

## **Research seminar on sociolegal theory and inquiry: studying EU law in context in the 21<sup>st</sup> century**

We will work together with the main purpose of articulating or least understanding the social-scientific approaches of studying law today. While the classic doctrinal approach (whose definition will also be subject to discussion here) remains the main modus operandum in legal scholarship nowadays, the questioning surrounding the politics and social forces lying underneath the law has been debated for decades, and the “methodological” turn has been in full swing in the last few years.

This leads to a set of opportunities and challenges, summarized here as:

- *An opportunity to escape the Kelsenian trap of viewing law’s developments as solely explained by the legal system.* The focus of classic legal theory on “validity” instead of “force”, “impact” of “passage” of law in contemporary societies leads legal scholarship to disarray when trying to grasp the unfamiliar developments of law and politics in the EU today, especially after a decade of socio-economic crises which challenged the smooth application of the *acquis* and led to what Joerges called an “overburdening” of the law. The hyperextension of treaty provisions in the actions of the Commission and the case law of the CJEU triggered a severe backlash from legal professionals (e.g. the German, Polish, Danish and Czech constitutional courts) and beyond (Rule of law crises pitting EU institutions against 2 Member state governments). Crises and controversies are occurrences portraying the downgrading and temporary suspension of a more traditional division of labor, reflected in society broadly but also in academia. Systems, fields or discipline tend to gain autonomy if not operative closure when not being under stress (with their own interpretation grids, publics studied and temporalities), whereas their separation is relativized if not erased during stressful times (we will explore the idea that such “stress” is precisely materialized by the Habermasian displacement of a problem of 1 system to the others, especially the political system). Law’s alleged internal validity does not suffice in explain its effects on the actors, agents or actants in society nowadays, forcing us to look for law’s authority within and but also beyond positive law.

- *An opportunity to understand a world with coexisting and competing rationalities/ontologies.* Major social theories tend to impose a single mode of behavior in society. A world of norms is a world where the dichotomy “legal/illegal” dictates the possibilities offered to members of society. A world of rational actors dictates that the maximization of self-interest drives the behavior of actors when dealing with others. A neo-institutionalist school of thought argues that the interplay between institutional setting and actors’ ideas and interests drives societal developments. These major lines of thought are often applied uncritically when forging theories (read the mid-range developments of these social-scientific paradigms) and are assumed to apply universally to all actors under study. We will challenge this by exposing these different paradigms and trying to assess whether multiple ontologies may coexist synchronously. Law offers a key example in that regard. If Parsons observed that law was a medium applied in all social systems, others like Luhmann or Bourdieu showed that law’s existence generating a segregating effect among agents. This points towards a differentiated relationship to law depending of the actors under study, meaning that law carries a different force depending on the individual or group under study.
  
- *A challenge regarding knowledge production.* The different purposes of disciplines led scholars to forge their own epistemology (science of science). A major division transcends the disciplines of law, political science and sociology: Normative vs empirical. Normative arguments present a vision of the world as it ought to be (*sollen*) while a focus on empirics describe the world as it is (*sein*). The purposes differ greatly here, and the sources for inquiry are thus divergent, but a mutual reading of the scientific literature produced about a common object of inquiry (e.g., judges and courts) either brightens the prospects of forging a fine-grained theory fitting within traditional disciplinary bounds or raises the possibility of exhausting the research project by having a comprehensive look at a concept (e.g. legitimacy) or an object (e.g., directive).
  
- *A challenge in terms of mutual acceptance.* Disciplines elevated outer bounds, which led to the establishment of a zone of comfort within the field while forcing a blind eye on the outer rim. This would not cause any trouble if there were a perfect

division of labor between the social sciences. However, 21<sup>st</sup> century scholarly production – especially in the last decade – saw disciples of various disciplinary dogmas research the same objects without having recourse to insights from other disciplines, leading to competing and sometimes diverging analyses of the same events (e.g. interpretations of the *Kadi* case of the CJEU). The purpose here is to accept a tolerance of different scientific visions and try to excavate from each the best elements available in order to forge the most comprehensive normative or sociological arguments (and we will see that classic socio-legal scholarship is usually very open-minded in terms of theoretical inspirations).

