

GENERAL ARTICLES

PHILOSOPHICAL QUESTIONS AT THE EMPIRICAL TURN

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Adopting a meta-perspective, this introductory contribution focuses on the ongoing empirical turn in legal scholarship as such. A recurrent issue of controversy and (self-) doubts has to do with understanding the intricate relationship between empirical findings and more traditional doctrinal approaches to law. This discussion centers on the following line of questions: i) In what sense do empirical studies form part of a legal science? ii) Why, if at all, should they be pursued at a law faculty? iii) What do empirical studies tell us about valid law? iv) What do they tell us about what obligations and rights people have? v) How do empirical findings relate to the kind of knowledge traditionally sought in the doctrinal study of law? Rather than attempting to give an answer to these questions, this contribution suggests a taxonomical framework within which discussion about them ought to take place. Based on an analysis of the different stances taken by prominent theorists on the relation between traditional doctrinal work and empirical work in the legal field, the author suggests that we should distinguish between the following three attitudes on the relation between traditional legal doctrinal studies and empirical studies of law: toleration, replacement, and synthesis.

Keywords: empirical studies of law, epistemology of law, international legal theory, the empirical turn

TABLE OF CONTENTS

I. INTRODUCTION.....	6
II. TOLERATION, REPLACEMENT, AND SYNTHESIS: A TAXONOMICAL APPROACH TO THE EMPIRICAL TURN IN LEGAL SCHOLARSHIP.....	9
1. <i>Toleration</i>	10
2. <i>Replacement</i>	12
3. <i>Synthesis</i>	13
III. CONCLUDING REMARKS	15

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I. INTRODUCTION

It has become commonplace to claim that legal scholarship has seen a boom in empirical approaches and even that empirical work 'has infiltrated the legal community'.¹ Even if the size of this boom is contested and may itself invite empirical scrutiny, it seems safe to say that the claim found widespread support among the people who gathered at Umeå University in March 2017 for the inaugural NoLesLaw workshop. One might even say that the participants were gathered to celebrate this successful infiltration of the legal community since hiding behind this particular academic acronym was the *Network of Legal Empirical Scholars*.

The present issue sees the fruits of this infiltration with a number of interesting contributions demonstrating the lasting value of empirical work in law. However, before getting carried away with all the wonderful new toys and the sophisticated tools suddenly available in the legal scholars' toolbox, this introductory contribution tries to take a step back and ask a few pressing philosophical questions at the empirical turn.² To do so, I first turn to another quote, this time with a somewhat more skeptical tone. The quote comes from Kenneth A. Armstrong who in 1998 asked the following question: 'Political science has discovered the European Court of Justice. But has it discovered law?'³

Of course, political science is only one among many empirical approaches to the legal field and it may not necessarily be representative of such approaches in a present day context.⁴ However, I think Armstrong's question is interesting because it is one example of a generic question that I believe almost all legal empirical scholars have been asked at one point or another by some of their more traditional doctrinal colleagues. In its generic version, Armstrong's question runs as follows: 'Very well dear colleague, you may have

¹ Lee Eppstein and Andrew D. Martin, *An Introduction to Empirical Legal Research* (Oxford University Press 2014) vii.

² In so doing, I shall be drawing extensively on work co-authored with Mikael Rask Madsen, in particular on the paper 'Toleration, Synthesis or Replacement? The 'Empirical Turn' and its Consequences for the Science of International Law' (2016) 29 *Leiden Journal of International Law* 1001-1019.

³ Kenneth A. Armstrong, 'Legal Integration: Theorizing the Legal Dimension of European Integration' (1998) 36 *Journal of Common Market Studies* 155, at 155.

⁴ For instance, this issue contains a number of big data empirical approaches that were not applied in 1998 including, for example, computer-based corpus linguistics (Holtermann & Kjær) and citation network analysis (Frese and Olsen).

discovered [insert your favorite empirical legal fact discovered with your favorite empirical method]. But have you discovered law?'

