THE ONTOLOGICAL, EPISTEMOLOGICAL, AND METHODOLOGICAL DIMENSIONS IN ACADEMIC LEGAL RESEARCH (JULIÁN HERMIDA) - APORTES AL DERECHO / REVISTA JURÍDICA DE UFLO UNIVERSIDAD / AÑO 2023 / VOL. 07 / Nº 07 / ISSN 2618-4192.

The Ontological, Epistemological, and Methodological Dimensions in Academic Legal Research

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Abstract

This article examines the ontological, epistemological, and methodological dimensions of academic legal research, i.e., the process that legal scholars follow in order to analyze legal norms, theories, and principles.

The article examines the concept and main characteristics of academic legal research and differentiates it from professional legal research, which predominates in professional practice and US Law schools, and from empirical research, which predominates in social science research about law. The article also stresses the importance for the academic legal researcher to make these reflections explicit and transparent in their research products.

Keywords: academic legal research; ontology; epistemology; methodology

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Las dimensiones ontológica, epistemológica y metodológica en la investigación jurídica dogmática

Resumen

El presente artículo examina las dimensiones ontológicas, epistemológicas y metodológicas de la investigación jurídica dogmática, es decir, el proceso que siguen los juristas para analizar normas, teorías y principios jurídicos.

El artículo examina el concepto y las principales características de la investigación jurídica dogmática y la diferencia de la investigación jurídica profesional, que predomina en la práctica profesional y las facultades de derecho de los Estados Unidos, así como de la investigación empírica, que predomina en la investigación en ciencias sociales. El artículo también destaca la importancia para el investigador jurídico académico de hacer explícitas y transparentes estas reflexiones en sus productos de investigación.

Palabras clave: *investigación jurídica dogmática; ontología; epistemología; metodología*

I. Introduction

The purpose of this article is to examine the ontological, epistemological, and methodological dimensions of academic legal research, i.e., the process that legal scholars –as opposed to legal practitioners– employ in order to analyze legal norms, legal theories, and legal principles.

The article aims to shed light on the importance of this tridimensional reflection, which is seldom critically examined or explained.

For this purpose, this article will first clarify the concept of academic legal research and will differentiate it from professional legal research, which predominates in professional practice, and empirical research, which predominates in social science research about law. Then, it will analyze the ontological, epistemological, and methodological dimensions of academic legal research.

II. Academic legal research

The academic legal researcher, generally a Law professor or legal author, discerns, hierarchizes, classifies, and critically reviews legal norms, places them within a certain legal category, and evaluates their place within the legal order. The crucial question that the academic legal researcher asks with respect to a legal norm is whether it is valid in light of its logical relation to other norms (legal order). The purpose is not to use this research to pursue legal actions in a court of law but rather

to demonstrate the validity or invalidity of a legal norm. It is similar to questions that researchers ask themselves in other disciplines such as: Can a claim be justified? And if so, how? Is it verifiable? Does it logically depend on some other claims? Or does it contradict them?

II. 1. Differences with professional legal research

Academic legal research shares some aspects of research in the context of professional practice; but it also greatly differs in the purpose, methods of data collection, data analysis, and other processes. In North America, professional legal research is generally associated with finding legal norms, citing them correctly, and writing memoranda or briefs to advance arguments in legal practice.[2]

II. 2. Differences with empirical research

Academic legal research is not empirical legal research, either. Empirical legal research combines insights and methodological approaches from different social sciences to delve into the analysis of the roles of legislation, regulation, legal policies, and other legal arrangements at play in society. As a way of illustration, sociolegal scholars conduct empirical research by resorting to the qualitative methods of data collection and by inserting their work within the theoretical debates in Sociology that are relevant to the study of law. Similarly, a legal anthropologist will employ the research methods usually associated with Anthropology such as observation or a life histories to investigate legal phenomenon or a legal agent. In general, in these types of empirical works, the research methods of both data collection and data analysis are the research methods of the ancillary discipline. So, these scholars do not employ the academic legal research method.

