Introduction to European Business Law

Methods in legal research

by Professor Hans Henrik Lidgard and his students

Once the *theme* has been decided and the *purpose* carefully determined, it is time to consider how to go about solving a set task.

A cornerstone of scientific work is solving tasks systematically. Generally one works according to a preselected method. A method is usually selected which will determine the actual practical work to be done. This will consist of collecting data and other information on the object of study, processing data and so on. Note here the broader concept of methodology, which refers to those philosophical and logical principles upon which different methods are based. Methodological considerations are not usually explicitly raised though they undoubtedly play a role in the choice of method.

At a legal faculty a legal (scientific) method is used to produce results. Unfortunately few of us have a clear understanding of what a legal method is. The issue has often not been given sufficient priority and we tend to have divergent understandings of the underlying methodological concepts at play. Many just focus on the source material; they discuss how to use the material and how reliable it is. This is without question an important issue, but is it really about method? This should not rather be a broader account of how the research will be carried out in order to fulfill the initial purpose. Evaluation of the legal sources should rather be placed within the delimited heading of source material and be subject to critical analysis, whatever the method ultimately selected.

Further, many choose to describe their method at a point when the research is near completion. Is it not more scientific and logical to consider this issue as soon as the problem/purpose has been decided: How will I proceed to solve my task? Well, I will look at …, I will compare this to …, I will analyze previous …, I will verify the economic rationale and so forth. If one works systematically, one also works scientifically and if the purpose has been adequately specified and the chosen method appropriate, then the task is made clear and irrelevant sidetracks can be avoided.

The method chosen should indeed be relevant - it seems certain that this will lead to insight into how to solve the problem. Another important reason for establishing and setting out one's method is that it lets a reader examine how the research is structured and if the argument is reliable. It also lets the reader verify whether the author has really worked in accordance with his intentions. The chosen method guides the *presentation of fact*, which in turn provides a basis for the *analysis*, which the researcher makes and which may lead to interesting *conclusions* when the author sums

up and completes the work. Of course, a section on method can always be placed at the start of any work; but if it has only been decided on in the course of the work, inconsistencies regarding the above matters are likely to show with a consequent loss of coherence and convincingness.

The following describes different methods as discussed during seminars with students preparing for their masters thesis. It is not at all intended to be exhaustive. For example, Saldén discusses "jurimetri", which is a form of quantitative analysis of legal material. Further, there are no clear-cut definitions and every researcher needs to reflect on his or her choice of method and to present it to the reader: just to name the method will never be adequate. Of course, not everything is an issue of method: perhaps the traditional legal method is always the main tool which is just supplemented by other angles of approach. But even an angle of approach needs to be treated systematically and is therefore entitled to be characterized as a method or at least a perspective.

I. Traditional legal (dogmatic) method

The traditional legal method, also known as the dogmatic method, is used to interpret and systemize applicable law. Sources such as laws, case-law, preparatory work and doctrine are assigned value and analyzed in such a way as to shed light on the given problem and find the answers to the question that has been posed. Although this method is traditional and in common use there is no consensus on what exactly it consists of. It is unsurprising that academic theses often contain extensive accounts of how the author interprets it.

A paper written according to the dogmatic method has as its ultimate aim to investigate applicable law within a certain area with a view to deciding how a court of law can be expected to rule. The applicable law is described and the point is not at all to question why the law is as it is. The method is concerned with issues related to a certain rule and its legal/technical significance.

The paper is normally split up into a descriptive section and an analytical one. The first part presents the area of law to which the current problem/question belongs. In the analysis the legal problem is scrutinized in terms of its components or rekvisit and finally brought together and analyzed as a whole. The conclusion which is reached does not need to claim to set any norm or be the only correct solution to the problem. What is crucial is only that it is based upon a well-founded argument.

The material/sources of used are preparatory work, case law and doctrine. This is the same material which a judge uses to determine the applicable law. In fact the reasoning can only be based upon such sources. Further, the sources used have hierarchical positions in relation to each other as a result of which laws, other norms and fixed customary praxis *must* be considered while preparatory work, case law and doctrine *may* be

considered. In a conflict between different legal norms the norms which must be considered are given priority over those which may be. Furthermore a norm of higher rank surpasses one of lower rank, a later norm is applied instead of a older one and a more specialized norm overrides a more general one. All this may not need any explanation, though deviations do need some justification.

II. A comparative legal method/perspective

After gathering information on and presenting foreign law, the comparative legal method involves the comparison of several legal systems. It is a method for discovering and dealing with similarities and differences between different legal families or within the same family. The accumulation of knowledge on foreign law is always the first step of the comparative process.

The comparative legal method means that two or more systems are compared. The interdependence and disparities of the systems are analyzed. Comparison may be made at two levels. In a macro comparison the spirit, style, method and procedure of systems are studied. In contrast a micro comparison examines specific legal issues. Different legal systems have common concerns. A comparative legal method studies the similarities and differences between the solutions provided by different systems.

Comparison is the essence of the comparative method; the point is always to review comparable elements and establish their similarities and differences. Which legal system and which elements one compares is naturally dependent on the purpose of the comparison and the interests of the researcher. The comparison may be bilateral or multilateral, it may be a material comparison or a formal one.

