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INTELLECTUAL AND FORMAL STANDARDS
OF SCIENTIFIC LEGAL RESEARCH AND WRITING
Contribution to the course *Methodology of Legal Research and Legal Writing*

concerning § 2 IV Precise and logical reasoning in accordance with legal methodology

Diagram 1
A brief overview over legal methodology

Preliminary remark: There is sometimes confusion in Indonesia about the essence of legal science and what is and what is not legal methodology. The following overview shall provide orientation but is not exhaustive.

A. The nature of legal science and legal methodology

- legal methodology is not an end in itself - its methods and standards derive from the nature of legal science
- there is a broad global consensus that legal science is essentially a *normative and hermeneutic*, not empirical science
  - it is the science of the *Sollen* ["Ought"] (as ordered in the legal norm, which needs to be interpreted), not of the *Sein* ["Is"]
  - it focuses on the contents, internal interrelations and coherence of the law, not on the phenomena caused by it or leading to it
  - its methods are closer to those of philosophy and theology than to those of natural or social sciences
- the law is also the research object of many other scientific disciplines: political science, social sciences, economics, historical science, philosophy, psychology etc. - *not every research about law is legal research!*
- there is no comprehensive uniform understanding of legal methodology but a broad transnational consensus on the main legal methods, focusing on the correct *interpretation and application of the law*
- attempts to establish empirical approaches on equal footing within legal science are in most countries overwhelmingly rejected; instead, legal research takes into account and often *builds on the results of empirical research in other disciplines*
- there are differences in legal methodology between common law and continental legal systems, due to the different role of written law and jurisprudence, but in practice they can be less significant than expected

B. The activities of the legal scientist

I. What does a legal scientist do?

1) Core activities of legal science

a) Interpreting the law
- the most important activity of a legal scientist
- in particular *defining and delimiting legal terms* and identifying important case groups

b) Applying the law
- usually supporting others who have the jurisdiction to apply the law through legal advice (e.g. legal opinions)
- in particular *subsumption*
- also developing scientifically based solutions for practical problems

c) Systematising the law
- clarifying the subdivision of the law in various fields and sub-fields of law and their relations
- clarifying the typology and hierarchy of norms in the given legal order
- working out the functions of individual legal norms and their consequences
- working out the relation between different legal norms
- *determining the applicabel norm in case of concurrence of laws*
- categorising frequent cases in case groups

d) Analysing, systematising and commenting the jurisprudence
- identifying the doctrinal core content of court decisions
- scrutinising and evaluating the quality of the court's reasoning
- relating new judgements to the previous line of jurisprudence
- compiling important court decisions and reproducing the development of the jurisprudence
- supporting the development of the jurisprudence by critical scientific comments

e) Providing for a deeper inherent understanding of the law
- exploring the potential of legal concepts
- working out the inherent structure of important types of norms (fundamental rights, norms on criminal offences, bases for claims, legal bases for administrative action etc.) and its consequences for their application
- working out the change in the interpretation of a legal norm in the course of time

f) Building up a sophisticated, consistent and differentiated legal doctrine
- working out the basic concepts and strutural principles in the various fields and sub-fields of law
- developing theories for a better (deeper, more consistent etc.) understanding of a field of law
- introducing new legal notions, concepts or principles in legal dogmatics
- critically inventorying the existing legal dogmatics, their limits and deficits, and assessing the state of legal science in a field or sub-field of law
- in some legal orders (e.g. French, EU, public intern. law) working out of inherent unwritten general principles of law

2) Other activities of legal science

a) Establishing the existence of customary law
- rare in highly developed legal systems because almost everything is regulated in laws and regulations
- still important in public international law
- still important in countries with a developing legal system where traditional law plays an important role - see for Indonesia art. 18B(2) Constit. 1945

b) Comparing law with the corresponding law in other legal orders
- thus developing a deeper understanding of the own law, its strong and weak points and possible alternatives
- e.g. studying foreign innovations and approaches as a potential model for the domestic legal development
- e.g. studying the jurisprudence of foreign supreme or constitutional courts on current issues that also arise in one's own country

c) Developing proposals for the improvement of the existing law
- e.g. for solving practical problems in a field or sub-field of law
- e.g. for consolidating or modernising the theoretical foundations of a field or sub-field of law
- often *making use of foreign innovations* that would also be beneficial for the domestic law

d) Developing proposals for a "cleaning up" in a field of law
- for the elimination of inconsistencies, paradoxes, unsuitable elemements imported from foreign law etc.