III. Ontological dimension

Ontology is the study of being and thus the study of reality. It is the study of beings to the extent that they exist. Christian Wolff claimed that ontology is a discipline that can reveal the essences of things. At the core of ontological debates lies the question about substance and its pre-eminence over all other traits and attributes. Thus, the ontological debates are basically debates on substance (Morfino, 2014). The researcher approaches the research project with a set of explicit and implicit assumptions about the nature of reality and the way it can be investigated. It is thus important to engage in an ontological reflection. This reflection fosters the researcher to question the underlying ontological assumptions

[2] This type of legal research also predominates in North American legal education and is, generally, taught in first year legal research courses.

with which the researcher approaches the project and to question the character – objective or subjective– of reality, that is, if reality exists outside the researcher or if reality is the product of its intellectual creation (Morgan and Smircich, 1980).

In academic legal research, it is also necessary to reflect about what law is, the characteristics of the law, and what differentiates it from other systems. Additionally, the ontological reflection includes considerations on the nature of the human being, since this is both the subject and the object of the investigation. Therefore, this dimension allows the researcher to reflect on the relationship of the human being with its environment and to question whether the human being is a product of the environment and if people respond mechanically to the situations found in the external world or if, on the contrary, the human being has free will and is the creator of the environment (Burrell and Morgan, 1979).

Ontological debates have existed for more than a millennium; and questions about reality have not been settled. Thus, it is necessary to reflect and make these reflections explicit in the texts academic legal researchers produce when they design, conduct, and communicate our research.

IV. Epistemological dimension

Epistemology answers the question "What can be accepted as knowledge?" This requires an examination of whether law is a science or not. This debate is still unsettled among scholars in both epistemology and law. For many, particularly those who subscribe to empirical and positivist epistemological conceptions of science, law is not a science (Markey, 1984). However, many legal scholars hold that law is a science and that it has a distinct method.

IV. 1. Is law a science?

Both legal professionals and epistemologists, many of whom are enrolled in the positivist tradition of science, have criticized the proposition that law is a science on a wide array of diverse grounds.

Some reject the scientific status of law by arguing that law is a branch of practical reason (Kronman, 1985; Perelman, 1980). Other scholars find that law is an art, either the art of argumentation (Fidel and Cantoni, 2004) or the art of social governance by rules of conduct (Posner, 1988). Others emphasize the fact that the law "has remained Aristotelian, while science has built up a new world of analyzed, systematized, and recorded facts (Morse, 1923). The scientific status of law has also been discarded for the reasons that law is a normative phenomenon (Roos, 2014), a social ordering instrument (Fuller, 1975), a body of applied learning (Cowan, 1948) or a product of custom, legislation, and judicial development (Roos, 2014). It has also been rejected for being pragmatic, i.e., for being a set of principles and maxims that aim to clarify concepts and hypotheses and to identify and solve disputes (Morse, 1923).

Popper's followers have also refused to recognize law as a science by virtue of the normative character of law (O'Connor, 1995). For positivists, norms are not susceptible of being falsified because

their nature is not descriptive but prescriptive, i.e., they are not formulations that refer to explanations about the world, but rather formulations about how people's behavior ought to be in the world (Escobar-Jimenez, 2018).

The interpretations of Thomas Khun's epistemological postulates (Vann Spruiell, 1983) consider the law to be in the pre-paradigmatic phase, i.e., the stage prior to the development of normal science where there is a state of confusion; and different ideas compete with each other (Khun, 2012).

However, according to the French tradition of historical epistemology (Althusser, 1999; Bachelard, 2002; and Bourdieu, 2008) and to some central aspects of Thomas Khun's contributions (2012), science can be conceptualized on different considerations than those sustained by empiricists and positivists. Thus, a discipline is considered scientific when the members of a disciplinary community, grouped around a common paradigm (Khun, 2012) or a research tradition (Laudan, 1978), recognize their disciplinary practice as scientific and engage in institutional social practices that members of other scientific communities also take part in, such as research, communication of results through peer-reviewed publications, participation in conferences, and university teaching, among others.

In this way, law, just like other disciplines, is science. And science –even the natural sciences– is a social construction, where knowledge is conquered, constructed, consented, and epistemologically watched (Bourdieu, 2008).

IV. 2. What can be accepted as knowledge in law?

This question calls for different considerations in the three epistemological contexts: a) discovery, where new theories or ideas are generated; b) justification, where most academic legal research takes place; and c) application, where legal practice takes place.