To illustrate, I can provide an example from my own experience. In the present issue, Anne Lise Kjær and I contribute the article 'What 'If'? Silent Prologue and Paradigm in the Emerging Epistemic Community of International Criminal Justice',⁵ which is based on a computer-driven corpus linguistic study of all judgments from the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) from 1996-2017. In this study, my co-author and I discovered that the frequency of the use of *ifs* in all judgements issued over this period exhibited a steady annual decline from 93 per 100,000 words on average in 1996 to 34 in 2017.

As we argue in the article, my co-author and I take this particular discovery to be profoundly interesting, with the potential to deepen our understanding not only of international criminal law but of legal knowledge as such. Nevertheless, while working on the article we were countless times asked questions virtually identical to Armstrong's, i.e. along the lines of: 'Very well dear [Anne Lise and Jakob], you may have discovered [a statistically significant steady drop in the use of *ifs* in the ICTY/ICTR case law across a 22-year period using computer driven corpus linguistics]. But have you discovered [international criminal] law?'

From what I hear from other legal empirical researchers, my co-author and I are not alone in being confronted with this kind of question. Whether engaged in citation networks analysis, interviewing judges or the like, empirical researchers very often report being asked, 'Armstrong-style', what their empirical results have to do with law. When asked this way, the question is often a rhetorical one. Starting from the assumption of a categorical difference between the empirical facts found and the law, the questioner rarely seems to expect that the empirical discovery does in fact have *any* significance for the study of law or for legal knowledge. As such, the question does not always mark the starting point of a fruitful discussion. However, when asked in earnest, it is actually a very good question and one that all empirically minded legal scholars ought to ask themselves, not only to be able to fend off their more combative traditional doctrinal law colleagues.

It is important to see that Armstrong's question can be posed and answered at different levels of abstraction. It can be answered concretely with

⁵ Cf. this issue at 49-90.

reference to any given study, i.e. with a view to demonstrating the legal relevance of that particular study. Thus, in our article, my co-author and I have naturally tried to demonstrate the specific legal significance of our corpus linguistic findings. I imagine other legal empirical scholars routinely do the same regarding their own work. However, considering the high frequency of these skeptical questions and the commonalities between them, even when posed in relation to quite diverse empirical studies, it would be a mistake to approach it as if we were dealing with a new question every time. For the sake of thought economy, we should also reflect upon Armstrong's question at a more general level.

Conceived at this level, it remains a good question because it points to a larger set of equally good and challenging questions, including:

- (1) In what sense do these new empirical studies form part of a *legal* science?
- (2) Why, if at all, should they be pursued at a law faculty?
- (3) What do the countless new empirical studies tell us about valid law?
- (4) What do they tell us about what legal rules exist, what obligations and rights people have, etc.?
- (5) How do empirical findings relate to the kind of knowledge traditionally sought in the doctrinal study of law?

These are all good philosophical questions, which ultimately address the epistemological foundations of legal science and the conditions of possibility of legal science.

As such, these are also questions which ought to be at the heart of European empirical legal scholarship, perhaps more so than has hitherto been the case in the US, where empirical legal studies have had a much longer and more influential history than on this side of the Atlantic. As I have argued elsewhere, philosophical concerns about the epistemological foundations of legal science seem historically to have played a less prominent role in American legal scholarship than in its European counterpart.⁶ This difference is particularly evident if we directly compare the more pragmatic

⁶ Cf. Jakob v. H. Holtermann, 'Getting Real or Staying Positive: Legal Realism(s), Legal Positivism and the Prospects of Naturalism in Jurisprudence' (2016) 29(4) *Ratio Juris: An International Journal of Jurisprudence and Philosophy of Law* 535 and Jakob v. H. Holtermann and Mikael Rask Madsen, 'European New Legal Realism and International Law: How to Make International Law Intelligible' (2015) 28 *Leiden Journal of International Law* 211.

and reform-oriented American legal realism with its 'scientific' Scandinavian cousin. However, the (continental) European concerns regarding the philosophical foundations of legal science are manifest also in the long debates between the doctrinal scholar Hans Kelsen and the more sociological scholars Max Weber, Eugen Ehrlich and Alf Ross.⁷ In line with this tradition, it seems that, unlike the Americans, present-day European empirical legal scholars cannot simply content themselves with pursuing empirical work. They have, in addition, to address the foundational philosophical questions directly.