3) Activities from other scientific disciplines integrated into legal science
- uncharacteristic activities based on or dominated by the approaches of other disciplines but so closely related to the law that they often have been integrated as *complementary side disciplines* into legal science, the researchers are employed at the law faculties and they can be studied as subsidiary (often elective) subjects within the legal studies

a) Exposing the historical backgrounds and reconstructing the historical development of the law
- studies in legal history, inspired or dominated by → historical science

b) Exploring the philosophical foundations of the law
- studies in legal philosophy, inspired by → philosophy
- studies in state philosophy (General Theory of State), dominated by → political philosophy

c) Assessing the economic impact of laws, individual norms or interpretations of norms
- economic analysis of law, dominated by → economic science

d) Examining the law in its relation to and its impact on the society
- studies in sociology of law and *socio-legal studies*, dominated by → social sciences

II. What does a legal scientist not do?

- experiment-based research (→ natural and technical sciences)
- economic research (→ economic science)
  - exception: side approach economic analysis of law
- empirical research (→ social sciences)
  - exceptions: side discipline legal sociology and side approach socio-legal research
- law-related research more closely related to other scientific disciplines
  - forensic research (→ medicine)
  - legal psychological research (→ psychology)
- promoting political objectives (→ politics, political science)
  - exception: legal politics (→ law-related politics - not legal science anymore)
- promoting morality (→ moral philosophy)
  - in a state committed to rule of law and human rights, law and morality are different spheres
- promoting religious objectives (→ religion, theology)

C. The methods of the legal scientists

I. Main legal methods

1) Methods of legal interpretation

a) Grammatical (literal) interpretation
- focuses on the *wording* of the norm
- note that the wording sets an absolute *limit* to interpretation!

b) Systematic interpretation
- focuses on the systematic *position* of the provision within a certain part or sub-part of the law or regulation
  - the position often indicates the function and, consequently, the sense of the norm
  - the same legal term may need to be interpreted differently in norms with a different systematic position (e.g. differently in the clause guaranteeing a fundamental right than in that limiting it)
- also aims to avoid inconsistencies in the legal system
  - a special kind: the *interpretation of legal provisions in conformity with higher-ranking law* (constitution, human rights, European Union law) to prevent conflicts

c) Historical interpretation
- focuses on the *genesis* of the norm
- important in particular for legal provisions reacting to the failures of their predecessors
- special regard to the explanatory memorandum to the bill and the discussion in the legislative procedure

d) Teleological interpretation
- focuses on the *purpose (ratio legis)* of the norm
- the most important method of legal interpretation in practice, requires a deeper understanding of the norm
- jurist must resist temptation to present his own political ideas as purpose of the law...
- includes impact-orientated interpretation
  - e.g. avoiding absurd and impractical results, harmful effects and undue hardship
  - e.g. ensuring the *effet utile* (practical effectiveness) of the norm (favoured by the European Court of Justice)
- can also result in a *teleological reduction*, i.e. not applying a norm, although it would be applicable according to its wording, with regard to its purpose

e) Additional specific methods for constitutional interpretation

aa) Interpretation with regard to the *unity of the constitution*
- a special kind of systematic interpretation, understanding the constitution as a homogeneous whole and resolving inconsistencies between individual provisions in its overall context

bb) Interpretation according to the principle of *practical concordance*
- a further development of this approach, gently reconciling colliding constitutional norms and values (e.g. the fundamental rights of different citizens) by considerate concretisation and balancing, allowing all of them to unfold under reciprocal limitation as far as possible

f) Comparison of laws as a method of legal interpretation?
- not a method of legal interpretation per se, since identical provisions can have a different meaning in different legal orders, due to different historical, ideological or cultural backgrounds
- but often a *source of inspiration* within the teleological (or other classical kinds of) interpretation

2) Subsumption
- subsuming a factual situation under a legal norm by relating the facts to the legal prerequisites of the norm
- needs to be done individually for every single legal prerequisite of the norm
- congruence of the facts with all legal prerequisites will trigger the legal consequences of the norm

3) Analogy
- application of a legal norm, which offers a suitable solution, to a case not regulated therein but similar to the regulated case (→ analogous application)
- comes into consideration if legislator did not or could not have in mind the given constellation
- presupposes an unintended regulatory gap (no conclusive regulation) and a comparable constellation of interests
  - assumes that the legislator would have regulated the case in this way if he had thought of it...
- impermissible in criminal law (→ nulla poena sine lege)
- opposite solution: argumentum e contrario

4) Methods to determine the applicable norm in case of concurrence of laws
- application of the *lex superior rule, lex posterior rule, lex specialis rule*, special rules in criminal law etc.