Comparative studies primarily examine the functionality of different legal systems. If the laws are too dissimilar it may be difficult to compare specific rules, but all systems are confronted with similar problems. In the end the results will be comparable.

III. Law and philosophy method/perspective

An alternative to the legal dogmatic method is the application of a law and philosophy perspective. Not uncommonly, the case law in an area, irrespective of quantity, is vague and lacks consistency. It may then be of interest to compare the law and any interpretation of it with those ideas which have been presented by various legal philosophers. In this way one may be able to find explanations of and support for the legal rules. In other words the purpose of the law and philosophy method is to increase the general understanding of a certain matter by using an additional point-of-view.

A law and philosophy method entails having a perspective which applies to such questions as “what is the law for?”, or “ what is the difference between law and morality”.

As an example, France was one of the first countries to pass laws on copyright protection, which could be explained by the fact that the right to one's intellectual achievements was then an important issue for the non-aristocratic writers of the Enlightenment, and one they themselves theorized about. Or, by a more general approach, one could attempt to infer the rights of a citizen, including the rights to his intellectual productions, from the social theories of writers such as Hobbes and Locke.

IV. Law and politics method/perspective

A law and politics method normally involving analyzing the circumstances which in fact determined why a certain societal matter has been regulated in a certain manner. The approach is not evaluative, as was the law and philosophy method. It considers which interests have been taken into account and how the relevant concerns have been protected.

The law and politics method leads to arguments on de lege ferenda and gives the author great freedom to use arguments from outside the traditional legal method. All laws can be criticized from this perspective, but the method is still subject to analytic rules. A law and politics investigation may cover both broad issues regarding the purpose of the laws examined as well as narrower technical problems, such as how the legislative process is structured and how interests should be protected by the system.

V. A law and sociology method/perspective

The law and sociology method is a variant of the previous method. It likewise complements the dogmatic method by asking questions about the background of the law or its consequences and functions. Expressed summarily it can be said that both the above methods deal with “law in action” whereas legal science deals with “law in books”.

More precisely, the law and sociology does not adhere strictly to the rules on hierarchy of laws, but rather employs sociological and other theories and studies in a broad interpretation of the reciprocal relations between law and society. Such a point-of-view requires using empirical methods, which can clarify the social factors which impact of the law and are themselves influenced by it. Empirical data may be gathered by text analysis, observations made by participants, qualitative interviews or statistical surveys.

A law and sociology analysis begins with legal facts on the ground and asks which normative premises accepted by society are at their base.

The normative content is constructed in the light of the facts and is not prescribed.

VI. Law and economics method/perspective

The law and economics method is a further variant of the above methods and entails investigating applicable law from a purely economic perspective. An economic system is always a balance between the desires of individuals and the (relative) scarcity of resources. Law and economics examines rules of law by considering in what way they contribute to helping society function at its optimum. Two angles of approach are available. The first analyses economic effects on norms and the second how the functioning of norms effects the economic sphere.

Rules which help the common good are welfare enhancing, valuable to economic development and therefore reasonable and appropriate. One aim here is to calculate the efficiency of a rule of law by investigating its transactions costs. If such costs are too heavy, one could argue that this is not in accordance with the wishes of those who apply the rule and the rule should be changed.

A broader approach is to see how the economy affects and generates norms. Economic theory may be applied to, say, the legal establishment and characterization of patents, and analyse whether patent terms, the protection available and so on are allocation efficient". Will the patent system lead to under- or over-investment?

VII Law & gender method/perspective?

Gender research is often cross-disciplinary but in general the focus is on understanding patterns and power structures inherently related to gender. This in turn provides useful tools for studying related issues in working life as well as indifferent areas of research.

Perhaps it would be more accurate to use the terms gender methodology/perspective rather than gender method. One might even argue that gender research is entirely without method and one uses other approved scientific methods to which a gender perspective is applied in order to make one's point. A perspective may generally be considered as consisting of three elements: *supposition* on the state of reality, *values* related to this reality and a *belief* as to how reality should relate to the values in question. The gender method/perspective is about understanding and reviewing the relationship between man and woman both in the private and the public sphere.

The dogmatic method is structured and does not make much room for fundamental social issues, principles or concepts. The fact that the traditional legal method sets its own boundaries makes it hard to align the

gender method with its analyses. Only those issues which fall within the boundaries of the law are considered legal matters, i.e. laws, preparatory work, doctrine and case law. Issues outside of these boundaries are considered political or moral and ignored. As developed laws are usually gender-neutral, at least in a formal sense, gender issues end up outside the purview of this method. As a result, one is obliged to temper the legal method with a gender perspective (and indeed the other scientific methods) so as to make the point and achieve the depth one is aiming for.

Although the gender method should perhaps still be regarded as a perspective when allied with any of the other methods which have been reviewed above, the fit is probably easier to achieve as all these methods range more broadly than does the strict legal method and are thus better able to work with a novel, and equally broad point of view.

HH Lidgard and his masters students