The seminar will look like a classic research design course taught to graduate students in sociology and political science faculties, albeit with a particular emphasis on the role of law in society. We will have a closer look first at the various ways scholars thought of the object of law as it is/should be (Law's Ontology). Then, we will see what these different visions propel in terms of producing knowledge, and highlight the possibilities and incompatibilities of the various ways of doing scientific production about law and lawyers (Law's Epistemology). This will lead us to frame the various potential investigation strategies a researcher must employ in order to answer her research question, i.e. by articulating the various consequences and hypotheses derived from the literature (research design) and by highlighting the different methods available to answer questions and validate/repudiate hypotheses when having a deductive research design or by exploring reality when having an inductive research design (methodology).

#### General bibliography

Javier Treviño (2008) *The Sociology of Law. Classical and Contemporary Perspectives*, Routledge

Mathieu Deflem (2008) *Sociology of Law. Visions of a Scholarly Tradition*, Cambridge University Press

Jiri Prihan (ed) (2020) *Research Handbook on the Sociology of Law*, Edward Elgar Publishing

Michael Freeman (ed) (2006) *Law and Sociology*, Oxford University Press

Reza Banakar and Max Travers (eds) (2013) *Law and Social Theory*, Bloomsbury, 2<sup>nd</sup> ed.

## **I) Law's ontology or ontologies? On competing visions of the legal world**

This will be an exploration of the various currents existing in legal scholarship and sociology about the study of law. More accurately, it will help us to reconcile the great names of the disciplines with a brief analysis of their approaches to law, along with their legacy in contemporary scholarship.

### *A) The basics and its critics: revisiting the pure theory of law*

Hans Kelsen, “On The Pure Theory of Law”, *Israel Law Review*, 1(1) , pp. 1 – 7:  
<https://www.cambridge.org/core/journals/israel-law-review/article/abs/on-the-pure-theory-of-law/5CC1B2C9A085AC3655AFBEDB7A3F6511>

Lars Vinx, “The Pure Theory of Law—Science or Political Theory?”, in *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy*, Oxford University Press, pp. 29 – 57:  
<https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199227952.001.0001/acprof-9780199227952-chapter-2>

Jean Cohen, “Sovereignty in the context of globalization: a constitutional pluralist approach” (especially Section 1.2 “The Legalistic Challenge”), in *Globalization and Sovereignty. Rethinking Legality, Legitimacy, and Constitutionalism*, Cambridge University Press, pp. 21 - 79: <https://www.cambridge.org/core/books/globalization-and-sovereignty/sovereignty-in-the-context-of-globalization-a-constitutional-pluralist-approach/E932C13440387AAD7CAEDDEEDD8BC205>

Joseph Raz, “Kelsen’s Theory of The Basic Norm”, in *The Authority of Law: Essays On Law and Morality*, Oxford University Press, p. 122 – 145:  
<https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780198253457.001.0001/acprof-9780198253457-chapter-7>

### Further reading

Andrei Marmor, “The Pure Theory of Law”, Stanford Encyclopedia of Philosophy:  
<https://plato.stanford.edu/entries/lawphil-theory/>

Hans Kelsen (1992 [1934]) *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law*, Oxford University Press:  
<https://academic.oup.com/book/32594>

*B) The classic sociological approaches to law (1<sup>st</sup> half of 20<sup>th</sup> century)*

Michael Clark, “Durkheim's Sociology of Law”, *British Journal of Law and Society*, 1976, 3(2), pp. 246-255: <https://www.jstor.org/stable/pdf/1409819.pdf>

Mathieu Deflem, “Max Weber on the rationalization of law”, in *Sociology of Law*, Cambridge University Press, pp. 37 – 55: <https://www.cambridge.org/core/books/sociology-of-law/max-weber-on-the-rationalization-of-law/CAE29D765766F5B49268A596C650C442>

David Nelken, “Eugen Ehrlich, Living Law, and Plural Legalities”, *Theoretical Inquiries in Law*, 9(2), pp. 443 – 472:  
<https://heinonline.org/HOL/Page?handle=hein.journals/thinla9&id=447&collection=journals&index=>

James Gardner, “The Sociological Jurisprudence of Roscoe Pound (Part I)”, *Villanova Law Review*, 7(1), pp. 1 – 26:  
[https://warwick.ac.uk/fac/soc/sociology/staff/sfuller/social\\_theory\\_law\\_2015-16/roscoe\\_pound\\_the\\_sociological\\_jurisprudence.pdf](https://warwick.ac.uk/fac/soc/sociology/staff/sfuller/social_theory_law_2015-16/roscoe_pound_the_sociological_jurisprudence.pdf)

