The congealed weighing of interests that is anchored in legal rules¹² and
23 which results in relevant viewpoints is not set in stone. A system is, as already
24 said, always in development and thus basically open. The validity of viewpoints
25 needs to be tested over and over again, to determine whether their relative worth
26 has changed, and to see whether new viewpoints or factors have arisen. These
27 tests are always necessary, even more so when the question concerns new situa-
28 tions and developments which sometimes require that existing distinctions are
29 amended or expanded, so that a productive new weighing of interests can yield
30 socially useful and improved law. Sometimes, the researcher comes up with a
31 surprising new angle or association and presses for changes in the system. Is this
32 allowed, desirable or perhaps even necessary? I think the answer is an emphatic
33 yes, but in relation to the view that subject and theoretical perspective coincide,
34 the question is how to determine whether the new balancing, new viewpoints,
35 new distinctions or new angles the researcher wants to introduce stay within
36 the limits of the developing system, especially taking into account that changes
37 often have unforeseeable consequences in other parts of the law or for other
38 doctrines. Yet, how do we clarify what a researcher is allowed to do?

39 In answer to this question I will give some examples. According to the prevail-
40 ing opinion, codes of conduct, guidelines, and other forms of self-regulation or
41 co-regulation do not play a significant part in contract and tort law at present.

42
43 ¹² For clarity reasons rules are used here as a collective term. They include principles, doctrines,
44 viewpoints, vague standards, judicial decision and so on.

Do researchers step outside the field defined for legal doctrinal scholars when they argue that these factors should be included¹³? Another example is the inflexible stance towards limitation of action periods, which in the past was justified by pointing towards legal certainty. The inflexibility has been significantly softened over the last few years. A whole range of elements that until recently were not acknowledged are now taken into account. The groundwork for this change was laid partly in literature. Did those who argued for more flexibility back then still use the (open) system as their starting and ending point, as is demanded in legal doctrinal research according to the analysis of Westerman? The same is true for those who argue for the acknowledgement of revindicatory claims towards bank accounts in certain situations. Following present standards these claims fail, but would it not be possible for this to change, as happened with other changes that seemed impossible 30 years ago?

The question is the same for all these examples: when and why does a viewpoint or argument remain within the limits of the system, and when and why does it not? Nobody is able to answer this question beforehand and that is not unsurprising, because developing law does not proceed step-by-step, along a predictable route. There is no preconceived aim, no master plan; there is only a debate, in which some dare to go further than others. I welcome that. In the end legal research, as other kinds of academic research, benefits more from creativity, fantasy, an open mind, contrary thinking and paradigmatic change than it would from rigid guarding of the system. Criticisms and new ideas may be discontinuities today, but tomorrow they could grow into established opinions. Whether they do will only become apparent in hindsight, within the debating forums where colleagues meet. This is why I am convinced that the idea of the legal system as both the starting and the ending point of legal scholarly research is untenable in itself. Eventually, the system is what researchers themselves make out of it, and that can vary from strictly delineated to almost boundless openness. One must not be too quick in seeing threats to ‘the’ system. It has been proven that ‘the’ system is quite resilient, not only in the long term but in the short-term future as well.¹⁴ I cannot think of a better sound bite and final thought than the title of an article by HCF Schoordijk: ‘We should not View the Law as a System, before Systematising it’.¹⁵

My *third* objection against Westerman’s central finding relates to the role of the researcher. What is the driving force behind progress in law? What are the societal and legal developments which the researcher has to understand in order to ‘translate’ or ‘integrate’ them into the legal system? According to Westerman’s

¹³ I Giesen, *Alternatieve regelgeving in het privaatrecht* (Alternative Rulemaking in Private Law) (Deventer, Kluwer juridisch, 2007) 68–69 and 98–99.

¹⁴ W Sniijders, who drafted the 1992 civil code and civil procedure code in the Netherlands, in an article on irregularities in property, contract and tort law, (2005) *Weekblad voor Privaatrecht en Notariaat* (WPNR) 79 and 94 (passim).

¹⁵ HCF Schoordijk, ‘Het recht moeten wij niet denken als een systeem vooraleer wij er systeem in gebracht hebben’ (translated to ‘We should not View the Law as a System, before Systematising it’) (2008) *Nederlands Juristenblad* 1720.

