

Research Methodology in Law and Its Application to Women's Human Rights Law

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Abstract

Legal scholars engaged in academic research inevitably encounter various issues related to applicable methodology in the respective area of their legal research. This is partly because academic legal research is a relatively new field of inquiry and those trained in traditional legal research usually choose to ignore writing a methodology for their research paper/thesis.¹ This has adversely affected the growth of a "methodology tradition" in the discipline of law. The article begins by defining methodology and briefly explaining some of the barriers underpinning the issues related to methodology in legal research as well as choices available to the legal academics in the said field. It will briefly describe two existing major methodological approaches for legal research, namely the Black-letter approach and socio-legal approaches.² The article then describes how various research approaches can be applied to human rights law and particularly to the field of women human rights.

Key words: Methodology, Human Rights, Legal, Research Methods, Feminists

Methodological Approaches in Law

Legal scholars engaged in academic research inevitably encounter various issues related to applicable methodology in the respective area of their legal research. This is partly because academic legal research is a relatively new field of inquiry and those trained in traditional legal research usually choose to ignore writing a methodology for their research paper/thesis (For details see below discussion on black-letter approach). This has adversely affected the growth of a "methodology tradition" in the discipline of law. The article begins by defining methodology and briefly explaining some of the barriers underpinning the issues related to methodology in legal research as well as choices available to the legal academics in the said field. It will briefly describe two existing major methodological approaches for legal research, namely the Black-letter approach and socio-legal approaches (McConville & Chui, 2007). The article then describes how various research approaches can be applied to human rights law and particularly to the field of women human rights.

¹ For details see below discussion on black-letter approach

² McConville, Mike, Chui, Wing, H., 2007, 'Introduction and Overview' in *Research Methods for Law*, Edinburgh University Press, p 1

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Introduction

“The study of the general approach to inquiry in a given field” is called methodology (Goldblatt, 2011). Research methodology is different from research methods (Ceyer, Hervey, & Bulley-Sokhi, 2011), which may be understood as all those techniques that are utilized for conducting research or the tools applied in performing research operations (Goldblatt, 2011). Research methodology on the other hand, is a way to systematically solve the research problem, or arrive from the problem statement to the conclusion (Coomans, Grunfeld, & Kamminga, 2009). Methodology describes the steps that are generally adopted by a researcher in studying the research problem along with the logic behind it (Ceyer, Hervey & Bulley-Sokhi, 2011).

A field of study would usually earn intellectual recognition by producing knowledge in accordance with the accepted standards of academia (Bartie, 2010; Collier, 1992). The status of professional legal education on the other hand, being traditionally designed to groom the students for law practice, remained doubtful in the scholarly world for quite a long time (Bartie, 2010; Vick, 2004). Some writers argue that the study of law in its traditional sense is not a pure field of inquiry or an academic enterprise (Manderson & Mohr, 2002; Salter & Mason, 2007). It is more of a technocratic knowledge, gained in the form of vocational training (Thornton, 2004; Vick, 2004), unlike various social science disciplines, which have been grounded in the mainstream university education, maintaining the scholarly tradition of the academic world. The vocational approach in legal education served to generate legal knowledge that reproduced the professional work and basic assumptions of its practitioners (Chynoweth, 2009). The elements which are essential to most types of academic researchers, such as theoretical literature on the nature of research, methodological principles, and information about what academics of a certain discipline actually do, have traditionally been seriously lacking in the field of law (Chynoweth, *Legal Research in Advanced Research Methods in the Built Environment*, 2009). Although both theory and methodology do exist in law, they are more suited to the needs of research conducted by professional lawyers and judges than legal academics. For instance the term “theory” within the context of legal knowledge connotes “jurisprudential theories” which aim to address abstract philosophical issues explaining the nature of law itself. Likewise, the black-letter approach, the principal methodology in legal research until recently, is basically a method of interpreting cases and statutes (Manderson & Mohr, 2002). This style and understanding of theory and methodology in the discipline of law, described as ‘theorists talking past each other’ (Chynoweth, 2009), has failed to explain the internal dynamics of intellectual activity carried out by the legal academics to the outer academia (Siems, 2008; Valverde, 2006) ‘Legal theory has failed to

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provide any significant explanation or justification of what academic lawyers do (as is normally demanded of the theoretical component of a discipline) and thus of what academic law is or might be'(Chynoweth, 2009).