Further reading

Maria Serafimova and al. (eds) (2009) *Sociology and Law: The 150th Anniversary of Emile Durkheim (1858-1917)*, Cambridge Scholars Publishing

Max Weber (1978 [1922]) *Economy and society: an outline of interpretive sociology*. Vol. 1, University of California Press

*C) Law in systems, critical and postmodernist theories (2<sup>nd</sup> half of 20<sup>th</sup> century)*

Niklas Luhmann, “Operational Closure and Structural Coupling: The Differentiation of the Legal System”, *Cardozo Law Review*, 13(5), pp. 1419 – 1442:  
<https://heinonline.org/HOL/Contents?handle=hein.journals/cdozo13&id=1&size=2&index=&collection=journals>

John McCormick, “Habermas' Discourse Theory of Law: Bridging Anglo-American and Continental Legal Traditions?”, *Modern Law Review*, 60(5), pp. 734 – 743:  
[https://www.jstor.org/stable/1096963?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/1096963?seq=1#metadata_info_tab_contents)

Yves Dezalay and Mikael Rask Madsen, “The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law”, *Annual Review of Law and Social Science*, 8, 433 – 452: <https://www.annualreviews.org/doi/10.1146/annurev-lawsocsci-102811-173817>

Alan Hunt, “The Theory of Critical Legal Studies”, *Oxford Journal of Legal Studies*, 6(1), pp. 1 – 45: [https://www.jstor.org/stable/764467#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/764467#metadata_info_tab_contents)

Gerald Turkel, “Michel Foucault: Law, Power, and Knowledge”, *Journal of Law and Society*, 17(2), pp. 170 – 193: [https://www.jstor.org/stable/1410084#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/1410084#metadata_info_tab_contents)

#### Further reading

Niklas Luhmann (2008) *Law as a Social System*, Oxford University Press

Jürgen Habermas (1996) *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, MIT Press

#### *D) Law in action, law beyond intersubjectivity: contemporary approaches*

Kimberlé Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color”, *Stanford Law Review*, 43(6), pp. 1241 – 1299:  
[https://www.jstor.org/stable/1229039#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/1229039#metadata_info_tab_contents)

Rebecca Sandefur, “Work and Honor in the Law: Prestige and the Division of Lawyers' Labor”, *American Sociological Review*, 66(3), pp. 382 – 403:  
[https://www.jstor.org/stable/3088885#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/3088885#metadata_info_tab_contents)

Annelise Riles, “A New Agenda for the Cultural Study of Law: Taking on the Technicalities”, *Buffalo Law Review*, 53(3), pp. 973 – 1033:  
<https://digitalcommons.law.buffalo.edu/buffalolawreview/vol53/iss3/11/>

Kyle McGee, “The Fragile Force of Law: Mediation, Stratification, and Law's Material Life”, *Law, Culture and the Humanities*, 11(3), pp. 467 – 490:  
<https://journals.sagepub.com/doi/full/10.1177/1743872112447144>

#### Further reading

Bruno Latour (2009 [2002]) *The Making of Law. An Ethnography of the Conseil d'Etat*, Wiley Publishing

Annelise Riles (2011) *Collateral Knowledge: Legal Reasoning in the Global Financial Markets*, University of Chicago Press

## **II) Producing knowledge about law: epistemology**

Epistemology is the science of science, i.e. the way we produce knowledge about the world/population/norm(s) we are studying. Legal scholarship has historically been characterized with its specific approach: doctrine. The place of doctrine is under closer scrutiny in contemporary social-scientific debates, with some claiming that it is a simple rhetorical exercise and others claiming that it is the only possible way to say something meaningful about the law. We will approach these questions by using the major cleavages in academia today.

### *A) What about the classical method? On doctrine in the 21<sup>st</sup> century*

Jan Smits, “What Is Legal Doctrine? On The Aims and Methods of Legal-Dogmatic Research”, in Rob Van Gestel and al., *Rethinking Legal Scholarship, A Transatlantic Dialogue*, Cambridge University Press, pp. 207-228, at:  
<https://www.cambridge.org/core/books/rethinking-legal-scholarship/A0C487D72AF7D2627B7C2EB6A6A7D1C8> (The entire section “Should Doctrinal Legal Scholarship be abandoned?” of the book is relevant)

Matyas Bodig, “Legal Theory and Legal Doctrinal Scholarship”, *The Canadian journal of law and jurisprudence*, 23(2), pp. 483-514, at:  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1263946](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1263946)