In the context of discovery, there is no particular method –or even logic– for the creation of new concepts, theories, or ideas. Bourdieu (2008) shows that every discovery has an irrational element or a creative intuition and calls for abandoning the idea that research consists of a systematic succession of steps that lead to a conclusion (Bourdieu, 2008). Like other theories, legal theories are created by individuals who produce knowledge in very different ways. They take ideas from social practice, governmental policies, cultural artifacts, other theories, other disciplines, legal texts, and even their own personal lives and experiences, among many other sources. Like in any other science, some theories are the product of serendipity; others are the result of rigorous reflection. All these situations, sources, and experiences constitute the genesis of legal knowledge and, legal science.

In the context of justification, the academic legal researcher analyzes, discerns, hierarchizes, classifies, and critically reviews the legal norm, places it within a certain legal category, and evaluates its place within the legal order. The crucial question that the legal researcher asks with respect to a legal norm is whether it is valid in light of its logical relation to other norms (Holterman and Madsen, 2020).

In the context of application, the legal practitioner legal reduces norms to a set of first principles (which are equivalent to the facts of natural sciences) and reaches a conclusion through deductive reasoning (Hoeflich, 1986), i.e., a uniquely correct result for the case in question (Wells, 1994).

Since epistemological issues and questions are not universally understood or shared, the academic

legal researcher needs to make their epistemological reflections and decisions transparent in their research products.

V. Methodological dimension

The methodological dimension deals with the question of "How can knowledge be produced?" The answer to this question involves decisions that the researcher makes in relation to the selection and application of techniques for collecting and analyzing data. These techniques constitute tools that the researcher uses to work with data and are articulated with the other two dimensions of the methodological process, i.e., ontological and epistemological.

V. 1. Academic legal research

Academic legal research is research based on texts. The research object, i.e., the scope which is the focus of the research, is a text, generally a legal norm, legal principle, or legal theory. And the data used to examine the validity of such text are also texts themselves, which includes other legal norms, journal articles, books, policy documents, and congressional debates, among many other textual sources.

The academic legal research process shares many features of research in other disciplines, which also base their research on texts such as most research in psychoanalysis, philosophy, theology, and critical literary studies.[3]

The academic legal researcher follows a kind of hermeneutical approach sometimes referred to as doctrinal legal analysis.[4] This is a systematic process of interpretation, analysis, and critical evaluation of the legal norm. Hermeneutics implies a dialectical process in which the researcher navigates between the parts and the whole of the text to achieve an adequate understanding of the text (hermeneutic circle). This method also involves a translation process, as a new text is produced that respects the essence of the original one while providing added value to the translation by emphasizing the original context of the text.

In hermeneutics research, the researcher explores the history of the text, engages in a dialogue with the text, interrogates it, and seeks answers to their questions. The academic legal researcher makes

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[3] This kind of text-based research can also be used in virtually any discipline, even when this is not the preferred or most usual approach in those disciplines. This can include, for example, theoretical research projects, where the researchers examine the value, the benefits, or the contradictions of a theory, a meta-analysis research carried out to systematically synthesise or merge the findings of independent studies, or a scholarly critical review of previous works.

[4] The legal method used in the context of application has sometimes been referred to as doctrinal legal method, which adds to the confusion about the methods used in law. When used as a synonym of legal method it simply aims to predict or influence a court case. In the context of justification, doctrinal legal analysis has the purpose and meaning discussed in this section.

use of all the dimensions of hermeneutics: reading, explanation and translation in order to achieve a deep understanding of the text and, thus, advance legal knowledge.

This process also calls for a constant reflection of the strategies and intellectual processes that the academic legal researcher resorts to in the interpretation of legal texts.

VI. Conclusions

Academic legal research is a type of research used to validate or justify a legal theory by analyzing and interpreting a legal norm in light of its logical relation to other norms. Academic legal research differs from professional legal research and empirical legal research in their goal, scope, and methods. This research process is tridimensional and includes ontological, epistemological, and methodological aspects. The work of experienced academic legal researcher includes reflections about each of these dimensions before and during the research itself. These reflections are permanent intellectual activities that guide the researcher throughout the entire process of knowledge production and validation. Making these reflections explicit in research products, such as journal articles and conference papers, contributes to research transparency and integrity.

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