Law's position in the wider academic community has remained questionable due to its nonconformity to the conventional demands of the scholarly world. Academic legal researchers have always strived to explain the nature of their activities to colleagues in other disciplines(Chynoweth, 2009). For the legal professionals the term "legal research" signifies a process of finding the law on a particular point, while enquiries such as those investigating the effects and influences of other social factors on law or vice versa, rarely falls under this heading (Manderson & Mohr, 2002). Thus books and articles on the topic of legal research mostly provide comprehensive guidance on how to look up cases and statutes, or explain various rules of interpretations in the legal text. This restrictive approach in academic research methodology has caused a degree of discomfort to some legal scholars who are tempted to conclude that "law is antithetical to scholarship" and the term legal research is merely an oxymoron (Manderson & Mohr, 2002).

As already mentioned, the black-letter approach has always been a dominant form of methodology in legal research (Chynoweth, 2009; Thornton, 2004). It has been variously described as doctrinal, law-in-books, legal formalism, expository, positivistic and analytical legal research. Nonetheless, they all share the same common theme which insists that law is a pure concept, independent of morality, politics/power or other outer influences (Chynoweth, 2009; Thornton, 2004). The avowed purpose of legal formalism or positivism is to maintain a non-political/rational perspective of law by firmly excluding ethical considerations; the ultimate aim is to preserve its neutral, objective, detached and thereby superior status as a normative science(Salter & Mason, 2007). According to this approach a rule achieves its validity and force of law when it is so declared by the formal legal authority (parliament, court), its validity is not dependent on any external validating factors(Oxford Reference). Therefore, coherence, integrity and autonomy are reckoned as prized traits of black-letter approach (Atria, 2011; Bartie, 2010; Smits, 2009). Black-letter approach assumes that the answers and solutions to every legal problem are available in the underlying logic and structure of rules which can be discovered by exposition and analysis of the legal doctrine(Chynoweth, 2009). From this point of view, law is perceived as a normatively closed system which can be studied by interpretation of authoritative text and accordingly, legal research can be conducted in the framework of pure legal doctrine (Bankar & Travers, 2005; Salzberger, 2007; Valverde, 2006). This self-referential (reference to its own sources) style of black-letter methodology (Munger, 1993) has made some writers criticize its circular reasoning approach as 'law

decides that what is and can be law, it is the legal system that identifies its boundaries' and determines itself what is legal and illegal(Freeman, 2006; Noble & Schiff, 2006). It takes an internal perspective to its objects of research, where internal refers to the perspective of the legal profession rather than that of the wider academia. Therefore this is sometimes called research-in-law rather than research-about-law(Caroline & Murphy, 2011; Chynoweth, 2009; Huffmann, 1973-74;Posner, 2001-02; Smits, 2009). However, normative closure, arguably, is the key tool through which law maintains its authority and domination in a certain given context (Vick, 2004).

