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RESEARCH ARTICLE

Theoretical Debates and Analysis of Legal Research Methods*

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Abstract

Legal research methods refer to a general term for disciplined and systematic procedures, approaches, means, techniques, and models used by researchers to acquire novel and reliable legal knowledge. Several theoretical debates on the originality of legal research methods go on as follows: Is one legal research method superior to another? Do legal research methods aim for methodological independence? Are legal research methods objective or subjective? Influenced by scientism, positivism is usually considered to be the only reasonable research method, but since law is different from science, only using positivist research approaches is insufficient for solving legal problems. Strictly speaking, a method that is appropriate for the research subject is a reasonable method. As one of the humanities and social sciences, law has similarities with other disciplines in terms of the scope of research; therefore, its research methods could be borrowed from other disciplines. However, law cannot ignore the development of its own unique research methods while retaining its advantages. Legal research methods are supposed to be objective because they should follow scientific standards and have objective arguments, but inevitably, legal research would be subjective and full of value judgments since it means subjective and creative activities of researchers. Of course, the choice of values should preferably be made in the context of value-freeness to ensure the organic combination of value-freeness and value judgment.

Keywords legal research methods; positivist analysis; value analysis; value-freeness; value judgment

Legal research methods are generally positioned as a general term for disciplined and systematic procedures, approaches, means, techniques, and models used by researchers to acquire novel and reliable legal knowledge. Here, "legal researchers" can refer to professional legal research fellows and legal practitioners, as well as researchers in other fields of the humanities and social sciences other than law. For examples, Plato and Aristotle in ancient Greece, Hobbes, Locke, Montesquieu, Rousseau, Kant, and Hegel in modern times, as well as Weber, Hayek, and Habermas in contemporary times, mostly argued legal theories within their overall ideological frameworks, or in other words, they regarded legal thought as an intrinsic part of their ideological framework. Meanwhile, "methodology" indicates that legal research must follow certain "ology" and presents itself as a complete set of reasonable procedures, approaches, models, and techniques. The reason why legal methodology is

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important is that it serves the primary goal of legal research, namely, acquiring "novel and reliable knowledge" about the law. Generally speaking, legal research methodology can be seen as an effective tool created by scholars or as skill used to solve difficult legal problems. However, the qualitative analysis of legal research methodology involves many theoretical disputes on originality, such as whether one legal research methodology is superior to another, whether legal research methodology should be independent of the research methodologies of other disciplines, and whether legal research methodology is subjective or objective in nature. The solution to these questions involves not only the issue of how to make reasonable choices under legal research methodology for different research objects but also issues such as whether and how value judgment exists in legal research. To this end, the author ventures to analyze the above three questions in order to better promote the standardization and scientization of legal research methodology.

I Is One Method Encompassed by Legal Research Methodology Superior to Another?

It goes without saying that legal research has a history of thousands of years, during which jurists have summarized and generalized many research methods, such as value analysis, positivist analysis, semantic analysis, historical analysis, and comparative analysis. But the problem is, faced with such a vast array of methods, what choices should we make? In the ought-to-be sense, there is only one correct method, or one kind of correct method. If finding the most appropriate method in our research, we may get twofold results with half the effort and achieve the expected research results. For this reason, the superiority and inferiority of different research methods have always been a concern in academia. For example, in the eyes of those scholars who insist on the positivist stance, only through positivist means such as observation, investigation, and experiment can true and reliable knowledge be obtained, because it can eliminate uncertainty in the conclusions, thus making research results accurate and reliable. While this scientific attitude is, of course, worth advocating, the practice of research has shown that not all problems of legal theory can be identified and solved by positivist study. For example, in modern law, we recognize that every person is a proper subject of law, which is based on the premise and foundation that every person has "personality" and that every person has the same personality as others do, which is derived from the fact that all members of society enjoy equal dignity like others do. Here, the establishment of legal categories, such as personality and dignity, is not described or generalized in a positivist manner. On the contrary, this relies on the deduction by principles or even philosophical assumptions. Some may think that such presuppositions are fantasies absent of scientific significance. However, core legal categories such as dignity, personality, and subject are precisely the cornerstones of modern legal institutions. If we do not recognize that people have dignity, then personality is out of the question; if we do not believe that people have personality, there is no way to prove that the capacity for rights begins at birth and ends at death. The same example can also be explained by the social contract theory. It is understood by all that no country, whether in history or in contemporary society, is built on a social contract executed by and with people. However, for modern democratic countries

under the rule of law, their existence presupposes the recognition of the core content of the social contract, that is, there between people and the country is a contract that must be mutually observed, and both parties must stay honest and trustworthy and must not violate it. On a general note, the core content of the contract is nothing more than the following aspects: First, a country is a public institution established by people through agreement, and the country's power comes from the alienation of people's natural rights; second, people alienate their natural rights to the country because the country promises to protect their lives, freedom, and happiness; and third, when the country betrays its promise, violates human rights, and oppresses the people, people have the right to disobey. It can be said that without the acceptance of and respect for the social contract theory, modern countries will lose the basis for their existence, and the ideals and beliefs in democratic and republican countries will vanish.

