

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

§ 2 Intellectual standards of scientific legal research and writing

- Note: The intellectual standards derive directly from the idea and the inherent laws of scientific research. Some standards, in particular those of intellectual thoroughness, are different for the *different types of scientific work*: a student's course paper, an article in a scientific journal, or a bachelor thesis, master thesis, doctoral thesis or habilitation thesis. Most standards, however, apply to any kind of scientific legal research.

I. Standards of intellectual authenticity and originality

1) *Intellectual honesty*

- the main idea: no copying or leaning on without quoting!
- a) No presentation of information gathered by other authors as the result of one's own work
 - in particular: the duty to *indicate* if and to what extent one's own compilation of relevant jurisprudence is based on *preparatory works of other authors*
- b) No presentation of other authors' reasoning as one's own thoughts
 - the duty to inform about the reasoning of other authors and to indicate precisely, to what extent one is following it
- c) No quoting without own reading
 - a standard difficult to comply with in Southeast Asia because the relevant literature is usually not available
 - if possible, use online publications, contact the author directly or ask friends studying abroad to help you to get copies of important contributions unavailable in your country
- d) No hiding of inconvenient theories or positions
 - a widespread but very serious violation of scientific fairness
 - *all* positions have to be presented, even if they are not "political correct", collide with religious or moral views in your country or are difficult to present or discuss
 - a big problem for doctoral students: famous fundamental works in their field of law, which they cannot pass by without an in-depth discussion, which causes a considerable workload
 - example: *Robert Alexy, Theorie der Grundrechte*, 1986 resp. *A Theory of Constitutional Rights*, 2002 (in general fundamental rights doctrine)

2) *Intellectual independence*

- a) Independent dealing with scientific literature and jurisprudence
 - not just reporting but *analysing, classifying, categorizing, contextualising, assessing and evaluating* the relevant literature and jurisprudence
 - more difficult in the limited volume of a course paper or short article than in a bachelor, master or doctoral thesis
- b) Independent reasoning
 - aa) Developing one's own reasoning without regard to "authorities"
 - references to "authorities" cannot substitute one's own reasoning!

- bb) In particular: not following court decisions without own reasoning
- except in common law countries, a court decision is an opinion about but not a source of law
 - usually not a problem in Indonesia
- cc) Considering, integrating and modifying but not just copying the arguments of others
- usually, they will not fit into one's own reasoning without adaptation or contextualisation

3) *The need for a scientific added value*

a) General remarks

- no successful scientific work without new scientific findings
- science is more than a new compilation of existing knowledge
- the scientific added value will vary strongly according to the type of the scientific work
 - student papers are often too short to provide a real scientific added value but must at least simulate it using scientific methodology
- examples for a scientific added value (e.g. in master or doctoral theses):
 - scientifically based solutions for practical problems
 - new theories providing for a better (deeper, more consistent etc.) understanding of a field of law, in particular introduction of new legal notions, concepts or principles
 - proposals for improvements (in theory or practice) making use of foreign innovations well-adapted to the specific features of the national law
 - proposals for a "cleaning up" in a field of law (elimination of inconsistencies, paradoxes, unsuitable elements imported from foreign law etc.)
 - critical inventory of the existing knowledge, its limits and deficits, and of the state of science (currents, developments, deficits, inconsistencies etc.)
 - in Indonesia also evidence of the (non-) existence of norms of customary law [hukum adat]
 - specific added values under complementary approaches
 - e.g. findings on the economic impact of certain legal norms (under the approach of the economic analysis of law)
 - e.g. law-related empirical results (under the socio-legal approach)

II. In particular: the fight against plagiarism

- plagiarism a serious threat to the integrity and, thus, credibility of science
- definition: plagiarism is the presentation of another author's findings, thoughts, ideas or formulations as one's own original work
 - short extracts from other sources (e.g. a certain formulation, a part of a sentence or one or two sentences) are admissible if the source and the original author is clearly and precisely specified
 - series of short extracts are principally also admissible but each extract must be documented separately
 - long extracts from other sources are generally inadmissible, even if documented (no plagiarism in the strict sense but also no independent own work); exception: if the compilation of the various extracts represents itself a scientific work (example: casebooks with numerous large but well-documented and -systematised extracts from jurisprudence and scientific texts)
- spectacular cases and the *rigorous fight against plagiarism in Germany*
 - the revocation of the doctoral degrees of two Federal Ministers and a German Member of the European Parliament for plagiarism in the early 2010s: the GUTTENBERG CASE, SCHAVAN CASE, KOCH-MEHRIN CASE
 - the revocation of the doctoral degree of a Federal Minister and future head of the Land Berlin in 2021: the GIFFEY CASE
 - the plagiarist hunters of the initiative VRONIPLAG - solely in the service of integrity of science?
 - the Joint Position Paper "Good academic practice in the context of theses submitted for a degree" of three leading German academic organisations of 2012¹
- plagiarism can be detected easily by entering text excerpts as strings into internet search machines
 - signs of plagiarism: incoherent terminology, style of citing or style of writing