II. TOLERATION, REPLACEMENT, AND SYNTHESIS: A TAXONOMICAL APPROACH TO THE EMPIRICAL TURN IN LEGAL SCHOLARSHIP

At the same time, however, I should emphasize that the aim of this contribution is not to try to develop one unique reply to Armstrong's questions about how empirical findings *really* relate to law. While tempting, it simply does not seem fruitful or even feasible to try to outline, almost Vienna Circle style, one common philosophical program to which all European legal empirical scholars could sign up.⁸ This group is simply too diverse, and this is perhaps as it should be.

⁷ Kelsen was deeply troubled by the challenge of empirical approaches to law and vehemently resisted recurring attempts by empirically minded scholars to make inroads into legal scholarship. Thus, over a period of more than 50 years, Kelsen confronted a series of empiricists starting with legal sociologists Eugen Ehrlich and Max Weber (in *General Theory of Law and State* (Law Book Exchange 2009), especially 'Part One, XII. Normative and Sociological Jurisprudence') and ending with Scandinavian legal realist Alf Ross (Hans Kelsen, 'Eine 'Realistische' und die Reine Rechtslehre. Bemerkungen zu Alf Ross: On Law and Justice' (1959–60) 10 *Österreichische Zeitschrift für Öffentliches Recht* 1). For their part, Ehrlich, Weber and Ross all provided substantive reflections on the relationship between empirical and legal scholarship, each in their own distinct way and with quite different conclusions. Cf. e.g. Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Transaction Publishers 2001), Max Weber, *Critique of Stammler* (Free Press 1977), and Alf Ross, *On Law and Justice* (Stevens & Sons Ltd 1958).

⁸ Together with Mikael Rask Madsen, I have developed one reply to these questions. Drawing on inspirations from Weberian sociology of law, Alf Ross's Scandinavian legal realism and combining them with insights originating from Bourdieusian sociology, Madsen and I have outlined a research program for an empirical science of law that attempts to address the questions mentioned. To emphasize the European heritage and distinguish this approach from what we argue are less philosophically concerned American realist approaches, we have dubbed this approach *European New*

What does make sense, what in fact seems imperative, is to instead try to provide a framework within which to situate the necessary discussions about the pressing philosophical questions relating to the epistemological implications and status of the empirical findings that scholars of this sort might unearth.⁹ In co-authored work, Madsen and I have tried to sketch out a taxonomy consisting of three basic ideal types in terms of the epistemological understanding of the interface of law and empirical studies, namely *toleration*, *synthesis* and *replacement*. I shall briefly outline each of these positions providing examples of characteristic scholarship. My goal here is twofold: to understand the underlying epistemological premises of different positions in relation to empirical legal scholarship and to explain how such ideas enable (or rule out) different forms of empirical legal scholarship.

1. *Toleration*

The first approach is perhaps also the one most commonly adopted in traditional doctrinal legal scholarship. This position is termed *toleration* since proponents accept the presence and even the legitimacy of empirical studies of law, but they do so only somewhat reluctantly and while simultaneously emphasizing the subordinate character of such studies vis-à-vis the mother discipline, i.e. doctrinal law. Armstrong expressed this attitude of toleration in his rhetorical question.

Toleration thus conceived is closely associated with the classic positivist theories of Kelsen and H.L.A. Hart but also includes present-day proponents of positivism like Jan Klabbers,¹⁰ Jörg Kammerhofer,¹¹ Ino Augsberg,¹² and Jean d'Aspremont¹³ – to mention just a few. Finally, the position is not

Legal Realism. Cf. notably Holtermann and Madsen (n 6); and Jakob v. H. Holtermann and Mikael Rask Madsen, 'What is Empirical in Empirical Studies of Law? A European New Legal Realist Conception' [2016] *Retfærd. Nordic Journal of Law and Justice* 3-21.

⁹ The rest of this contribution relates closely to work co-authored with Madsen, cf. Holtermann and Madsen (n 2).

¹⁰ Jan Klabbers, 'The Bridge Crack'd: A Critical Look at Interdisciplinary Relations' (2009) 23 *International Relations* 119.