2 chapters of the book *The Politics of European Legal Research. Behind the Method*, Edward Elgar, at: <https://www.elgaronline.com/view/edcoll/9781802201185/9781802201185.xml> :

- Christina Eckes, “A Timid Defence of Legal Formalism”, pp. 192-207
- Gareth Davies, “Taming law: the risks of making doctrinal analysis the servant of empirical research”, pp. 124-138

### *B) On normative and empirical designs*

Rainer Bauböck, “Normative political theory and empirical research”, Donatella della Porta and Michael Keating (eds), *Approaches and Methodologies in the Social Sciences. A Pluralist Perspective*, Cambridge University Press, pp. 40-60, at:

<https://www.cambridge.org/core/books/abs/approaches-and-methodologies-in-the-social-sciences/normative-political-theory-and-empirical-research/0B1EB89477E0194B0676B08E6DA1E6D8>

Kenneth Thompson, “The Empirical, Normative, and Theoretical Foundations of International Studies”, *The Review of Politics*, 29(2), pp. 147-159, at:

[https://www.jstor.org/stable/1405662#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/1405662#metadata_info_tab_contents)

Jürgen Habermas, “Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research”,

*Communication theory*, 16(4), pp. 411-426, at:

<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-2885.2006.00280.x>

Theresia Anita Christiani, “Normative and Empirical Research Methods: Their Usefulness and Relevance in the Study of Law as an Object”, *Procedia - Social and Behavioral Sciences*, 2019, pp. 201 – 207, at:

<https://www.sciencedirect.com/science/article/pii/S1877042816300660>

Silvia Zorzetto, “Normative Legal Positivism: from Metaphysics to Politics”, *Isonomía. Revista de Teoría y Filosofía del Derecho*, 54, pp. 139-166, at:

<https://doi.org/10.5347/isonomia.v0i54.463>

Jacques Lenoble, “Epistemology and Validity in Law”, in Alexander Peczenik and al. (eds), *Theory of Legal Science*, D. Reidel Publishing Company: Boston/Dordrecht, pp. 163-174, at:

<http://hdl.handle.net/2078.1/89152>

*C) Is there a compatibility between legal scholarship and social-scientific epistemology?*

Lee Epstein and Gary King, “The Rules of Inference”, *The University of Chicago Law Review*, 69(1) pp. 1-133, at:

[https://www.jstor.org/stable/1600351#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/1600351#metadata_info_tab_contents)

Frank Cross and al., “Above the Rules: A Response to Epstein and King”, *The University of Chicago Law Review*, 69(1) pp. 135 – 151, at:

[https://www.jstor.org/stable/1600350#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/1600350#metadata_info_tab_contents)



Jack Goldsmith and Adrian Vermeule, “Empirical Methodology and Legal Scholarship”, *The University of Chicago Law Review*, 69(1) pp. 153 – 167, at:

[https://www.jstor.org/stable/1600351#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/1600351#metadata_info_tab_contents)

These 3 articles coming from the same issue form a controversy that are crystallizing the tensions between (normative) legal scholarship and inference-based (thus causality) designs that prime nowadays in political science. The 1<sup>st</sup> piece is written by political scientists (the 1<sup>st</sup> is a specialist of judicial behavior, the 2<sup>nd</sup> is a quantitative methods specialist) explaining how the logic of inference could be applied to study law. The other 2 pieces reject their approach by stressing the specificity of law.

Juan Mayoral and Tommaso Pavone, “Statistics as if legality mattered: the two-front politics of empirical legal studies”, in Marija Bartl and Jessica Lawrence (eds), *The Politics of European Legal Research. Behind the Method*, Edward Elgar, pp. 78 – 93, at:

<https://www.elgaronline.com/view/edcoll/9781802201185/9781802201185.00013.xml>

#### Further reading

Lee Epstein and Andrew Martin (2018) *An Introduction to Empirical Legal Research*, Oxford University Press

Gary King and al. (eds) (1994) *Designing Social Inquiry: Scientific Inference in Qualitative Research*, Princeton University Press

#### *D) A way forward? Flexible epistemology via interpretive and inductive scholarship*

John Gerring, “Part II: Description”, in *Social Science Methodology. A Unified Framework*, Cambridge University Press, 2<sup>nd</sup> edition, pp. 105 – 194, at:

<https://www.cambridge.org/highereducation/books/social-science-methodology/D1214FCA9B6AEE4E5914E0169A426255#overview>

Michel Callon, “Some Elements of a Sociology of Translation: Domestication of the Scallops and the Fishermen of St Brieuc Bay”, *The Sociological Review*, 32(1 suppl), pp. 196 – 233, at:

<https://journals.sagepub.com/doi/10.1111/j.1467-954X.1984.tb00113.x>

Anne Warfield Rawls, “Harold Garfinkel, Ethnomethodology and Workplace Studies, 2(5), *Organization Studies*, 701 – 732, at:

<https://journals.sagepub.com/doi/10.1177/0170840608088768>

Malcolm Williams, “Interpretivism and Generalisation”, *Sociology*, 34(2), pp. 209 – 224, at: [https://www.jstor.org/stable/42858032#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/42858032#metadata_info_tab_contents)

#### Further reading

Michael Freeman and David Napier (eds) (2009) *Law and Anthropology: Current Legal Issues Volume 12*, Oxford University Press

Alain Pottage and Martha Mundy (eds) (2009) *Law, Anthropology, and the Constitution of the Social*, Cambridge University Press

### **III) Seeking answers: the methods**

Once an epistemology has been adopted and a subsequent research design has been developed, the researcher possesses several methods at its disposal. The choice of the method is not totally free: it depends on certain cleavages such as normative/empirical or qualitative/quantitative.

#### *A) Quasi-empirics: counterfactuality*

Roland Wenzlhuemer, “Counterfactual Thinking as a Scientific Method”, *Historical Social Research / Historische Sozialforschung*, 34(2), pp. 27 – 58, at: [https://www.jstor.org/stable/20762353#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/20762353#metadata_info_tab_contents)

Robert Strassfeld, “If . . . : Counterfactuals in the Law”, *Case Western Reserve University - School of Law*, Faculty Publications, 373: [https://scholarlycommons.law.case.edu/faculty\\_publications/373](https://scholarlycommons.law.case.edu/faculty_publications/373)

Russell Sandberg, “Counterfactual Legal History: Why Legal Scholars Should Enter the ‘What If’ Multiverse”, at: [https://www.academia.edu/51142443/Counterfactual\\_Legal\\_History\\_Why\\_Legal\\_Scholars\\_Should\\_Enter\\_the\\_What\\_If\\_Multiverse](https://www.academia.edu/51142443/Counterfactual_Legal_History_Why_Legal_Scholars_Should_Enter_the_What_If_Multiverse)

#### *B) Small-N samples: qualitative methods*

Andrea Voyer, Mats Trondman, “Between theory and social reality: Ethnography and Interpretation and Social Knowledge: Introduction to the special issue”, *Ethnography*, 18(1), pp. 3 – 9, at: <https://journals.sagepub.com/doi/10.1177/1466138115592415?icid=int.sj-full-text.similar-articles.1>

Heather Stuckey, “Three types of interviews: Qualitative research methods in social health”, *Journal of Social Health and Diabetes*, 1(2), pp. 56 – 59, at: <https://www.thieme-connect.de/products/ejournals/abstract/10.4103/2321-0656.115294>

Florence Delmotte and al., “Belonging and Indifference to Europe: A Study of Young People in Brussels”, *Historical Social Research / Historische Sozialforschung*, 42(4), pp. 227-249, at: [https://www.jstor.org/stable/44469368?sid=primo#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/44469368?sid=primo#metadata_info_tab_contents)

### *C) Large-N samples: quantitative methods*

Satyapriya Chaudhari, “What Is Descriptive Statistics?”, at: <https://builtin.com/data-science/descriptive-statistics>

D. R. Cox, “Preliminaries” and “Some concepts and simple applications”, in *Principles of Statistical Inference*, Cambridge University Press, pp. 1 – 29, at: <https://www.cambridge.org/core/books/principles-of-statistical-inference/BCD3734047D403DF5352EA58F41D3181>

Petra Lietz, “Research into Questionnaire Design: A Summary of the Literature”, *International Journal of Market Research*, 52(2), pp. 249 – 272, at: <https://journals.sagepub.com/doi/abs/10.2501/S147078530920120X>

John Scott, “Introduction” and “History of social network analysis”, in *What is Social Network Analysis?*, Bloomsbury, pp. 1 – 30, at: <https://www.bloomsburycollections.com/book/what-is-social-network-analysis/>