The reason why the above discussion takes "positivism" as its target is because under the scientific trend of thought, positivism is often used as the only way and means to acquire knowledge, while other methods and ways are either abandoned or classified as suspicious methods. The so-called scientism, by the definition set by. WU Guosheng, is the advocate of those methods that are effective in the scientific field and can and should be widely used in non-scientific fields.[1] The source of this trend of thought lies in the development of natural sciences such as astronomy, physics, and biology in the 19th century, especially the three major discoveries of cells, the law of conservation and conversion of energy, and biological evolution, which have brought great shock to the research of the humanities and social sciences. To base the conclusions derived from reasoning on an unquestionable positivist foundation and to establish a law-based explanation of objective things and social phenomena is nothing less than the highest pursuit of scholars.[2] The achievements in natural sciences have inspired people to think: Since natural sciences can enable people to have such a great understanding of nature, can these methods not be successfully applied to the social field?[3] It is driven by this academic trend that scientism came into being, and since then academic research has been dominated by science. For example, Comte, the founder of sociology, defined the methods and spirit of sociological research by the scientific standard. He pointed out that the history of human thinking can be roughly divided into three stages, namely the theological stage, the metaphysical stage, and the positivist stage, and that the positivist stage is also the scientific stage. True science is far from being based on observation alone. It always tends to avoid direct exploration as much as possible and replace it with reasonable predictions, the latter of which in all aspects constitute the main characteristics of the positivist spirit...[4] However, it must be noted that advocating scientism is certainly helpful to the scientization of social sciences and humanities; to wit, it is conducive to

[1] WU Guosheng, 让科学精神成为我们的自觉意志 (Make the Scientific Spirit Our Conscious Will), in 论科学精神 (*On the Scientific Spirit*), edited by WANG Dayan & YU Guangyuan, 中央编译出版社 (Central Compilation & Translation Press), at 190–191(2001).

[2] "In natural science, if a theory is sufficient to explain a wide range of phenomena, we can call it a law." See Betty H. Zisk, 政治学研究方法举隅 (*Political Research: A Methodological Sampler*), translated by SHEN Mingming et al., 中国社会科学出版社 (China Social Sciences Press), at 27–289 (1985).

[3] Ian Robertson, 社会学 (上册) (*Sociology*), Vol. 1, translated by HUANG Yufu, 商务印书馆 (Commercial Press), at 16 (1990).

[4] Auguste Comte, 论实证精神 (*A Discourse on the Positive Spirit*), translated by HUANG Jianhua, 商务印书馆 (Commercial Press), at 12 (1996).

further standardization and scientization of various disciplines in terms of the development of internal norms, the accuracy of theories, and the logical standards of reasoning. However, it is at the cost of certain developments in the humanities and social sciences themselves that scientism prevails. For example, the positivist philosophy advocated by Comte, especially the creation of social physics (i.e., sociology), has been promoting scientism to the extreme. Consequently, as sociologists point out, sociology had better not become rigidified into a humorless attitude of scientism, because this would blind and deafen us to the humor of the social landscape. If this is true for sociology, we will find that sociology, though having obtained an extremely simple methodology, has missed the phenomenal world that sociology was intended to explore... In short, when sociologists carefully avoid scientism, they will discover many human values, which are omnipresent in the scientific procedures of social sciences and natural sciences.[5] Although this argument aims at the discipline of sociology, it is also applicable to other social sciences and humanities. In fact, there is a fundamental difference between the understanding of society and human beings and the dissection of nature. If we forcibly deconstruct social and life problems with the methodology of natural science, we may fail to see the deeper emotions and value preferences of human beings and neglect the analysis of the living people behind social systems and social behaviors, thus eventually putting the research of social sciences and humanities on a path of self-isolation from humanity: either human beings are regarded as just an object subject to equal treatment with other objects; or human beings are regarded as just a quantitative unit void of the awareness of ultimate concern, which is most essential to these disciplines. For this reason, scholars warn us: The rise of science has pushed human beings into a tunnel of specialized training. The more human beings advance in knowledge, the less they see the world as a whole or themselves, and the further they sink into... "existential oblivion."[6] This not only causes a separation between scientific research and human beings but also leads "science" to a loss of meaning of itself.

Moreover, in some cases, the despotism of the rulers comes along with the discourse of science, turning science into a hegemonic discourse or even a tool for value dogmatism. WU Guosheng proposed a piece of thought-provoking advice, i.e., the scientific methodology serves the domination and control of nature, so its basic logic is the logic of power and strength. When this logic is applied to social issues, it will inevitably produce a social solution of strict control and efficient rule. And the best object to which it applies is a slavery society. This is exactly why we should be wary of the application of scientific methodology in the social field: The place where scientific social theories are fully applied could be a totalitarian society.[7] This is not an exaggeration. The fact that ideological "value dogmatism" will inevitably lead to a situation where "all voices are silent" is clear proof. For this reason, when reflecting on the prospects of social development and summarizing relevant historical experiences, people have to hold high the banner of "humanistic spirit" again, advocating

[5] Peter Berger, 社会学导引——人文取向的透视 (*Invitation to Sociology: A Humanistic Perspective*), translated by HUANG Shuren & LIU Yaling, 巨流图书公司 (Juliu Book Company), at 166–167 (1982).

[6] Milan Kundera, 小说的艺术 (The Art of the Novel), quoted from 人文精神与人文科学——人文科学方法论导论 (*Humanistic Spirit and Humanistic Science: Introduction to the Methodology of Humanities*), authored by ZHU Hongwen, 中共中央党校出版社 (The Central Party School Publishing House), at 5 (1994).

[7] See WU, fn 1 at 190–191.

that social sciences and humanities should have unique methodological contents such as explanation models, presuppositions, and value judgments rather than the methodology of natural sciences simply introduced into the research of social sciences and humanities. When talking about his own research process, Hayek also pointed out earnestly, I am increasingly aware that it is the great tragedy of our time to destroy values with the fallacy of scientism—it is a great tragedy because the values that the fallacy of scientism tends to discard are the indispensable foundation of all of our civilizations and are also the indispensable foundation of those scientific researches themselves that turn against these values.[8] It is not difficult for one to see if he applies this remark to legal research that when legal theories are being constructed, whether they recognize human values or criticize original values, they are inseparable from the analysis of human beings *per se* and the exploration of social ideals. Completely denying the rationality of values in the name of so-called "science" will ultimately only turn legal research into a study of the art of rulership.

