Special Issue: Labour Law Research Methodologies Editors' Introduction

The aim of academic research is to make a new argument that advances human knowledge. In each discipline there are conventions about what counts as good research, what methods are acceptable and how to write up the results. In many disciplines conventions regarding methodology are well established. Although there are always innovations in research methods, and debates about new ideas, the basic structure is clear: in social sciences, for example, a researcher will study basic research methods and statistics during the undergraduate/bachelor's degree, advanced courses of research methods and statistics at the master's degree level, and then use these skills and methods to perform research during and following the doctoral studies. It seems safe to assume that the contents of these courses will be quite similar across universities and countries. In law, by contrast, the situation is much murkier. There are usually no courses in legal research methods in the first or even second degree in law, and when there *are* such courses, their content is far from universally accepted. Furthermore, unlike the situation in other disciplines, there are no basic texts summarizing the accepted knowledge and conventions regarding research methods in law.

The lack of clear, universal conventions regarding research methodologies arguably stems from the history of law faculties, which for many years were seen as professional schools whose main goal was to train lawyers. In some countries this is probably still the case. But in many countries law faculty members have been increasingly expected to produce research that is assessed against the same standards employed in other disciplines. And even in 'professional schools' of law, research has been produced and academic articles have been written for many years. So one could have expected conventions to emerge – and to some extent formalize in courses and books – about the acceptable methods to perform such research.

A different but related explanation has to do with the evolution of our understanding of the legal system itself. Scholars who believe that law is a closed system that can be examined only from within are now a minority. It is much more common today to see law as a means to various ends, and to appreciate the multitude of external factors influencing and shaping the law (and often the lack of

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clear boundaries between law and politics). Such understandings have led many scholars to rely on external research methods – imported from other disciplines – in studying the law. Although this phenomenon was observed decades ago, it has become much stronger in recent years; and today many new hires in law faculties at the United States (and some other countries) hold advanced degrees in another discipline – whether economics, sociology, history, philosophy or otherwise.

Such developments may seem to give rise to an existential crisis for legal research.[1] Some may argue that there is no such thing as legal research methods, only a variety of 'external' methods to study the law. This seems like an exaggeration. It is more correct to say that there is a plurality of methods in legal research, which includes some external methods alongside unique legal methods. Even the external methods seem to have a variation unique to legal research: that is, economic analysis of law as performed by legal scholars is not the same as that performed by economists. So there is no reason to despair about the future of legal research; on the contrary, with the inclusion of insights and methods from other disciplines, it appears to be richer and more rigorous than ever.

Is it important to define the boundaries of legal research as an independent methodology, entirely separated from other disciplines? Probably not. A degree of overlap between disciplines does not seem to be problematic. It is, however, important to articulate, refine and justify the methods we use in legal research. The current issue is intended to contribute to this goal, in the more specific context of research in labour law. We invited seven leading labour law scholars, who use different methodologies in their research, to explain their methods, justify them and reflect on them. These contributions can serve several purposes. Scholars who already use a particular methodology can find it useful to reflect on their methods and refine them in light of the insights included in the article dealing with that methodology. Other scholars can extract new ideas about what kind of methodologies to use in their research and how to employ them. Hopefully those using entirely different methods would also be inspired to think about their methodology and attempt to justify its usefulness. Other 'consumers' of legal research – including judges, practitioners and students – can use these contributions to better understand labour law articles, to evaluate them and to appreciate why a certain approach was taken.

It was not possible to include in this special issue every research method commonly used by labour law scholars. In particular, we did not include a

[1] For an elaborate and interesting discussion *see Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Mark Van Hoecke ed., Oxford: Hart 2011)

discussion of doctrinal research, not because it is not important or valuable in our eyes, but because it is more familiar to most readers. Other methods that are missing from this issue – without any intention to downplay their usefulness – are law and literature, regulation theories, law and culture, sociology of law, integrative approaches, and surely there are others. Moreover, in retrospect it turns out that we gave more focus (overall) to descriptive research, and perhaps not enough to normative research – even though many labour law scholars engage in normative studies. We are also well aware that by inviting mostly Anglo-American scholars to contribute to this special issue we have likely missed some approaches that are more common in other parts of the world. We will be happy to rectify such omissions by publishing more contributions on methodology in the future.