The black-letter approach continued to monopolize the legal research landscape until the middle of 20th century (Posner, 2002) when it started to attract a raft of criticism by the American (and the Scandinavian) Realism movement (Salzberger, 2007). This movement, influenced by early 20th century European legal thought in the form of sociological jurisprudence (Vick, 2004), took a sharp departure from positivism on the ground that it does not understand and study law in its actual social context(Davies, 2002; Munger, 1993; Salzberger, 2007). The American version of sociological jurisprudence, primarily constructed/modified by Roscoe Pound, and called sociology of law (Charlesworth, 2007; Deflem, 2008; Salter & Mason, 2007), revolted against doctrinal conservatism due to its rigid preoccupations with technicalities(Vick, The Critical Jurisprudence could be considered closest to sociology of Law in the UK context, 2004). In the late 1970s the term sociology of law was abandoned and replaced by socio-legal studies (SLS) arguably due to introduction and proliferation of empirical research techniques into it(Freeman, 2006). This approach studies "law in context", rather than merely in books and thereby attempts to 'open up the black box of legal culture' (Nelken, 2006; Thornton, 2004). This analysis of law is chiefly committed to social considerations and is sometime referred to as research-about-law (Chynoweth, 2009). Law in books is understood as the image law projects, and law-in-action is the actual effects it produces when translated into reality. Socio-legal research highlights the gaps between "legislative goals and ideals" and "social reality" and thereby depicts a true picture of law-in-action. It stimulates awareness of the social aspects of the law and provides a unique understanding of the way law develops and works in different societies. It argues that black-letter approach is a deficient method of legal research for being indifferent to the social impact of specific legal measures (Bartie, 2010). It criticizes black-letter approach's claim of neutrality and rejects its self-proclaimed autonomy as myth. It maintains that law makers are inevitably influenced by their social background and ideologies, thus, law could not do away with its inherent subjectivity (Sisk, 2008). Further, no matter how authoritative judicial doctrines are, they cannot attain the status of any philosophical system, in that sense legal knowledge lacks intellectual

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content(Collier, 1992). Hence, SLS takes an external approach to law, it does not usually accept the way things are, rather stands at a distance to question the status quo (Berard, 2009). SLS rapidly gained wide popularity partly because it became possible to look into a variety of topics, with numerous possible lenses, that were previously not covered by a restrictive doctrinal approach, and partly due to increased interest of social science research in the social dimensions of law(Salter & Mason, 2007). As Cotterrell notes:

All the centuries of purely doctrinal writing on law have produced less valuable knowledge about what law is, as a social phenomenon, and what it does than the relatively few decades of work in sophisticated modern empirical socio-legal studies (McConville & Chui, 2007).

The Realism movement triggered a host of similar other approaches, which flourished under the umbrella of SLS, such as critical legal studies, critical race theory, feminist theories, queer theory and so on(Posner, 2002). Given its remarkable flexibility, SLS encompasses a broad range of research activities (Salter & Mason, 2007). Perhaps for this very reason there is no consensus on the definition of SLS, its definitions are as diverse as the topics that are addressed by it(Salter & Mason, 2007). Broadly speaking, all research that deliberately distances itself from the professional view point of the lawyer would fall under the rubric of SLS (Cotterrell, 1983). Also it has been given many different labels, such as inter-disciplinary research, law-in-action, law reform research, law and (reality) approaches (Gordon, 1993;Munger, 1993; Siems, 2008; Stewart, 2006), law-in-context, law and society etc., according to the approach it adopts. Despite all its diversities, identifying and addressing the discrepancies between law-in-books and law-in-action remains central to its aims. It seeks to explain the existence of this gap by studying the way law actually works in practice and to examine its concrete social impact, particularly on those social groups that are most effected by its operation(Collier, 1991-92; Salter & Mason, 2007). It also attempts to analyze the policy behind the legal rule to expose potential biases of law in a particular context(Salter &Mason, 2007). Arguably, the main goal of sociological analysis of legal rules is to compensate for the presumed deficiencies of practice/client oriented black-letter methodology of law, both by promoting social justice aspects of legal norms and by introducing scholarly approaches to it.

Thus, the aim that law would be accepted as an authentic intellectual discipline within academia in the same way as other social sciences is, arguably, being achieved to a certain extent by employing SLS methodologies to it(Bartie, 2010; Thornton, 2004).

Research Methodology in Women/Human Rights

The problem of violation of women's/human rights is not just a legal phenomenon (albeit one that is under recognized), but a problem that is also deeply socially entrenched. As such, "answers" and solutions to this problem do not lie solely in law, they lie in other disciplines too. Human rights, though traditionally a province of international law, socio-legal study of human rights has brought fresh insights into its theory and praxis (Charleworth, 2007).