It is precisely because of his vigilance against scientism that Feyerabend advocates the "anarchist" methodological model, that is, he does not take a particular stance in methodology, and as long as the research objectives can be achieved, "whatever works" can be adopted as the methodology. Feyerabend believes that the separation of science from non-science is not only artificial but also detrimental to the advancement of knowledge. If we want to understand nature, if we want to dominate our natural environment, we must make use of all ideas and all methods rather than making narrow-viewed choices among them. However, to assert that "there is no knowledge beyond science" is just another cheapest fairy tale.[9] In his view, science is just one of the many ideological forms that people have developed, but it is not necessarily the best. Science is eye-catching, sensational, and rude. Only those who have decided to support a certain ideology, or those who have accepted science but have never examined its superiority and limits, will think that science is inherently superior. Science and ideology have become a phenomenon of inseparability in modern society, and the choice of ideology should be left to individuals. Feyerabend argues that science is actually the newest, most aggressive, and most dogmatic religious institution, and that the separation of state from church, a principle of the modern rule of law, should be supplemented by the separation of state from science, which may be our only chance to achieve a humanistic spirit.[10] Therefore, he advocates "whatever works" methodology to eliminate scientific "chauvinism." Of course, this statement is somewhat extreme. The correct understanding of it is: First, we must resolutely eliminate the influence of scientism and refrain from applying the positivist standards of natural science to everything in legal research. Dutch jurist Smits explicitly advocates: I strongly oppose the view that the knowledge obtained by positivist methods is more reliable or better than the knowledge rendered by traditional research methods.[11] This statement is true, as evidenced by the great theoretical achievements made in legal theories

[8] Friedrich von Hayek, 法律、立法与自由 (*Law, Legislation and Liberty*), Vol. 1, translated by DENG Zhenglai et al., 中国大百科全书出版社 (Encyclopedia of China Publishing House), at 10 (2000).

[9] Paul Feyerabend, 反对方法——无政府主义知识论纲要 (*Against Method: Outline of an Anarchistic Theory of Knowledge*), translated by ZHOU Changzhong, 上海译文出版社 (Shanghai Translation Publishing House), at 266 (1992).

[10] Id.

[11] Jan Smits, 法学的观念与方法 (*The Mind and Method of the Legal Academic*), translated by WEI Leijie & WU Yating, 法律出版社 (Law Press · China), at 140 (2017).

by the natural law school and the philosophical law school, as well as the academic value and revolutionary significance still held by these theories in contemporary times. Second, we must also respect science and try our best to incorporate scientific standards in the formulation, argumentation, and testing of propositions so that relevant theories and viewpoints have a more solid empirical, factual, and logical basis.

In fact, from the perspective of legal research, a reasonable methodology is a methodology that is suitable for the research subject. For example, if we want to trace the origins of a certain stereotyped legal concept, such as unjust enrichment and self-defense, then historical analysis is a must-have research method. Only by tracing the origin of such a concept, stating its development stages and the exact meaning of the concept in different eras, and analyzing the different positioning that it may have in the laws of different countries in contemporary society can we understand the ins and outs and evolution of the concept, and thereby more accurately define its connotation and denotation. Similarly, if one wants to understand how "intention" and "negligence" are positioned in the laws of various countries, no method other than comparative analysis will do, i.e., he or she should analyze the legal provisions of major countries and the theories behind them, so as to find out whether there are any deficiencies or inappropriateness in the provisions of the laws of one's own country and in related theories. In conclusion, it is not surprising that many different research methods can be used on law and that one method is not necessarily superior to another. Which method must be used depends entirely on the objectives of the study.[12] Perhaps it is for this reason that some scholars pay special attention to the comprehensive research method in law. For example, GUAN Ou says the comprehensive research method, also called the integrated method and the inductive method, combines annotative, historical, comparative, philosophical, social, and other methods for a comprehensive application. In that the study of law cannot be done with a single method, the philosophical method focuses on ideals while the annotative, historical, comparative, social, and other methods focus on facts, all of which are biased. Only by combining the above five methods, taking into account the static and dynamic, theoretical and factual aspects of law, can we achieve profound results. This is the comprehensive research method.[13] It can be seen that the comprehensive research method, by emphasizing the combination of the strengths of various methods and the avoidance of the shortcomings of a single method, enables us to examine a legal issue more comprehensively. However, the premise for the application of the comprehensive research method must be that a certain topic is the common concern of various disciplines. For example, "power" is a case in point, which is taken by disciplines such as economics, political science, and sociology as a core concept altogether. Adopting a multidisciplinary analysis method will naturally achieve good research results. However, it should be noted that legal issues do not necessarily entail this type of method for research, and the mixed use of methods will to a certain extent lead to confusion in the research, which is also an issue we must pay attention to when conducting legal research.

[12] Id. at 136.

[13] GUAN Ou, 推开法律之门 (*The Door to the Law*), 中国政法大学出版社 (China University of Political Science and Law Press), at 17–18 (2011).

II Should Legal Research Methodology Aim for Methodological Independence?

