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On the Scientific Nature of Legal Scholarship[1]

• Abstract •

The 'scientific' nature of legal scholarship represents a long-term, more than 150-year-long controversy in which it is often questioned whether legal scholarship is really a science. In this paper, we try to compare the features of unquestioned 'real' sciences (meaning specifically natural sciences), with the features of legal scholarship, in order to assess to what extent legal scholarship meets the standards of science accepted in natural sciences. We prove that some features of proper scientificity are thereby not being met by the natural sciences themselves.

Keywords: Natural sciences, Legal scholarship, Philosophy of science, Methodology of science.

Introduction

Does legal scholarship constitute 'real' science? Legal scholars somehow automatically accept the criticism voiced by representatives of natural sciences (Schmidt, Taliga, 2013) and possibly also representatives of other social sciences and humanities, when they themselves admit that the field they study and research, is not really 'scientific' (Kosinka, 2018). The 'unscientific nature' of legal scholarship is often admitted even by practicing lawyers themselves (Honsell, Mayer-Maly, 2015, pp. 18–19). This debate is not new and was present among lawyers and legal scholars throughout the 19th and 20th Century, reacting to the criticism of unscientific nature voiced by Julius von Kirchmann (1847). For over 150 years, legal scholars have been striving to develop a new form of modern legal scholarship,

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taking various approaches to the relationship or a distinction between law as an object of scientific research and legal scholarship itself.

A basic obstacle to the perception of legal scholarship as a 'real' science in the current understanding may be the impossibility to clearly and with complete certainty predict future legislation or a final court decision (especially in cases where there is no straightforward legislative regulation). Even legal principles, which should be used in case of a "gap" in law, are namely not always a guarantee of a predictable and only correct solution. This problem accompanies not only the adjudication and the legislative drafting (not respecting the ideal of a "rational legislator"), but also affects the compliance with law, i.e. implementation of the law by its addressees, or the lawyers giving advice to their clients. However, this is rather a problem of legal practice than of legal scholarship.

Another obstacle to the scientific nature of legal scholarship could be the diversity of legal systems across continental Europe. Laws and legal scholarship provide different answers to the same questions in individual states and their domestic legal systems. Even within one jurisdiction, opinions on the same legal issue may differ across the spectrum of lawyers. In this context, it is being claimed half-jokingly that where there are two lawyers, there are at least three legal opinions. Thus, lawyers seem to know the correct answers, but not the 'only correct answers', which is often considered a fundamental obstacle to the exact nature of legal scholarship. Again, however, this seems to be rather a problem of practical law that of legal scholarship proper.

Still, there are also voices that claim that it is still possible to make legal scholarship a real science – e.g. by examining what all legal orders and legal systems have in common (Honerkamp, 2017, p. 143 ff.). However, these approaches would be rather descriptive and not normative (prescriptive, providing guidance for the practical solution of everyday situations), albeit it might be a good distinctive feature between the legal scholarship and actual law proper – considering legal scholarship to be descriptive and law to be prescriptive. Still, another problem with this approach to legal scholarship would be the degree of abstraction which then loses sight of the practical dimensions of legal scholarship. Such a legal scholarship would namely be considered too detached from the needs of positive law and legal practice (Leith, Morison, 2005, p. 147 ff.). Currently it is namely dogmatic legal scholarship that is considered to be specifically useful for lawyers, since it is most closely connected to legal practice and to positive law. Still, it is the scientific nature of this approach in legal scholarship precisely that is being the most questioned.

In this paper, we will therefore first introduce the most relevant objections against the scientific nature of legal scholarship and will try to evaluate these. Then

we will compare the standards of scientificity in natural sciences and in legal scholarship. We will thereby argue that legal scholarship meets the standards of a science, even when taking into account the criteria of natural sciences. Moreover, we show that natural sciences themselves admit and accept that they do not meet all the criteria of scientificity properly.