1 view, the researcher is mainly a follower and I think this is simply not the case.
2 It completely ignores the choices that, in my opinion, researchers always need
3 to make before they can start translating and integrating: what system should
4 be chosen and which (new) viewpoints should be included, and what should be
5 their relative weight? I explained that legitimate choices can be made from com-
6 pletely different perspectives other than just the consistency and coherence of
7 the system. The researcher enjoys a large degree of freedom here, with very few,
8 if any, prior limitations. Whether the chosen perspective yields usable or better
9 law, can only be judged in hindsight. A consequence of this is that the research-
10 ers can start their work independently from societal and legal developments.
11 They do not need to wait for an ‘assignment’ before employing their creativity.
12 They can come up with ideas, posit theories, and apply various approaches off
13 their own bat, without following topical casuistry, if they feel they can advance
14 the law in that way. A good, creative researcher would do so. They are, as I
15 attempted to say previously, people who think outside the box, who ask them-
16 selves the question: could this be done differently? They are people who draw
17 inspiration from a wide range of internal and external comparative law, or from
18 insights from other disciplines, and who are willing to push boundaries and,
19 where necessary, break them. Indeed, why should legal scholars always consider
20 themselves bound by current law?

21 Perhaps one is inclined to answer that the kind of researcher I welcome here
22 is not a legal doctrinal scholar anymore. I do not stick to sharp distinctions.
23 Therefore, to make myself clear and to avoid easy escapes: even if I limit myself
24 to legal doctrinal research, and accept Westerman’s analysis and description
25 thereof which exclusively emphasises the legal system as the starting and ending
26 point, the view that the desirable broad theoretical framework of the researcher
27 is incompatible with another floodlight than ‘the’ system, does not hold water.
28 ‘The’ system is not only a collection of connected rules,¹⁶ but also a collection
29 of perspectives.¹⁷ Each rule can be approached from a large number of divergent
30 perspectives. The notice of default in the context of failures to comply, for exam-
31 ple, can be viewed from the perspectives of the right to be heard before granting
32 legal action, of the need to protect parties against hasty action, of being counter-
33 productive towards amicable settlements, or from the perspective that it does not
34 contribute to harmonising European private law. Meaning and knowledge are
35 always dependent on perspective. I feel it is useless to deny this reality. Would
36 it not be better for the doctrinal researcher to clearly formulate and justify the
37 perspective from which they depart?

38 This is unusual in law. Legal scholars want to tackle the whole problem at
39 once. However, influenced by the debate on methods and legal methodology, the
40 awareness that a more specified focus might be desirable is gaining ground. It
41

42 ¹⁶ See for the concept of rules, n 12.

43 ¹⁷ M Doorman, Steeds Mooier. *Over de geschiedenis en zin van vooruitgangsideeën in de kunst*,
44 thesis (Amsterdam, Bakker, 1994) (5th edition, 2005) links progress in art to an increasing number
of perspectives. I consider this a fruitful idea.

would offer the opportunity to build on the work of others, and from there add something new. This can be achieved with a well-formulated research question in which the legal scholar explains and justifies the choices he or she makes. In his PhD thesis, Tijssen noted that of the 90 dissertations he investigated, which were all defended between March 1999 and June 2006, more than 50 per cent had a clearly formulated research question. Quality remains an issue, but both the percentage and the quality will probably see significant improvements, because meetings with young PhD researchers in Tilburg, Louvain, Ghent and Florence showed that there is a great need for clearly defined, attainable research questions, and much effort is poured into them.¹⁸

In light of the above, I can be brief in describing my *fourth* objection. Consistency and coherence of the legal system as the only allowable and obvious perspective for legal doctrinal research, is far from evident. Instead, it is based on a normative choice. However, why should a consistent and coherent system be preferable over, for example, social justice, improving the wellbeing of people, the proper functioning of markets, practicality, functionality, effectiveness or Europeanisation and globalisation?¹⁹ If we follow Westerman's analysis and description, we have to conclude that no choice exists between perspectives within legal doctrinal research. As soon as legal researchers choose another framework than consistency and coherence of the legal system, they are no longer conducting legal doctrinal research, but legal science. I strongly disagree because even from a very strict doctrinal approach I hope to have shown that more perspectives than consistency and coherence are possible and desirable, but, again, I do not stick to definitions.

III. METHODOLOGICAL CONSEQUENCES

In my critical review, the central finding of Westerman's analysis and description of doctrinal legal research, that the *subject* and *theoretical framework* of this type of legal scholarship are one and the same, turns out to be untenable for at least four reasons.