¹ *Deutscher Hochschulverband* (German Association of University Professors and Lecturers); *Allgemeiner Fakultätentag* (Combined Faculties Association); *Fakultätentag* (Faculties Association), Good academic practice in the context of theses submitted for a degree, 09.07.2012, www.hochschulverband.de (at "Presse", "Resolutionen). See also, for up-to-date standards, *Harvard University, Avoiding Plagiarism*, <https://usingources.fas.harvard.edu/avoiding-plagiarism> (with some exaggerations), *Purdue University Global, A Guide to Plagiarism and Paraphrasing*, 2020, www.purdueglobal.edu/blog/online-learning/plagiarism-and-paraphrasing.

III. Standards of intellectual accuracy, consistency and precision

1) *Accurate information based on references*

- an essential requirement often ignored in Southeast Asia, the disregard of which deprives the text of its scientific quality
- **every single information** in the whole text **which is not evident (obvious)² must be backed by a reference which allows to verify it**
- this requires usually at least one or two references in every paragraph
- often it will be necessary to cite several reliable sources to back one's information
 - the writing of one scholar does not yet stand for the dominating position in scholarly doctrine
 - a single court judgment does not necessarily stand for a well-established jurisprudence
 - dissenting minority opinions need to be cited too

2) *Logically and dogmatically consistent structure*

- a) The importance of the structure for the quality of a scientific work
 - the *structure reflects the ability to think correctly and precisely* - and therefore the intellectual capacity of the author
 - a convincing, consistent structure allows an easy access to the reasoning of the author and may even conceal shortcomings in the argumentation; a defective structure leads a skilled reader directly to the weak points
 - the quality of a scientific paper or thesis is often already evident in its outline
 - the necessity of a detailed structuring
- b) The standards of a logically consistent structure
 - no dealing with sub-subjects at the same level as the main subject
 - no introduction of a new subordinated level within the structure if there are not two or more subordinate points
 - identify any remarks outside the line of thoughts as "excursus"
- c) The standards of a dogmatically consistent structure
 - the whole structure must be in line with the dogmatic structure of the relevant field or sub-field of law (as it is understood by the author)
- d) Standards for correct headlines (titles) within a consistent structure
 - precise reflection of the content in the correct dogmatic context
 - systematic coherence; in particular: *homogeneity of headlines at the same level*
 - headlines must make the line of thoughts transparent, allow easy orientation of the reader and prevent misunderstandings

3) *Intellectual coherence*

- a) Use of a coherent terminology
 - the same terms for the same content throughout the work
 - a consistent system of terms that fit together logically and dogmatically
- b) Coherent use of legal methods
- c) Coherence and consistency of the developed theories and positions
 - no combination of incompatible elements adopted from theories of different authors

² E.g. common scientific knowledge which is not anymore scientifically disputed - you do not need to prove that the Earth is round and more than 4 billion years old or that the coronavirus can cause a deadly disease...

IV. In particular: precise and logical reasoning in accordance with the legal methodology

- see on legal methodology **Diagram 1**
- *legal reasoning, not political, moralising or religious reasoning*
 - political reasoning only admissible in the field of legal politics and if clearly marked as such
 - moral and religious considerations generally irrelevant in law (→ no confusing of law and "ethics")
 - exception: if legal concepts clearly refer to them (e.g. "religious values" in art. 28J(2) Indones. Constit. 1945) or, in a limited way, as secondary considerations to elucidate backgrounds
- *applying legal methodology, not the methodology of other scientific disciplines*
 - no experiment-based research as in natural sciences
 - no economic research (except under the complementary side approach of economic analysis of law)
 - no empirical research (except in the side discipline of legal sociology and under the complementary side approach of socio-legal research)
- transparent reasoning *disclosing* which *legal method* is applied in which context with which results
 - indicating at which points the conclusion could have been different
 - indicating subjective elements in the reasoning (which are unavoidable but must be disclosed)
- discussing and justifying the method if it is not generally acknowledged in legal science or not generally acknowledged in the relevant context
 - in particular if following the side approaches of economic analysis of law or socio-legal research
 - *no justifying for following classical legal methodology* (in Indonesia called "normative approach")!
- precise and differentiated reasoning
- no reasoning contravening the laws of logic (→ absolutely inadmissible in any scientific work!)
 - a widespread mistake: presenting logically possible as logically compelling conclusions