The idea of comprehensive research mentioned above actually gives rise to another theoretical question, namely, should legal research focus on using the inherent research methodology of law to analyze legal issues, or does it need research methodology of other disciplines in addition? As is known by all, legal research, nomological analysis, semantic analysis, historical analysis, and comparative analysis have gathered quite a number of proven rules and produced a large number of classic research results. This is enough to show that legal research methodology can be unto itself. To a certain extent, without an independent or autonomous system of research methodology, it would be difficult for law to become an independent discipline. Smits has issued a serious warning about the legal community's enthusiasm for imitating the research methodologies of other disciplines. In his view, the development trend of legal research—the research methodologies external to law are prevailing—is a dangerous trend. It goes without saying that law can benefit from the perspectives of other disciplines. Nevertheless, this does not mean that the normative approach to law should be discarded. On the contrary, the core question should not be how other disciplines can help us make the academic research of law more "scientific," but how legal research methodology itself can better meet people's expectations of an academic discipline. To put it somewhat paradoxically: for the sake of law, there are good reasons for us to rediscover its research methodology.[14] The attitude that the author wants to make clear here is: First, blindly imitating the research methodologies of other disciplines is an extremely dangerous move for legal research. After all, the maturity and achievements of a discipline are inseparable from its unique methodology and methods, which is true for law as well as for other disciplines. A research methodology is intertwined with the research objects and objectives, and since law has its own unique research objects and objectives, it is naturally impossible to draw appropriate conclusions by simply borrowing research methodologies from other disciplines. Second, positivist research methods can certainly improve the scientific nature of legal research. For example, the analysis, classification, and statistics of relevant data enable us to understand existing legal phenomena and trends more accurately. However, what law needs to focus on is, as said by the author, thinking about what people in our society should do legally and providing methods to determine such issues.[15] When it comes to this kind of research, it is naturally difficult to achieve this objective through positivist research methods. Third, we do not need to reject the research methodologies of other disciplines, or what the author calls "research methodologies external to law." After all, one more research perspective or one more analytical dimension will enable us to look at related issues more comprehensively. However, the role that the research methodologies of other disciplines can play is not more than supporting and cannot be primary. For example, the analysis method as in economics has drawn our attention to issues such as cost and efficiency that have been there all along in law but have been ignored in legal research. It has expanded the original scope and theoretical depth of legal research; however, this method is unlikely to be mainstream in the legal research methodology. After all, replacing the analysis

[14] See Smits, fn. 11 at 7.

[15] See Smits, fn. 11 at 139.

of distribution and fairness with money and efficiency will inevitably throw legal research off the right track.

Generally speaking, we agree with Smits' statement that it is alright for legal research to engage research methodologies of other disciplines, but it should not ignore the refinement of its own unique methodology or the superiority of its original methodology. Smits believes that there are four main types of research methods for law: The first is the descriptive method of law, which is represented by the dogmatic method of research. The practice of presenting the law as an internally coherent collection of concepts, rules, and principles by revealing contradictions, defining concepts, and distinguishing between rules and precedents runs throughout the history of legal research. The dogmatic method has thus become an "independent and autonomous method" in legal research because it "does not need to refer to any other sources except its own legal sources."[16] The second is the positivist legal method, which focuses on studying legal actors, institutions, rules, and procedures "to better understand how they work and what effects they produce. Therefore, this field is not concerned with what the law says, but with what effects the law actually produces." Since this research method itself presupposes that "law is a tool," it is difficult for it to reconcile with the dogmatic method of legal research, and instead, it borrows more from the methodologies of non-legal disciplines.[17] The third is the theoretical legal method. This type of research "focuses on questions such as what law is, how it differs from other sets of rules, why and when it is effective, and how it is formed." In terms of methodology, it can adopt the argumentation methods and techniques in common with positivist legal research and draw on research methodologies of other disciplines.[18] The fourth is the normative method of legal research, also the research method most strongly recommended by Smith. In Smits' view, the ultimate question of law should be what law should be: law is a discipline about what individuals, enterprises, states, and other organizations should or should not do. For this reason, the search for answers to questions such as "should children be deprived of their inheritance rights?" "Should criminals be sentenced to death?" is "unique to the discipline of law," and therefore the normative method for legal research is bound to become a method unique to law.[19]

It is not difficult to see that, in Smits' view, the research methods unique to law are mainly the descriptive method of law and the normative method of legal research; and while the descriptive method of law represented by dogmatics is held up as a research method unique to law, the normative method of legal research is proposed for the purpose of making up for the shortcomings of the method of legal dogmatics or even replacing it. So, what are the advantages of the normative method of legal research compared with the dogmatic method? Smits' arguments, as an overview, mainly include the following aspects: First, the research perspectives are different. The dogmatic method is for professionals to analyze legal norms from an internal perspective. They use the same wordings and concepts as their research objects do and often maintain close contact with legal practices. However, the normative

[16] See Smits, fn. 11 at 17, 4–5.
[17] See Smits, fn. 11 at 32–33.
[18] See Smits, fn. 11 at 36–38.
[19] See Smits, fn. 11 at 47.

method of legal research is to examine "how the law should be explained" from an external perspective in order to meet the general requirements of legal theory.[20] Second, the objects of analysis are different. The dogmatic method is "oriented only towards the products of the legislature and courts of a country," but the normative method of legal research, instead of being confined to the legislation and precedents of a country, pays attention to foreign law, regional law, and even international law. Moreover, it not only studies the laws enacted by organs of power but also explains the laws as spontaneous orders.[21] Third, the research orientations are different. The dogmatic method is to eliminate differences through description, deduction, and interpretation, determine the exact meaning of concepts, rules, and principles, and provide standard answers for case resolution, whereas the normative method of legal research emphasizes that law is a "discipline for dealing with conflicting arguments." In other words, in the application of the normative method of legal research, there are no existing conclusions telling people what should be done legally. The core of legal research methodology is to recognize uncertainty: law can boil down to disputes about what should be done legally. That is, we should not eliminate the uncertainties in norm, but rather, we should view them as the starting point of legal research: if a consensus is impossible for normativity, we should not strive for it. This implies that it is not only inevitable but necessary that people can debate over the correct outcome.[22] Specifically, the normative method of legal research recognizes that the uncertainty of norms is an objective existence, and for this reason, legal debates can be held to allow those with better reasons to prevail. It can be seen that the core of this method is that legal studies should pay less attention to the construction of the systems of rules and laws or to the search for "correct" results but should pay more attention to relevant arguments and the methods to be used to resolve conflicts among these arguments.[23] In essence, the normative method of legal research is a method based on judgment, that is, to use "substantive argumentation" to make trade-off choices among the "substantive arguments" behind the rules of different countries and different legal jurisdictions, so as to identify and reflect on" such arguments, and further to "reveal how various arguments stand for and against specific solutions and how these arguments work in different legal jurisdictions,[24] thereby showing the different practical wisdom applied in different legal jurisdictions to solve the same problem.