5) Balancing
- between legally protected interests with regard to a specific situation
- in particular between fundamental rights and public interests but also between private interests
  - an essential part of the application of the principle of proportionality
- goes often hand in hand with a concretisation of legal principles or values
- determination of the protected interests, compiling of the relevant facts, consideration of all relevant aspects, reasoned balancing decision
- note that the balancing itself is ultimately a subjective process - here we meet a limit of objectivity in law

6) Theoretical reflection about the law
- necessary on a large scale for most activities of legal science!
- often actually the predominant part of the work of the legal scientist
- analysing, identifying, describing, defining, concretising, delimiting, categorising, comparing, assessing, evaluating, conceptualising, creative etc. ...

II. Other legal methods

1) Empirical studies for establishing the existence of customary law
   - on the required continuous common practice in the population or among other relevant players (*consuetodo*)
   - on the required common opinion that this practice is legally binding (*opinio iuris sive necessitatis*)

2) Comparative methods
   - classical methods of comparison of laws
   - drawing inspiration from foreign court decisions for answering questions in the own law
   - evaluative comparison of laws [wertende Rechtsvergleichung] (a method developed by the European Court of Justice for identifying and concretising unwritten general principles of European Union law)

3) Adaptation of foreign legal concepts to the specific features of the domestic law
   - a prerequisite for a successful transfer of foreign concepts to the domestic law
   - requires a deeper understanding of both, the foreign legal concept and the domestic law and legal culture
   - must include the adaptation to the cultural, social and economic context of the domestic law

III. Complementary methods from other scientific disciplines

- used for the complementary activities which have been integrated into legal science (→ B.I.3)
- usually only taught in complementary and elective courses

1) Legal historical exegesis
   - historical and legal analysis and interpretation of sources from legal history

2) Specific methods of legal philosophy
   - a broad, heterogeneous spectrum of proposed methods

3) Political-philosophical reasoning
   - the methods in state philosophy (General Theory of State)

4) Economic analysis of law
   - usually by microeconomic analysis, with special regard to the behavioural consequences of legal norms

5) Methods of socio-legal research
   - an interdisciplinary variety of methods but predominantly empirical sociological research
   - useful, for example, as a basis for impact-orientated drafting or interpretation of legal norms
   - useful also to elucidate the influence of the mentality and socio-cultural background of judges on the jurisprudence

> **Note on socio-legal research within legal science:** Be aware that this is not a genuine legal science but a predominantly social sciences approach, which is supported by a small minority of legal scholars. While it is useful for Indonesia, its methods can only complement but not replace the established legal methodology. Do not confuse socio-legal research with legal science as such! The fact that this often happens risks to isolate Indonesian legal scientists in a small cocoon.
> When performing socio-legal research, the theoretical part of your work must still comply with the established standards in legal science, which can be different from those in social sciences. For example, you must not only present and discuss the positions of scholars that support your own approach but also the opposing and mediating opinions and their arguments.

D. Further reading (selection in English)

- note that there is an abundance of scientific literature on legal methodology in German language

Bongiovanni, Giorgio; Postema, Gerald; Rotolo, Antonio and others (editors): Handbook of Legal Reasoning and Argumentation, 2018
Bos, Keen van den: Empirical Legal Research, 2020 (on a controversial approach in legal science)
Ginsburg, Jane C.: Legal Methods, 5th edition 2020
Hardianto, Danang: Reorientation towards the Nature Of Jurisprudence in Legal Research, Mimbar Hukum 26 (2014), p. 340 ff.
Hoecke, Marc van (editor): Methodologies of Legal Research. Which Kind of Method for What Kind of Discipline?, 2013
Husa, Jaakko; Hoecke, Marc van (editors): Objectivity in Law and Legal Reasoning, 2013
MacCormick, Neil; Summer, Robert S. (editors): Interpreting Statutes. A Comparative Study, 1991
Möllers, Thomas M. J.: Legal Methods. How to work with legal arguments, 2020 [→ T.S.]
Núñez Vaquero Álvaro: Five Models of Legal Science, Pravna metodologija 19 (2013), p. 53 ff.
Riesenhuber, Karl (editor): European Legal Methodology, 2nd edition 2021
Scalia, Antonin; Garner, Bryan A.; Easterbrook, Frank H.: Reading Law. The Interpretation of Legal Texts, 2012
Smits, Jan M.: The Mind and Method of the Legal Academic, 2012
Vols, Michel: Legal Research. One Hundred Questions and Answers, 2021
Zippelius, Reinhold: Introduction to German Legal Methods, 2008 [→ T.S.]

See also, as a classic of legal interpretation, *Friedrich Carl von Savigny*, System of the Modern Roman Law, vol. 1, 1867, sect. XXXIII, p. 171 ff. [German original: System des heutigen Römischen Rechts, vol. 1, 1840, § 33, p. 212 ff.]