¹¹ Jörg Kammerhofer, 'Hans Kelsen in Today's International Legal Scholarship' in Jörg Kammerhofer (ed), *International Legal Positivism in a Post-Modern World* (2014) 81.

¹² Ino Augsberg, 'Von Einem neuerdings erhobenen empiristischen Ton in der Rechtswissenschaft' (2012) 51 *Der Staat* 117.

¹³ Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (2011).

confined to positivism but can be found also in the work of, for example, Ronald Dworkin.¹⁴ Proponents of toleration base their reserved attitude to empirical work on two related but logically distinct arguments. First, they maintain that exclusively empirical approaches cannot capture the essential character of the legal field in its entirety. It bases this claim on the assumption of a categorical divide between *Sein* and *Sollen*, facts and norms, the descriptive and the normative, the external and the internal. Observing that law consists of legal rules which are normative phenomena, toleration infers that law as such necessarily remains categorically impervious to empirical studies.

This idea is reflected in Kelsen's idea that empirical science can only study the *Sein* and never the *Sollen* of law. It also recurs in Hart's equally well-known distinction between internal and external aspects of legal rules.¹⁵ To both Hart and Kelsen, all identification of valid law in practice requires engagement in inter-normative reasoning beginning from a presupposed starting point and leading to the ascertainment of primary legal rules as parts of a given legal system. In other words, a pure, doctrinal study of law using the legal method.¹⁶

The second main argument, which is applied by at least some proponents of toleration,¹⁷ is more radical. This argument holds that not only can empirical legal studies never exhaust the field, but they are also conceptually and epistemologically *dependent* upon doctrinal studies. Accordingly, the ambitions of some empirical scholars are fundamentally misguided because they fail to appreciate the asymmetric, inferior interrelation between their

¹⁴ Cf., for example, Ronald Dworkin, *Law's Empire* (Hart Publishing 1998).

¹⁵ Hart applies this distinction to explain how a habit differs from a rule: 'A social rule has an 'internal' aspect, in addition to the external aspect which it shares with a social habit and which consists in the regular uniform behavior which an observer could record. This internal aspect of rules may be simply illustrated from the rules of any game. Chess players do not merely have habits of moving the Queen in the same way which an external observer, who knew nothing about their attitude to the moves which they make, could record. In addition, they have a reflective critical attitude to this pattern of behavior: they regard it as a standard for all who play the game. Each not only moves the Queen in a certain way himself but 'has views' about the propriety of all moving the Queen in that way'. H.L.A. Hart, *The Concept of Law* (Oxford University Press 2012) 56-57.

¹⁶ For an extended argument for this claim, see Jakob v. H. Holtermann, 'A Straw Man Revisited: Resettling the Score between H.L.A. Hart and Scandinavian Legal Realism' (2017) 57(1) Santa Clara Law Review 1.

¹⁷ Notably Kelsen (n 7, 2009) but cf. e.g. also Augsberg (n 12).

own approach and traditional doctrinal scholarship. The relationship is asymmetric because for the empirical legal scholar to even begin studying her preferred external aspect of legal rules, i.e. the *is* beyond the *ought*, she shall necessarily have to presuppose the validity of the discipline which studies this *ought* in the first place, i.e. doctrinal law. The latter constitutes the conditions of possibility of the former.

Whether applied individually or in concert, these two arguments lead proponents of toleration to maintain that the very notion of an *empirical turn* is misguided. Properly understood, for these proponents, the current boom in empirical approaches is simply a regrettable development taking time and resources away from the primary issues, which continue to require doctrinal approaches.

2. *Replacement*

At the opposite end of the spectrum, *replacement* represents the most radical challenge to traditional doctrinal approaches to law. Proponents of replacement take the idea of an empirical *turn* seriously, in the philosophical sense in which it is used in relation to Kant's Copernican revolution or the linguistic turn. This means seeing the turn to empirical approaches as a radical and irreversible scholarly reorientation based on the perception that a previously predominant approach to a given field has become obsolete.