Of course, pragmatically, in Smits' explanation there are still many things vague about how the normative method of legal research actually works. In the "Conclusion" of *The Mind and Method of the Legal Academic*, he reiterates that the research methods advocated by him are to identify and think about the arguments standing for and against certain solutions, and to observe whether these arguments can be recognized in the normative environment of a particular jurisdiction. However, the author did not give a clear account of how to identify and think about the arguments and what conclusions to draw after identification. However, the author's efforts must be acknowledged, i.e., if the core issues of the legal discipline are

[20] See Smits, fn. 11 at 50–51.
[21] See Smits, fn. 11 at 51, 55–64.
[22] See Smits, fn. 11 at 48, 66, 84.
[23] See Smits, fn. 11 at 93.
[24] See Smits, fn. 11 at 94, 98.

not identified and there is no research methodology unique to the legal discipline, then law can do nothing more than "imitating" the methodologies of economics, psychology, and other disciplines and "following in their footsteps," which will ultimately lead it to become "a miserable failure in the battle with other disciplines" and become a "despised second-class discipline."[25] Among domestic scholars, Professor XIE Hui also attaches great importance to the idea that law must have its own unique research methodology, emphasizing that the so-called unified academic research methodology applicable to all disciplines is not more than the methodology shared by various disciplines against the background of academic division of labor. It may promote the development of a specific discipline, but it cannot replace the unique methodology that a discipline has developed based on its own objects of research. Otherwise, the so-called disciplinary independence will end up being an unattainable mirage. Professor XIE Hui positions the "normative analysis method" as a research method unique to law, and defines it as a legal analysis method about "legality/illegality, operation/effect, rights/obligations."[26] However, it should be noted that it deviates from the original purpose of "normative analysis" to a certain extent that Professor XIE Hui directly equates normative analysis with "positivism" and believes that normative analysis includes three specific research methods: value positivism, social positivism, and normative positivism. Generally speaking, normative analysis and positivist analysis are opposite research methods with two different paths and orientations. Of course, it must be pointed out that there is such a close connection between law and other disciplines that while we emphasize that law must have its own unique research methodology, we cannot reject taking reference to or adopting reasonable and effective research methodologies from other disciplines.

III Is the Legal Research Methodology Objective or Subjective?

A certain degree of objectivity in research paths is required of legal research methodology as a means of acquiring new legal knowledge, in order for its conclusions to be acceptable. In other words, only when a research methodology follows general scientific conventions and takes a path that is recognized and believed by other researchers can its conclusions become new knowledge recognized by the public. Although human cognitive activities, including legal research, are mainly carried out by individuals using unique methods, there are also universal methodological contents behind these achievements. As Finnis puts it, objectivity is a matter of the exercise of our reason free from all the prejudices that would make the attainment of truth, which is the goal of research, more impossible.[27] Only by transcending our own prejudices and accepting the guidance of common sense can we obtain true and correct knowledge. It is precisely this methodological rule that enables human society to make greater scientific achievements based on the foundation of our predecessors; scientific activities among members of society can also gain a basis of consensus and form a scientific

[25] See Smits, fn. 11 at 171, 138–139.

[26] See XIE Hui, 论规范分析方法 (On Normative Analysis), 2 中国法学 (*China Legal Science*), 36–44 (2009).

[27] John Finnis, 自然法：古典传统 (Natural Law: The Classical Tradition), in 牛津法理学与法哲学手册 (上册) (*The Oxford Handbook of Jurisprudence and Philosophy of Law*), Vol. 1, authored by Jules Coleman & Scott Shapiro, translated by DU Yanlin, ZHU Zhenwei, HONG Fa et al., 上海三联书店 (Shanghai Sanlian Bookstore), at 49 (2017).

community that follows the same norms. In short, only by following methods and rules that are commonly recognized by the academic community can we prevent arbitrary interpretation of propositions and random choices of arguments, so as to realize the normalization and standardization of academic research. For this reason, objectivity is the foundation of research methods. The objectivity of legal research methodology is no exception. When we call a method encompassed by legal research methodology objective, it means that this method can withstand the test of logic and facts and can provide people with novel and real knowledge about a certain aspect of legal issues.

To achieve objectivity in legal research methodology, we should first emphasize that one should not impose its own values or beliefs upon others. Due to specific family backgrounds, education levels, and social experiences, everyone has developed his or her own thoughts and values. Of course, knowledge that is only grasped and possessed by an individual is at most "personal knowledge" in the philosophical sense; however, the general rule for scientific methods is that we cannot spend science or research efforts on personal subjective issues, so there is no way to derive reliable public knowledge solely from personal subjective opinions themselves.[28] Therefore, the legal research methodology in the scientific sense is not to guarantee the realization of individual-specific subjective experiences and subjective values but to provide a channel to demonstrate and verify the conversion of such personal knowledge into public knowledge. However, the observation of legal phenomena will always be colored by the observer's subjectivity,[29] and legal researchers are certainly no exception. Theories will be permeated by the temperament, preferences, interests, and political purposes of researchers. Emotional motivation is extremely important for dedication and success in theory construction, and it may also make a difference in the choice of topic for a doctoral dissertation or habilitation thesis. Without the emotional drive, people would not be able to devote themselves to scientific research.[30] As a subject with subjective initiative, a legal researcher will inevitably mix its personal subjective emotions and thoughts into the research process, and the specific social environment will also leave an indelible mark on the mind of every researcher. For example, although Hobbes and Locke are both representative figures of the British natural law school, their conclusions on state issues are poles apart. According to later research, one of the very important reasons is that the two lived in different times, and the political situation and political demands led them to a world of difference between their views on "totalitarian state" and "limited government." Likewise, every famous thinker or legal jurist has created a typical "self" in his or her works, fully expressing his or her own sense of value and legal propositions. It also shows that objectivity and subjectivity are bound to coexist and must coexist when it comes to research methodology.