Paradoxically, national law originates from a particular society and yet the doctrinal approach claims its objective isolation from the influences of its land of origin. A doctrinal approach works by focusing upon finding an immediate answer to the problem at hand, treating it as a pure legal proposition, having no links with the broader domain of the problem, of which a single issue might just be a part (Wilson, 2007). A sociological approach places law back into its locale and studies it within that context (McConville & Chui, 2007). Therefore, a purely doctrinal analysis may prove insufficient in confronting some of the contemporary moral and political issues involved in this area of law, socio-legal approach can be helpful in analyzing existing national and international law and policy concerning the protection of women's human rights. Since legal process is a part of wide social surroundings, it is not desirable for a legal researcher to lose sight of that bigger picture (Nelken, 2006). Frequently, the scholars choose to examine the intersectionality of law and society while researching in this area. Often, the purpose is to gain a greater understanding of the various patterns of violations of women's rights and to assess the role of legal intervention in this area.

That said, this author does not wish to reject doctrinal approach altogether as some elements of doctrinal analysis are found in all types of legal research (Chynoweth, 2009). Cryer argues that it is quite usual for feminist critics to employ a doctrinal approach to identify the nature of law before proceeding to critique its strengths and weaknesses (Hervey, Bulley-Sokhi, & Cryer, 2011). Moreover, the research does not have to rely on a single methodology wholly excluding the other; more than one methodology can be applied with varying degrees of analysis, depending upon the nature of the research problem (Hervey, Bulley-Sokhi, & Cryer, 2011). This includes the assessment whether a certain methodology should occupy the "centre stage" or be used at the initial phase of the research project that employs other approaches too (Hervey, Bulley-Sokhi, & Cryer, 2011). Although a broad list of research methods is being provided for socio-legal research by UK research bodies, such as the Economic and Social Research Council (ESRC) and the Arts and Humanities Research Council (AHRC), very few scholars can have full command of all known research skills. Salter argues that limited expertise in

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any of the areas would be sufficient to carry out such research (Salter & Mason, 2007). Similarly Wilson suggests that '[f]or lawyers to be interested, concerned and knowledgeable in social, economic and political matters does not mean that they must become experts in other disciplines but rather they should develop a broader notion of what is relevant to their own' (Wilson, 2007).

Women/human rights research is not in itself an academic discipline it is rather a field of research where different disciplines apply their own research problems, approaches and methods (Gentian, 2012). Given the multi-dimensional and highly complex nature of the notion of human rights, Coomans argues that interdisciplinarity is particularly essential for research in the field of women/human rights (Coomans, Grunfeld, & Kamminga, 2009). It will help understand and better clarify the concept from various angles, and might also be able to assist in achieving balance in case of conflicting claims of human rights. The socio-legal approach can broaden the scope of legal research both by making available vast varieties of information and by providing conceptual frameworks within which the information can be evaluated (McConville & Chui, 2007; Munger, 1993; Vick, 2004). It has a potential to expose actual patterns of power dynamics in a variety of social settings. Socio-legal insights have increasingly gained importance for legal scholars partly because doctrinal approaches are incapable of covering the ethical dimension of women/human rights. The legal scholars, therefore, agree that a socio-legal approach is a suitable methodology to study women/human rights (McConville & Chui, 2007; Salter & Mason, 2007).

Feminist jurisprudence is among the most influential approaches of SLS, using it as a theoretical framework enables the researcher to critically examine the moral claims of women/human rights (Crossman). The feminist analysis of law provides new insights and helps gain familiarity with the phenomenon of violation of women's human rights by identifying gendered components and gendered implications of apparent neutrality of human rights law and practice (Hervey, Bulley-Sokhi, & Cryer, 2011).

Not only do various types of feminist ideas draw upon each other, feminist and human rights approaches quite often do inform each other. This can be done, for instance, by integration of human rights and feminist explanation to account for problematic themes such as ethical/cultural relativism or the public/private dichotomy in law.