In the context of empirical legal scholarship, then, the 'turn' refers to the replacement of doctrinal scholarship by empirical approaches (broadly understood). This approach is captured by Quine's description of a parallel empirical turn in general philosophy: 'But why all this reconstruction, all this make-believe? Why not just see how this construction really proceeds?'¹⁸ Hence, Quine urges philosophers to get 'out of the armchair and into the field',¹⁹ i.e. to adopt whatever empirical approaches are relevant to understand knowledge and science.

In philosophy proper, this maxim has led to an exodus from philosophy into an array of empirical disciplines, from neuroscience to social science studies, disciplines which all promise to inform us 'how this construction really proceeds'. Turning to the current development in legal scholarship, the

¹⁸ Willard Van Orman Quine, 'Epistemology Naturalized', in Willard Van Orman Quine, *Ontological Relativity and Other Essays* (Columbia University Press 1969) 75.

¹⁹ Although this particular slogan is due to Quine's former student Daniel C. Dennett, 'Out of the Armchair and into the Field' (1988) 9(1) *Poetics Today* 205.

parallels are clear. Among a number of proponents of empirical approaches, we find an ambition not only to do 'additional useful work', but to *replace* doctrinal approaches to law outright.

This ambition is generally expressed in a two-stage framework analogous to Quine's program: first, the replacement approach to law consists of a *negative* claim that traditional philosophical attempts to justify doctrinal scholarship on law have failed and, second, it contains a *positive* or *constructive* claim that the existence of law should therefore be studied and explained empirically.

A wide variety of studies in law seem to all fit this general description, including political science, Law and Economics, Empirical Legal Studies, European New Legal Realism, sociology of law, etc. But these schools also differ in a number of ways. Firstly, they differ in their perceptions of what kind of empirical study doctrinal scholarship should be replaced by. That is, borrowing a phrase from Wittgenstein, proponents of replacement differ in their perception of who should be the rightful 'heir to the subject that used to be called' doctrinal law.²⁰ These scholars also differ regarding which aspect of law they try to explain empirically. Is it law as such? Doctrinal scholarship on law? The professional identities of key agents? The institutions, e.g. international courts? And replacement theorists differ, finally, with regard to how reductionist their approach is, i.e. whether they recognize legal doctrine as an independently existing empirical phenomenon in its own right or whether, for instance, they focus exclusively on the external aspect of legal rules reducing doctrine to, for example, overarching societal structures.

As yet another example of the replacement approach, the hallmark of the European New Legal Realism developed by Madsen and myself is precisely that it attempts to approach law in a non-reductionist way, i.e. to define valid law in such a way that it can be recognized and studied as a genuinely empirical object of study without resorting to traditional doctrinal studies based on the legal method. This is an attempt to take law itself seriously as an empirical phenomenon and not to succumb in one's empiricism to facile reductionism.

3. *Synthesis*

The third position is referred to as *synthesis*, which denotes approaches which emphasize and seek to establish more peaceful co-existence where doctrinal law and empirical studies of law are seen as complementary. This position is

²⁰ Ludwig Wittgenstein, *The Blue and Brown Books* (Harper 1965) 28.

characterised by the notion that doctrinal studies can be enlightened by empirical studies and vice versa. Its methodological trademark is a form of transdisciplinarity, which is, however, rarely fully exposed and discussed. In short, this more 'moderate' programme assumes that both doctrinal and empirical work are to benefit from the current boom in empirical approaches. However, proponents of synthesis are often silent regarding the precise epistemological premises for this collaboration.

As a position, synthesis is difficult to outline systematically. In some versions, it has an element of eclecticism to it and can perhaps best be described through examples. One such example is provided by the opening of Brian Simpson's *chef d'oeuvre* on the European Convention, where he bluntly states his premise as follows:

This book is indeed written in the spirit which inspires the journalist who features as the letter 'J' in Edward Gorey's illustrated alphabet. He, after contemplating the scene of some disagreeable yet attractively newsworthy disaster, consoles himself with a gin and water, and thus refreshed, wonders how it came about. So it is, for me, with the European Convention. I do, however, have a message, albeit a fairly obvious one, which is that political, legal, and institutional development is the product of extremely complicated interrelationships between individuals, institutions, and governments, with their varied ideological commitments and perceptions of reality, history and self-interest.²¹

From this point onwards, the book takes off without ever explaining how all this possibly relates to any given epistemological framework. Instead, these important epistemological considerations are tellingly relegated to the book's preface.