In evaluating Hart's research methodology, Finnis mentions that although Hart advocates description neutrality or value-freeness, his actual research methodology abundantly confirms what the classical theory (i.e., classical natural law theory—the quoter's note) argues for.

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[28] Don Ethridge, 应用经济学研究方法论 (*Research Methodology in Applied Economics*), translated by ZHU Gang, 经济科学出版社 (Economic Science Press), at 55 (1998).

[29] Klaus Adomeit & Susanne Hähnchen, 写给学生的法理论 (*Legal Theory for Students*), translated by LEI Lei, 中国政法大学出版社 (China University of Political Science and Law Press), at 54 (2018).

[30] Rüthers, 法理学 (*Jurisprudence*), translated by DING Xiaochun & WU Yue, 法律出版社 (Law Press · China), at 11 (2013).

General descriptions and interpretations necessarily rely on the shared evaluations defined between the author and the reader. By identifying the functions, benefits, pleasures, defects, and remedies, etc., of society, Hart certainly makes progress in each of these areas. His arguments against competing descriptive and explanatory theories of law would be virtually impossible, let alone successful, without an appeal to values as good reasons for action.[31] In other words, although the new analytical jurisprudence advocates value neutrality, or value-freeness, and intends to exclude the subjectivity and value preferences of the researcher, there is no guarantee that the relevant theoretical statements will be agreed upon and respected if they are divorced from socially accepted values and value standards.

Taking "justice" as an example, it is recognized as the most difficult value proposition in legal theory to have a definition and clear standards. When researchers resort to justice to make judgments on legal issues, we can assert that they would surely do so according to the connotation of justice that they consider to be correct and reasonable, and thus the subjectivity of the conclusions of this research is inevitable. However, for this subjectivity to be translated into objectivity, there inevitably would be a process where, as scholars have said, we should seek the broadest possible basis of public opinion, that is to say, from the feelings of the law that as many people as possible have and, based on that, from the concepts of justice acceptable to the majority of the people.[32] If the standard of justice proposed by the researchers cannot go through this objectivity test, it would be a self-serving argument and unlikely to become a legitimate and reasonable scientific conclusion.

In short, the correct attitude in choosing the path of legal research is that, on the one hand, we must adopt the most scientific possible research objectives and methods to eliminate the influence of our own subjective values on the research process; on the other hand, subject to scientific standards, we must demonstrate our own value orientation as much as possible to make legal research a form of study that contains subjective consciousness. In fact, every subjective individual will inevitably bring its own values and ideas into the research activity conducted by it; otherwise, it will be a research void of stance. As the political scientist Frohock puts it, science is a way of examining the world that produces publicly recognized knowledge. But science, as a means of acquiring such knowledge, is not self-reassured. That is to say, scientific undertakings cannot be verified by scientific methods.… In all research, the question of "why," if repeatedly pushed back, will soon reach the realm of value choices. In essence, the rationality of science *per se* must be verified based on external value judgments.

The subjectivity and objectivity issues of legal research methodology can also be transformed into the question of whether to adhere to the "value neutrality" stance or adopt a "value-relevance" approach in legal research. In other words, in legal research, is it allowed for researchers to have "value judgments"? As Radbruch pointed out, there has always been a "dual methodology" opposition in legal research; the kingdom of values and the world of facts are close to each other, and there is no overlap between them. People call this relationship

[31] See Finnis, fn. 27 at 20–21.

[32] Zippelius, 法学方法论 (*Jurisprudential Methodology*), translated by JIN Zhenbao, 法律出版社 (Law Press · China), at 21–22 (2009).

between value and reality, between what ought to be and what is, a "dual methodology."[33] Due to the obsession that law must be scientific, most supporters of positivism advocate a value-neutral and value-free research stance. Cotterrell tells us that positivism is essentially a philosophical theory that scientific knowledge comes from the observation of empirical data, that is, the search for the ultimate cause, meaning, and essence from "behind" the observed facts rather than from "thinking." Therefore, what we see are real things in existence, in the scientific sense, literally all things in existence. From this philosophical point of view, value judgments, distinctions between good and evil, political and policy issues, and questions about the fundamental properties of things (which cannot be determined by general survey results) are all unscientific. Since these types of questions are subjective and exist only in people's minds, they cannot be analyzed by scientific methods. From an extreme positivist point of view, they constitute no knowledge at all. In this way, facts and values are strictly divided. In terms of specific content, science should be, in a certain sense, "free from value concepts." It should neither give rise to value judgments on the things observed via it nor lead to the study of the inherent value connotations and ultimate meanings of the things observed via it. Of course, this does not mean that values cannot be studied, but that values can only be studied based on the preferences observed by people and the actual constraints imposed on individuals, and cannot be studied based on the true meaning and reality of the values themselves.[34] But in the eyes of legal scholars with a positivist orientation, legal research that excludes value judgments is truly scientific.

From the perspective of theoretical origin, the issue of value neutrality stems from the distinction between "is" and "ought to be" as drawn by Hume, and the "value neutrality" or "value-freeness" put forward by Weber have become the examples frequently cited in academia. As summarized by the German scholar Kammler, the so-called discourse of Weber on "value judgments free of personal ideas" mainly includes that, first, social scientists must refrain from evaluative statements at all times, whether in professional practice or in publishing research results; and second, social scientists should avoid aesthetic or moral evaluations, and they are only allowed to make evaluations that distinguish between truth and falsehood. Social scientists are not political activists. All conceivable ethical and political abstract values, such as "freedom," "equality," and "justice," among other things, are of equal significance of value; science must therefore not treat them differently to any extent. Third, the value of social actors themselves and the assessment of their value, are not the subject matters of social science.[35] In his speech "Science as a Vocation," Weber specifically used jurisprudence as an example to illustrate this issue. He pointed out: "The body of legal thought has been built partly on logic and partly on practices established by convention. It determines which elements are valid. In other words, it determines when specific rules of law and specific modes of interpretation are to be recognized as authoritative. It does not explain

[33] Radbruch, 法哲学导引 (*Introduction to the Philosophy of Law*), translated by LEI Lei, 商务印书馆 (Commercial Press), at 21 (2021).