This issue opens with **Alan Bogg**'s contribution on philosophical perspectives of labour law. Bogg relies on philosophical writings and analytic methods to examine how labour law can be understood as a coherent, independent body of law, and later, to argue (perhaps surprisingly) that theories of corrective justice can advance our understanding of labour law. In the final part he rejects claims that philosophical investigations in labour law are 'futile', using as an example his own recent work on freedom of association.

In the following contribution, **Eric Tucker** reflects on the development and current state of labour law history scholarship. He gives numerous examples of fruitful studies performed within this area, and shows that a variety of different methodologies can be employed as part of such research. Using as an example his own research project on labour law's recurring regulatory dilemmas – and specifically the history of director/shareholder liability for unpaid wages – Tucker discusses some theoretical and methodological challenges and how they can be addressed.

The next article, by **Simon Deakin** and his colleagues **Zoe Adams**, **Parisa Bastani** and **Louise Bishop**, can be seen as an introduction to the growing field of empirical labour law. The authors begin by discussing the arguments for and against quantitative studies in labour law. Much of the article is then devoted to the dataset which they created at the University of Cambridge Centre for Business Research – the Labour Regulation Index – which covers no less than 117 countries and includes an assessment of changes in labour laws over time. By explaining in detail the methodology and the results, the authors shed light on how such studies can be conducted, what the methodological challenges are, and how the outcome can be useful and important.

The contribution by **Joanne Conaghan** explores the feminist method of research as applied to labour law. She starts by explaining how gender is taken to

be analytically central, assumed to be always relevant, and law is examined critically through gendered lenses. She then provides numerous examples of fruitful studies that expose the operation of gender bias and neglect; destabilize the normative and conceptual infrastructure; and historicize and contextualize the field. Conaghan ends with a comment on the points of convergence between feminism and labour law but also the ways in which feminism is disruptive to this field – although, as she adds, with good intentions and for worthy ends.

In the following article, **Stewart Schwab** discusses the law-and-economic analysis of labour law. He begins with a brief history of law and economics, which he sees as developing in three eras. He then gives two examples of economic analysis of employment regulations. Examining a simple mandatory vacation legislation as well as a more complex common law doctrine setting limitations on wrongful discharge, Schwab shows the usefulness of economic analysis to the understanding of the implications of such regulations. He concludes by listing and explaining a number of key concepts that clarify the assumptions and basic principles of economic analysis in the context of labour law. As part of this discussion, he offers an illuminating account of 'unequal bargaining power' and what it means from an economic perspective.

Schwab explains that economic analysis is concerned with maximizing overall social welfare while being agnostic about who wins. This is very different from the approach of critical legal studies (CLS), which puts distributive considerations and implications centre stage. The contribution by **Michael Fischl** offers a fascinating introduction to this methodology, which as he explains, focuses on 'demystifying' legal reasoning. He uses a specific case – dealing with an attempt by a labour union to prevent a plant closure on the basis of 'promissory estoppel' – to contrast the mainstream, legal realist and CLS 'stories' about this doctrine. Fischl then uses a number of critical techniques to expose the ideological dimension behind the courts' decision to reject the union's argument.

The final contribution of this special issue, by **Dagmar Schiek**, introduces the comparative methodology, while at the same time employing a 'social actor' perspective imported from sociology. The idea is to take comparative labour law to the next level: not only to compare the law on the books and the surrounding context of industrial relations determining how the law is applied, but also to examine the way social actors utilize different levels of legal norms in a globalized setting. Schiek focuses on the EU internal market, exploring the ways social actors shape the rules affecting labour in the context of multilevel labour law regimes. She argues that such a methodology is able to address the current challenges of comparative labour law.

We are extremely thankful to all the authors for their willingness to contribute to this special issue. We feel fortunate to receive such thoughtful

reflections on research methodologies from leading scholars in the field, who have been applying these methods successfully for many years. We have no doubt that readers will similarly find this issue stimulating, enlightening and useful. We welcome additional submissions that will further enrich the discussion of methodology in the pages of this Journal.

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