Another example is Gregory Shaffer who calls himself an American New Legal Realist. Shaffer curiously acts as a social scientist but never gives up entirely on doctrinal law.²² He is thus strikingly close to the positions of US legal philosophers such as Leiter²³ and Schauer²⁴ who also argue that realism

²¹ A. W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press 2001) viii-ix.

²² Cf. Gregory Shaffer, *The New Legal Realist Approach to International Law* (2015) 28 *Leiden Journal of International Law* 189. For critical discussion, see Holtermann & Madsen (n 6, 2015).

²³ Cf. e.g. Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press 2007).

²⁴ Cf. e.g. Frederic Schauer, 'Editor's Introduction', in Karl N. Llewellyn & Frederic Schauer (eds) *The Theory of Rules* (University of Chicago Press 2011) 1-28. .

and the associated empirical methods are relevant only on the rare occasions when law is underdetermined. This could be viewed as a variation of toleration, if not for the highly social scientific dimensions of Shaffer's studies. To conclude, under the heading of synthesis we often find some very competent studies of law, but when scrutinized on epistemological grounds they appear somewhat lacking.²⁵

III. CONCLUDING REMARKS

As suggested by the descriptions of these three main groupings of attitudes toward empirical scholarship on law, as well as the differences within each of the positions, the taxonomy presents a broad framework. The three categories represent ideal types and in research practice it may sometimes be difficult to place specific approaches unambiguously in one of the three categories. For instance, it seems, perhaps somewhat surprisingly, that some of the approaches presented in this issue could be placed in the toleration category, despite their application of quite sophisticated quantitative machinery to the study of law.²⁶ In these cases, it seems that the enthusiasm for computer-assisted large n-data is tempered by a willingness to domesticate or instrumentalize empirical methods and to apply them strictly as a *science auxiliare* for more traditional doctrinal purposes.

Even if some of these approaches present challenging cases at the borderlines between the three categories, the taxonomy is presented with the ambition to exhaust the logical space of possible attitudes toward empirical approaches to law and to force legal scholars to openly take a stand. The framework is intended to provide the conceptual space for rethinking the *actual* interface between doctrinal law and empirical approaches on epistemological grounds. Admittedly, this has an element of wishful thinking as the actual practices in this regard stand in sharp contrast to the debate in the legal field on the place of empirical studies in law. While doctrinal lawyers have often been highly defensive, empirical legal scholars very often avoid direct debate with proponents of doctrinal scholarship.

Some may, of course, do this out of genuine agnosticism. They may simply do empirical work within each of their own specialized discipline and have no strong opinion about its relationship to doctrinal scholarship. Others, however, may secretly reject doctrinal approaches and do so because they

²⁵ For extended argument, cf. Holtermann & Madsen (n 2).

²⁶ Cf. e.g. Frese and Palmer Olsen this issue.

consider them both epistemologically problematic and inadequate for explaining many current issues of law. Regardless of the position ultimately assumed, however, proponents of empirical approaches to law often tend not to openly state and defend but rather tacitly presuppose the view they hold. This makes epistemological debate highly difficult and leads to the mutually dismissive attitude between doctrinal and empirical scholars referred to earlier in this piece. This is clearly unproductive and renders legal scholarship incapable of really benefiting from some of the methodological and empirical revolutions currently taking place. It therefore seems preferable, especially for a network of European legal empirical scholars, to instead engage head-on with the pressing philosophical questions presented at the empirical turn, as set out above:

- (1) In what sense do these new empirical studies form part of a *legal* science?
- (2) Why, if at all, should they be pursued at a law faculty?
- (3) What do the countless new empirical studies tell us about valid law?
- (4) What do they tell us about what legal rules exist, what obligations and rights people have, etc.?
- (5) How do empirical findings relate to the kind of knowledge traditionally sought in the doctrinal study of law?

Hopefully, the framework presented here has the potential to help promote engagement with these questions. Only in this way can we hope that findings such as the ones presented in this special issue will not be summarily dismissed with sceptical versions of Armstrong's question: but did they discover law?