[34] Roger Cotterrell, 法律社会学导论 (*The Sociology of Law: An Introduction*), translated by PAN Dasong et al., 华夏出版社 (Huaxia Publishing House), at 10–11(1989).

[35] Hans Kammler, *Systematische Politikwissenschaft* (*Political Science*), Wiesbaden, at 2000 (1976). Quoted from Dirk Kaesler, 马克斯·韦伯的生平、著述及影响 (*Max Weber: An Introduction to Life, Work and Influence*), translated by GUO Feng, 法律出版社 (Law Press·China), at 232 (2000).

whether such a thing as law should exist and whether these particular rules should be adopted. Jurisprudence can only tell us that if we wish for success, then according to the norms of our legal system, the best way to achieve it is to apply this particular rule of law."[36] From this, we can see that in Weber's view, the study of law only addresses the formal validity of law, and it does not need to make a response to the legitimate basis for the existence of the law and related issues on value evaluation. However, it must be noted that while Weber put forward the proposition of "value judgment free from personal ideas," he also assumed the theoretical premise of "value relevance." In Weber's view, "issues in social science are picked out according to the value relevance of the phenomena being explored,"[37] and this "relevance" is presented through the explanation of "understandability." Weber believed that the value in this method is as follows: First, it is conducive to empirical causal analysis made in an attempt to establish the real decisive motives of human behaviors. Second, when a person argues with another person who actually or apparently has different values from himself, it is conducive to the communication of truly opposing evaluations.[38] In this sense, it is impossible for the humanities to be completely "objective," "what is possible is merely a research choice of 'value–concept'."[39] In fact, unlike the purely objective material entities that natural sciences deal with, it is the social and human issues that social sciences and humanities analyze and explore, and therefore, it is difficult to be "value-free."[40] Another thinker, Hayek, also believed that science itself certainly has nothing to say about the relative value of ultimate goals. It is also evident that picking out issues for our scientific investigation *per se* involves value judgments; therefore, a clear distinction between scientific knowledge and value judgments cannot be drawn without resorting to value judgments but can only be made by explicitly stating the dominant value.[41] That is to say, when a researcher chooses a research topic, he is actually making a certain value judgment; even if he wants to ensure the purity of science, he can only manifest it in the format of argumentation through the use of scientific methods and statement forms. Research that lacks dominant value is meaningless and purposeless in effect.

Now we go back to legal research. Although it cannot be said that the main research path in law is value judgment, the issue of value judgment is unavoidable in research. To a certain extent, value has been integrated into the body of the law, and there are no legal norms that are completely separated from value. If value judgments, such as moral factors, as is generally acknowledged, constitute an inevitable feature of the environment in which law

[36] Max Weber, 学术与政治 (*Science and Politics*), translated by FENG Keli, 生活・读书・新知三联书店 (SDX Joint Publishing Company), at 35–36 (1998).

[37] Max Weber, 社会科学方法论 (*The Methodology of the Social Sciences*), translated by YANG Fubin, 华夏出版社 (Huaxia Publishing House), at 120 (1999).

[38] Id. at 112.

[39] See Kaesler, fn. 35 at 236.

[40] Regarding this concept brought forward by Weber, LY Yali, a scholar from Taiwan of China, pointed out that Weber's methodological views show the two sides of his influence: German "historicism" and British "positivism." On the one hand, he advocated that individual events would only be meaningful if general laws were discovered to cover them; however, on the other hand, he emphasized that social phenomena (what he called cultural phenomena) were unique and must be studied using methods different from those used to study natural phenomena. He also believed that anyone studying social phenomena could only see one side, so viewpoint was very important. If the "viewpoint" was appropriate, one would have more insight into the "ontological truth" of the phenomenon. See LYU Yali, 政治学方法论 (*Methodology of Political Science*), 三民书局 (San Min Book), at 87 (1979).

[41] Friedrich von Hayek, 经济、科学与政治——哈耶克思想精粹 (*Economics, Science and Politics: The Essence of Hayek*), translated by FENG Keli, 江苏人民出版社 (Jiangsu People's Publishing House), at 14 (2000).

comes into existence and develops, then it is difficult to see how such an exclusionary attitude is justifiable. It is impossible for legal researchers to turn a blind eye to controversial conflicts regarding value, nor can they be as indifferent as robots to calls for justice. Such being the case of legal research, how could there be any difference in legal practice? As Larenz told us, legal judgments, such as judgments as to whether a particular act is wrongful, often include value judgments. When judges decide whether to apply analogy or not, when they "weigh" conflicting legal interests or benefits, or when they consider new developments and changes in domestic relations (which they have much more opportunities to do than before), they need to base their decisions on value judgments. It is generally believed that value judgments cannot be examined by scientific methods. They are merely personal convictions expressed by the judgment makers, and unlike factual judgments, they are not based on sensory perception; therefore, they cannot be proven by observation or experiment. If the inference involves some premises based on value judgments, then even correct logical inference cannot guarantee the justifiability of the conclusion in terms of content.[42] It can be seen that value judgment is indispensable in legal research, which, in return, reflects the humanistic background of legal research.