V. Standards of intellectual thoroughness

1) *Comprehensive consideration and appreciation of relevant jurisprudence and literature*

- in a course paper: of the most relevant jurisprudence and literature
- in a scientific article or other short contribution: of all important jurisprudence and literature
 - in particular of the newest jurisprudence and literature (check before submitting your article!)
- in a doctoral thesis: of *all* relevant jurisprudence and literature
 - *every single publication* which directly concerns the subject must be consulted and mentioned
 - every idea in the relevant publications which concerns the subject must be taken into consideration and related to one's own reasoning
 - all *fundamental theories* on basics or backgrounds which have an impact on the subject must be presented and discussed in the given context
 - for this reason, the careful determination (and limitation) of the subject is crucial
- in developing countries: also of *foreign legal literature* if it directly concerns the subject, is fundamental or important and the presented arguments can be effective in the own legal system too
- not only of articles but also of textbooks, commentaries, handbooks and anthologies, which still form the most important source of legal science
- if possible, not only of publications in English, since the quality of the legal discussion in other languages (e.g. French, German, Spanish) is often higher

2) *Comprehensive discussion of all relevant aspects and arguments*

a) Comprehensive discussion of all relevant aspects

- the need for a *multi-perspective approach*: one of the most common deficiencies in legal publications is a one-sided, too narrow perspective...
- comprehensive discussion of *all* relevant aspects mentioned in jurisprudence or literature (even if published in another language than English)
- consideration of old and new aspects (including the possible impact of new legislation)
- the quantity of aspects to be considered varies according to the type of scientific work and the limitation of the subject
- consideration of all aspects with all their connections at the same time (→ the need for a *well-balanced approach*, in particular in a doctoral thesis)

- b) Comprehensive discussion of all relevant arguments
 - arguments which are difficult to rebut must not simply be ignored...
 - arguments which appear immoral or politically incorrect must still be refuted...
- 3) *Getting to the bottom of the questions (only in a doctoral or habilitation thesis)*
 - thorough thinking without limits...
 - in particular: foreseeing (and considering or even discussing in advance) any possible objections and counterarguments to one's own reasoning
 - also considering all *possible consequences* of a proposed solution in advance (and checking compatibility with *ethical standards*)

VI. In particular: How to find all relevant literature

- 1) *Access through references in specialised literature*
 - in articles in law journals, working papers, contributions in conference proceedings, monographies
 - milestone articles may be available in the *scientific web repositories* ([JSTOR](#), [ResearchGate](#), [SSRN](#))
- 2) *Access through references in general literature on the relevant field of law*
 - in textbooks, commentaries, works of reference, specialised encyclopaedias, handbooks, expert websites etc.
- 3) *Access through information on legal literature in the internet*
 - see for more details **Diagram 2**
 - a) Online catalogues of legal literature for sale
 - in particular *Amazon* (search the different catalogues for the different countries)
 - b) Online catalogues and databases of libraries
 - in particular comprehensive *national libraries* with a large stock of domestic and foreign legal literature
 - [Library of Congress](#) (Washington D.C.)
 - [Bibliothèque nationale de France / National Library of France](#) (Paris)
 - [Deutsche Nationalbibliothek / German National Library](#) (Berlin, Frankfurt, Leipzig)
 - [British Library](#) (London)
 - in particular *research libraries with a focus on comparative and international law*
 - [Max Planck Institute for Comparative and International Private Law](#) (Hamburg)
 - [Max Planck Institute for the Study of Crime, Security and Law](#) (Freiburg)
 - [Max Planck Institute for Comparative Public Law and International Law](#) (Heidelberg)
 - [Max Planck Institute for Social Law and Social Policy](#) (Munich)
 - [Max Planck Institute for Legal History and Legal Theory](#) (Frankfurt)
 - c) Metacatalogues (integrated search in various library catalogues)
 - [Karlsruhe Virtual Catalog](#) (KVK, Univ. of Karlsruhe) - integrated search in all important German, Austrian and Suisse catalogues and in the most important library catalogues throughout the world
 - [Library Hub Discover](#) (Jisc) - integrated search in the catalogues of UK and Irish libraries
 - d) Specialised databases
 - commercial databases (access via the Law Library)
 - [GlobalLex](#) (NYU) - database on international, comparative and foreign Law
 - [CommonLII](#) (Commonwealth Legal Information Institute) - database on law in common law countries
 - [Electronic Research Guide](#) (ERG, ASIL) - database on international law
 - research guides of American libraries (e.g. of the Library of Congress on [Foreign, Comparative and Intern. Law](#))

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