Theoretical Framework for Research in Women/Human rights

Feminist theoretical framework can be used in women's human rights research in order to understand the nature of systematic gender inequality that arguably perpetuates different forms of gender discrimination in various societies. Feminist analysis of law will be helpful in identifying gendered components and gendered implications of apparently neutral laws and practices prevailing in various countries (Hervey, Bulley-Sokhi, & Cryer, 2011). Feminist theory like any other body of scholarly work did not develop in a social and political void. It is influenced by a number of philosophical trends that shaped 20th century intellectual thought (<http://plato.stanford.edu/entries/feminism-approaches/>). Generally it is founded on a premise that traditional political and philosophical thought is inadequate, it manifested male biases because women had been excluded from the process of knowledge construction (Beasley, 1999). As Theile remarks 'social and political theory was and for the most part still is, written by men, for men and about men' (Beasley, 1999). The resulting exclusion, marginalisation and trivialisation of women and their perspective of social and political life led the feminist theorists to challenge male hegemony in the knowledge discourses (Beasley, 1999). Since feminist responses to the perceived inadequacy of mainstream thought are diverse, feminist accounts offer a wide variety of critique. The ultimate aim is to empower women by challenging unequal power relations in society through reconstruction of knowledge.

This author agrees that all these strands of feminist legal theory are useful and capable of addressing or responding to various aspects of women's lives. By drawing a framework from a combination of these theories the multi-faceted issue of violation of women's human rights can be explored and addressed. Liberal legal feminism wants women to have more choices and radical legal feminism wants women to have more power (Robin, 1987). The former can assist the legal system to improve and create equal opportunities for women and for everyone else; the latter will help to empower not only women but all suppressed groups and classes in a given society. Charlesworth et al have employed this approach in their scholarly piece which attempts to analyze and critique International law from a feminist perspective (Charlesworth, 2007). Teson's critique of this piece has identified and labelled this method as 'theory mismatch' (Charlesworth, 2007). Charlesworth et al concede that they have drawn from wide range of feminist scholars, having diverse viewpoints, in their work on international law. However, they offer reasons for this choice, arguing that the 'feminist project is less a series of rival interpretations than a sort of archaeological dig where different methods are appropriate at the different levels of the excavation' (Charlesworth, 2007).

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Essentialist discourses have a tendency to limit the possibility of reconfiguring the political and legal culture in the international realm. Since there is frequent overlap among various approaches Cryer finds nothing inherently incongruous in applying different theoretical methods to the same research problem (Hervey, Bulley-Sokhi, & Cryer, 2011). Scholars can employ more than one theoretical framework for research or can be eclectic when it serves their purpose (Hervey, Bulley-Sokhi, & Cryer, 2011). Lugones has likened this technique to the image of a feminist world traveler, who uses different means of transport for different geographical terrains (Charlesworth, 1995). This approach is arguably even more justified and desirable in the feminist analyses of international law because its rules operate on a global level. The emancipatory project of feminist International law should be designed in a manner that is more responsive to the needs of women from diverse nationalities and geographical locations. Through interpretation of international legal rules it should be able to produce a narrative that is more respectful and reflective of the interests or concerns of women from every contemporary society of the world. Thus, a feminist critique of mainstream International law has to be a multi-perspective one, in order to integrate the political, ethnic, racial and religious differences of the women in the world (Charlesworth, 1995).

The ideals of dignity and equality of all human beings underpin the conceptual basis of human rights law (Radacic, 2010). The roots of international human rights can be traced back to the philosophical foundation of liberal theory originating from (secular) natural rights tradition (Radacic, 2010). However, the norms and institutions of human rights law shaped by this philosophy proved ineffective to adequately address gender specific violations of women's human rights. A liberal conceptualization of an equal treatment strategy does not challenge structural disadvantages attached to differences (gender, race etc.), and therefore fails to bring any meaningful change in these areas of human rights law. For some feminists, this was the basis for a reform agenda. In the mid 1990s, the persistent struggle of women's advocacy brought home the fact that the strategy of adding "women questions" in human rights law discourses had done little for the cause of women. On the strong recommendation of various feminist groups, the UN intensified its efforts to mainstream the gender perspective into all its policies and programmes (Radacic, 2010).