First, because there are hundreds of different systems in contract and tort law alone, which are subject to constant change when old ones disappear and new ones arise.

Second, because all systems are open and in a never-ending state of development, it is impossible to say beforehand what new arguments or viewpoints are allowable or not. *Third*, because the researcher is more than someone who just translates and integrates new developments in law and society in one or more of

¹⁸ The courses were held by my colleague RAJ van Gestel, who participated in the 2007 founding of the Research Group for Methodology of Law and Legal Research, School of Law, Tilburg University (www.tilburguniversity.nl/faculties/law/research/methodology). A consultation with individual PhD researchers on their intended project was always part of these courses.

¹⁹ I drew inspiration from Hesselink (n 7) 34–36.

1 the many systems. Researchers also have an independent position in furthering
2 the law. The wide view – the knowledge and the overview that a researcher has
3 or should have – is the essential inspiration for finding new perspectives that
4 can contribute in improving the law. An erudite researcher is better equipped for
5 innovation than a narrow-gauge lawyer.

6 *Fourth*, because choosing consistency and coherence of the legal system as
7 the only valid perspective is a normative choice, which without further substan-
8 tiation is no better or worse than many other perspectives, either in connection
9 with them or substituting them.

10 The central idea of the above is the inevitability of making choices, not only
11 between the legal doctrinal approach and an external approach, as Westerman
12 points out in her chapter in this volume, but also within the doctrinal approach
13 itself,²⁰ the four issues I indicated. As soon as a researcher has to make choices,
14 the consequence is that they have to explain or justify them. That is part of
15 what is required in the academic world. This world is based on the assump-
16 tion that academic scholarship, as Tijssen states,²¹ is an open, democratic, and
17 self-reflecting enterprise. It does not accept immunisation against critical assess-
18 ment. On the contrary, it demands transparency. Why does the researcher choose
19 the perspective of Europeanisation and not, for instance, the consumer perspec-
20 tive? This is a methodological question. In legal doctrinal research, however,
21 methodological questions are quite unusual and, to be frank, they are hardly
22 needed if the idea of the identity of subject and theoretical framework would
23 be correct. Why explain the choice for the perspective of consistency and coher-
24 ence of the system if this is the only possible one? In that view researchers would
25 merely have to choose whether they prefer to do legal doctrinal research and not,
26 for example, empirical research, but as long as legal doctrinal research strongly
27 prevails in legal scholarship, nobody will ask.

28 This was the situation until some years ago. Nowadays, we have vehement
29 debates on both the academic nature of the legal discipline – is law an academic
30 discipline? – the various types of legal scholarship which can be distinguished²²
31 and their methodological consequences. In this comment I only mention this
32 debate without going into the diverse and manifold reasons.²³ I limit myself to

33 ²⁰ The same applies, of course, to the external perspective if the researcher chooses such perspec-
34 tive.

35 ²¹ HEB Tijssen, *De juridische dissertatie onder de loep. De verantwoording van methodologis-*
36 *che keuzes in juridische dissertaties* ('Legal Dissertations through a Magnifying Glass. Justification
37 of Methodological Choices in Legal Dissertations') (The Hague, Boom Juridische uitgevers, 2009)
120–22, 137 ff and 183 ff.

38 ²² See n 6 and n 7.

39 ²³ To give an impression of this diversity, I mention, among others, (a) the increasing contex-
40 tualising of law, where more than just legal doctrinal elements are considered; (b) the increasing
41 popularity of law and movements, especially law and economics and law and social sciences, as a
42 symptom of a wider movement, in other fields as well, towards more multidisciplinary research,
43 because the problems that need to be solved cannot be reduced to mono-disciplinary limits. The
44 multi-disciplinary evaluating committees of funding institutions in countries and in Europe follow
suit and strengthen this trend; (c) the need of primarily regulators and policymakers (and judges as
well) for more advanced knowledge regarding the effects and effectiveness of the intended rule (or

the observation that methodological issues in doctrinal research are emerging.²⁴ The Tilburg Conference, of which the current book is the result, reflects this growing, international attention.