It must be emphasized that "value judgment" and "methodological value-freeness" are not two completely contradictory terms. Scholars have proposed that although science cannot operate without value, it has the obligation to be value-free.[43] On the surface, this seems to be a reconciliation and compromise in roundabout disguise, but in fact, it means that in research, one should avoid value judgments such as "desirable" or "undesirable," "nice" and "good," or "evil" and "bad," and take a neutral position in methodology to consider such questions as what value concepts are there, how does the value system work, what consequences will the recognition of it lead to, and to what extent are values followed and effective?[44] In fact, this also means that the picking-out of "value" *per se* can be done from a neutral standpoint. That is to say, if we want our research to be successful, we must adopt publicly recognized and humane value standards: value judgment is a private matter, but the hierarchy of value is a social standard. In this sense, "methodological value-freeness" is the premise of "value judgment." Specifically, "methodological value-freeness" is mainly to extract publicly recognized values, and one cannot replace public judgment with personal value preferences or policy factors. For example, we cannot place order above justice nor regard justice as a value benchmark that is higher than freedom. After all, based on common sense, people will admit that freedom is higher than justice, and justice takes precedence over order.

This is not only true for pure legal research but also for legal sociology, where people are reflecting on the relationship between value analysis and positivist analysis. In general, legal sociology, which originates from sociology, is obviously influenced by the sociological tradition, and therefore most legal sociologists recognize the value of positivist research in terms of research means. Ehrlich once described the poverty of legal methods as one of the

[42] Karl Larenz, 法学方法论 (*Legal Science Methodology*), translated by CHEN Aie, 五南图书出版公司 (Wu-Nan Book Inc.), at 1 (1996).

[43] George Enderle et al., eds., 经济伦理学大辞典 (*Dictionary of Business Ethics*), translated by WANG Miaoyang et al., 上海人民出版社 (Shanghai People's Publishing House), at 577 (2001).

[44] Id.

"loopholes in contemporary jurisprudence." In Ehrlich's view, the key to all research is to find a research methodology that is suitable for its research object. Therefore, what should be the research methodology of law or legal sociology? This is the positivist methodology, of which the inductive method is one of the most important aspects. In true science, the inductive method is dominant, and it seeks to give us a deep insight into the essence of things through the observation of facts and the accumulation of experience.[45] In this regard, "positivism" is the one and only way to conduct research in legal sociology. So, how to conduct positivist research? Cotterrell pointed out that an understanding of the nature of law requires not only a systematic, empirical analysis of legal doctrines and legal institutions but also an analysis of the social environment to which the legal institutions are attached.[46] Here, the scope of positivism is extended from the law itself to the social environment; to wit, we must not only objectively describe the legal institutions but also have some understanding of the environment in which the legal institutions exist so as to correctly handle the conditions, mechanisms, and other related issues for the legal institutions to function. In terms of specific means, there are many methods, such as legislative positivism, judicial positivism, and social positivism. As the German scholar Raiser pointed out, people can conduct a representative and critical questionnaire survey on a specific group of people or ethnic groups. And the survey can be an oral interview, a written interview, a telephone interview, or an open or secret observation. In addition, people can evaluate official statistics and analyze documents of all kinds and documents related to social science practice. In fact, people usually use several of the above methods at the same time when conducting legal sociology research.[47] Of course, a positivist survey is only one aspect of positivist means, as there are many other ways of positivist research. As mentioned earlier, the positivist methodology is a must-have to overcome pure theoretical abstraction. It is also a scientific methodology to overcome the problem where one makes judgments without any supporting factual materials. Its significance and importance are undeniable. However, the significance of the positivist methodology itself should not be exaggerated infinitely. Cotterrell particularly reminded us that, in the most general sense, a scientific methodology contains two factors: First, we should be aware that the observation angle based on experience is bound to be one-sided and incomplete. Second, we should systematically collect, analyze, and interpret the positivist materials from actual activities, and make serious but never-ending attempts to overcome the limitations brought about by one-sided observation. The understanding of real society is not only influenced by unbiased exploration, but also by many other factors.[48] It follows that although positivism is an important means of obtaining real materials, this method is not omnipotent. Technically speaking, the positivist subjects, scope, and means we choose are bound to be one-sided; on the other hand, the analytical skills of positivist researchers and the social environment in which they live will also affect the level and degree of scientific knowledge to a certain extent. In this regard, exploring as complete positivist means and

[45] See Eugen Ehrlich, 法社会学原理 (*Fundamental Principles of the Sociology of Law*), translated by SHU Guoying, 中国大百科全书出版社 (Encyclopedia of China Publishing House), at 8 (2009).
[46] See Cotterrell, fn. 34 at 10–11.
[47] Thomas Raiser, 法社会学导论 (*An Introduction to Law-Sociology*), translated by GAO Xujun et al., 上海人民出版社 (Shanghai People' s Publishing House), at 7 (2001).
[48] See Cotterrell, fn. 34 at 4–5.

techniques as possible is the key to engaging in legal sociology research, meanwhile, positivist analysis should be reciprocally combined with value analysis to make scientific judgments on legal issues.

In short, when it comes to legal research, it is neither theoretical fantasy divorced from reality nor simple attempts to list positivist materials, but rather the combination of the paths of positivist analysis and value analysis. Generally speaking, researchers should first collect as much relevant material as possible, including literature, legislative texts, judgment documents, and survey data, and, based on that, lay a solid foundation for raising and solving problems. In addition, they should use the method of value analysis to abstract relevant theories or put forward feasible countermeasures and suggestions. For a theoretical doctrine, the more important criterion for its rationality and legitimacy is its function and effectiveness rather than its scientificity (in the sense of natural science) and logicality in promoting the progress of human history and society. Fortunately, the method of value analysis has already gained enough good reputation and enough glory in this regard. In this connection, it is very necessary to review the advice given to us by Rüthers in the conclusion of his book *Jurisprudence*: If a legal order, a jurisprudence, or a judiciary does not recognize the essential value order of inalienable basic rights and human rights, they may become tools for the then rulers to do whatever they want. And the so-called value-free or value-neutral law, judicial system, and jurisprudence will be like a weathercock that resigns itself to the rulers of their respective times. Any jurisprudence that does not study the value basis of law is tantamount to losing its object.[49]

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[49] See Rüthers, fn. 30 at 405.