Another challenge to human rights law, particularly affecting women, is the separate sphere philosophy of liberal theory. Postmodern feminists, by utilizing deconstructive techniques exposed the public/private divide in the human rights discourses. This divide, they argue, is not only false but also gendered; it makes women's rights abuses invisible (Chinkin, 2005). Re-

conceptualization of key themes of human rights law, including formal equality and public/private dichotomy, was demanded in a manner that transcends all barriers, and acknowledges various layers of identity for the purposes of women's empowerment in the true sense. Legislative reforms in many countries, such as in the fields of domestic violence against women; abortion and statutory rape, to protect violations of women's human rights in the private sphere, are a consequence of feminists' efforts.

International legal rules, including human rights norms, do not establish hierarchical and adversarial mechanisms, institutions and justice systems; they are more of a consensual nature. The structure of authority in the international legal arena is not arranged in a vertical manner, it spreads horizontally through the sovereign equality principle; consent plays a crucial role in regulating states' relationship. The international legal order based on the principles of consent and interdependence of communities of states, generates communal values, this approach has more in common with cultural feminism rather than liberal theory (Binion, 1995). Other features of human rights law such as those which promote respect for moral or non-commodified values or reconciliation of conflicting positions, little known in liberal theory, resonate with the ideology of cultural feminism. Likewise the concept of "soft law" in human rights and cultural feminist approaches share similar features. The mechanism of soft law is designed in human rights to accommodate the economic, political and cultural diversity of international society and to achieve consensus on new rules (Andorno, 2007; Hillgenberg, 1999). Cultural feminists also stress the positive value of women's "different voice": male/female differences should be accommodated to achieve collective goals (Baker, 1998). This approach does not promote the idea of using law as a coercive force. Law should be a 'process of persuasion and bargain leading to consent' (Baker, 1998) is very close to the notion of soft law in human rights law.

It is clear that one of the fundamental objectives of the UN Charter is the promotion of friendly relations among states and resolution of conflicts by peaceful means (Art. 2(3) of the UN Charter). With the purpose to prohibit the use of force, International law proposes non-coercive methods for dispute resolution, such as consultation, negotiation, reconciliation, mediation, and arbitration (Art. 33 (1) of the UN Charter). Arguably, settlement of disputes through non-aggressive means requires feminine values like emotional intelligence, care and intuitive understanding to appreciate and accommodate other viewpoints (Chinkin, 2005). Moreover, a judicial body exists in international law in the form of the International Court of Justice (ICJ), but unlike most legal systems (based on liberal-positivist philosophy), its jurisdiction is not compulsory. Its authority flows from the free consent of the

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states, party to a given dispute. Liberal-positivists do not recognise such a system as “properly legal” as it is not backed by coercive authority of law (Hart, 1997). The International legal system (the ICJ arbitration system) is more in line with the ethics-based approach of cultural feminism rather than the rights-based approach of liberal legalism (Chinkin, 2005; Fellmeth, 2000). Further, the *opiniojuris*, a state's feeling of being bound by customary norms (North Sea continental Shelf cases ICJ (Federal republic of Germany/Netherland) (Merits) ([1969 ICJ Rep 3 at Para 77])), an important concept of International law, is a subjective and psychological element (O'Brien, 2002), and relates to the ideals of cultural feminism, rather than (masculine) concepts of rationality and objectivity promoted by liberal ideology. Environmental law, a subfield of international law, is another instance that embodies feminist morality, as it embraces a notion of caretaking and accountability to us and future generations (Fellmeth, 2000; McConville & Chui, 2007).

Concluding Remarks

It is concluded that the longstanding and well known criticism, by legal positivists operating in the liberal tradition, that international law is not law in the true sense of the term, seems valid only because it is measured by the standards of liberal theory (O'Brien, 2002). The core theme, particularly that underpins the UN based international legal system, is motivated by ethical considerations rather than an objective philosophy of liberal legalism. Arguably, the whole idea of International law as well as human rights law will make more sense if it is judged from the perspective of cultural feminists.

End Notes

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