Where multi-disciplinary²⁵ and empirical²⁶ researches are concerned, there is no disagreement. Methodological questions are unavoidable. The researcher not only has to gather knowledge on what is required in other disciplines for reliable and valid research, or the demands placed on empirical research, but he or she also has to adapt the research to the peculiarity of legal scholarship. What determines that peculiarity? Answering that question inevitably leads to legal doctrinal research. Some, including myself, maintain that this type of research would benefit from a better methodological justification. One of the underlying reasons is that such a justification would enable putting into operation the generally accepted quality criteria for legal research: originality (innovation), rigour, significance, thoroughness and exploring boundaries.²⁷ Developments in, among others, Belgium and England, point to the same or similar view.²⁸ Primarily a well-formulated research question, which I referred to at the end of my third objection, forces scholars to consider the innovative contribution they expect

judgments), which requires a lot of knowledge in the fields of social sciences and economic evaluative research; (d) dissatisfaction with the common approach, which unavoidably leads to a certain degree of tunnel vision. The desire to break through that limitation is nothing new and far from limited to legal research (even though it itself tends to lead to a different form of tunnel vision); (e) the worldwide increasing interest developing criteria to assess the quality of legal research, eg on behalf of research assessment exercises, funding institutions or awards committees.

²⁴ In 2007 we established in Tilburg the Research Group for the Methodology of Law and Legal Research (www.tilburguniversity.nl/faculties/law/research/methodology). The 2009 Tilburg Workshop is one of the research activities of the Group.

²⁵ Outside of law and economics and law and literature, multi-disciplinarity can be found primarily in what could be described as Law and Social Sciences, which is also called New Legal Realism. See, for example, ThJ Miles and CR Sunstein, 'The New Legal Realism' (2007) (www.law.uchicago.edu); H Erlanger et al, 'Is It Time for a New Legal Realism?' (2005) *Wisconsin Law Review* 335. For the UK, see for example the overview in Crudden, 'Legal Research and the Social Sciences' (2006).

²⁶ Empirical legal research has a long history in the US, although its track record is far from flawless (for example Heise, Uhlen, Korobkin, Epstein and King, who are among those mentioned in G Mitchell, 'Empirical Legal Scholarship as Scientific Dialogue' (2005) *North Carolina Law Review* 167. Empirical research in the US recently received an enormous boost from Empirical Law Studies (ELS). ELS is developing energetically, partly because of the involvement of a number of top law schools (Cornell, New York, and Austin Texas) which provide money and influence. For now, the conducted research is exclusively quantitative and statistical. The research is large-scale and aimed at developing large databases which will be accessible to everyone. A sympathetically critical evaluation of ELS can be found in E Chambliss, 'When Do Thoughts Persuade? Some Thoughts on the Market for Empirical Legal Studies' (www.nyls.edu).

²⁷ This includes inter- or multi-disciplinary, international, and internal, external or historical comparative legal research.

²⁸ See for Belgium www.vlir.be/media/docs/Onderzoeksbeleid/ranking_resultaat.pdf, for England refer to www.hero.ac.uk.rae and T Sastry and B Bekhradnia, 'Using Metrics to Allocate Research Funds: A Short Evaluation of Alternatives to the Research Assessment Exercise' (2006) *Oxford Higher Education Policy Institute*; R Johnston, 'On Structuring Subjective Judgements: Originality, Significance and Rigour in RAE 2008' (2008) *Higher Education Quarterly* 120, 132–33; Society of Legal Scholars, AHRB Journal Reference List, 23 January 2005. This can be retrieved from: www.legalscholars.ac.uk/pubdocs/05/joint_letter_ahrb.pdf.

1 to make, the sources they need to consult, and the methods they need to use to
2 answer the research question.²⁹

3 To avoid misunderstandings, I immediately add that a proper methodological
4 justification is no guarantee for high quality research, as quality always depends
5 on the contents, but it does make it easier to determine when quality is *lacking*.
6 It sets a minimum limit. Not everyone agrees however, far from it. The debate on
7 whether or not a proper methodological justification of legal doctrinal research
8 is desirable or even possible is still raging. However, I applaud the fact that the
9 discussion has started, even though the debate is still in its infancy, as is shown in
10 this comment: we are still struggling with the preliminary issue of determining
11 the main characteristics of legal doctrinal research.
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42 ²⁹ RAJ van Gestel and JBM Vranken, 'Legal Scholarly Papers. Towards Criteria for Methodological
43 Justification'. Exploring Three Methodological Quality Criteria for Legal Research (2007)
44 *Nederlands Juristenblad* 1448. An English version of the article is forthcoming; a draft is already
available (j.b.m.vranken@uvt.nl).