Objections against the scientific nature of legal scholarship

The basic criticism addressed to legal science (not only at present, but also in the past, at least since the mid-19th Century critique voiced by Kirchmann) is the argument that neither judicial decisions, nor future legislations, are clearly predictable. That means that law has no clear methods, and thus is not meeting the criteria of a science. Disregarding here for a while the mixing up of law and legal scholarship, indeed, in legal discourse it is widely disputed whether legal methodology always leads to a single correct result. The opinion of the possibility of only one correct opinion is held today mostly by the so-called *one-right-answer theory*. Its prominent representative in recent jurisprudence was especially Ronald Dworkin (Aarnio, 2011, pp. 165–166). According to this theory, every legal problem has only one correct solution. If we cannot achieve it in practice, it is only due to lack of information or a misjudgment derived from the actually available information. Since for purely practical reasons, it is often not possible to obtain all the necessary information, it may thus happen that, on the basis of the available information, different results will appear to us to be equally well-founded and acceptable. In this regard, in fact, the theory of the one-right-answer actually coincides with its opposite – the theory of indeterminacy (underdetermination) of law, according to which it is not possible to claim in legal practice that there is a single correct answer to every legal problem. Since we do not have absolute knowledge of reality, a situation can arise, and in practice it usually does, when several solutions are equally acceptable – in that case, all the results obtained in this way (while applying generally accepted standard legal operations, e.g. of interpretation and argumentation) must be considered correct, or at least acceptable (Melzer, 2010, p. 15). This just underlines our previous argument of a difference between the theory (legal scholarship) and practice (practice of positive law).

The opinion that it is not always possible to find a single correct answer in law was nevertheless extrapolated even to legal scholarship by the prominent Czechoslovak legal theorist of the 20th Century, Viktor Knapp, when he claimed that legal scholarship is argumentative, and not axiomatic in its nature (Knapp, 1995, p. v). This means that often the choice between several possible answers does not

depend on the logical derivation of the answer by deductive method from some higher principle, from a legal axiom, but the choice between several options results rather from the arguments used by the parties, while the judges (as well as legal scholars) will base their decision on these arguments (Houbová, 2003, pp. 48–49).

It is thereby precisely the aforementioned elements of indeterminacy, non-axiomatic nature, and the application of rather persuasive, rhetorical arguments that leads critics to questioning the actual nature of the "science of law". Still, this feature may in fact rather be the actual distinction criterium for law (legal practice) and legal scholarship. While practical cases may be hard to find an answer to, the theory is built up in systematic and scholarly way.

Still, even in legal practice the ambiguity in the search for the right answer is not an issue in all cases. Ambiguous situations do not represent the core of legal problems. There are clearly more of the so-called "simple cases" (easy cases), where the answer can be found directly in the wording of the law. Only in "difficult cases" (hard cases) a situation of ambiguity may occur, but even there it is often possible to find the "correct" answer by pointing to the basic legal principles. Only in exceptional cases (i.e. in the "most difficult cases") of several "equally good" legal solutions, lawyers resort to persuasive, rhetorical arguments. However, even then they must fundamentally respect legal principles and the text of the law, and only very exceptionally can a decision go directly against the wording of the law. This is only in the cases of so-called value gaps, when the wording of the law would lead to obvious injustice.

Thus, claiming that law is completely uncertain and unscientific, is not true in most cases – in fact, cases of indeterminacy, or of several 'correct' legal solutions, from which the competent authority (judge when applying the law, legislator when drafting a legislative solution) chooses the 'final' correct solution, is in practice only present in minority of cases. And even there is always an authority entrusted with the power to have the last say, which serves to mitigate the cases of uncertainty in law (albeit in the future the said solution may be overturned in the light of other additional information and findings in different cases). Still, in most cases it is true that the correct answer can be found in the text of the legal regulation, or in the established judicial interpretation of the relevant regulation, or finally "at least" in the basic principles as additional legal tools. Thus, in most adjudication cases, a kind of a 'mechanical' approach to solving legal problems can in fact be used, in the form of a logical syllogism. This is possibly an argument "in favour" of the scientific nature of law as such. Still, this cannot be generalized since this approach would disregard the above-mentioned "difficult cases", which sometimes occur in legal practice.

Furthermore, coming back to the criticism of scientific nature of legal scholarship, it is being additionally stated that legal scholarship theories are not empirically verifiable, that they sound more like opinions than scientific theories, and finally that the argument by authority plays a major role in both law and legal scholarship, as it was the case in medieval scholasticism (Hesselink, 2009, p. 22). It is thereby true that due to the need for a quick reaction to changing situations, legal norms are usually not tested in advance experimentally before their adoption. Still, this would undoubtedly be possible. This is namely how the Austrian Civil Code of 1811 was tested, before it was introduced for the entire territory of Austria – it was first introduced in the newly acquired Polish territories of the empire. Still, a number of theories are being tested in practice and are, in fact, verifiable, as we will point out below.

Similarly, if the arguments of legal scholars sound more like opinions than scientific theories, this is again only due to the fact that they are not based on formal empirical or sociological research, but still, they are based on the generalized knowledge drawn from the actual legal practice, i.e. being based on the inductive method of collection of data from case law and legal practice. Dogmatic legal scholars cannot neglect the inductive method and the knowledge of legal practice. Their theories are based on formal logic and a systematic approach to law, rather than on haphazard opinions, as it may seem to the lay public.

Still, due to the traditional distinction between "is" and "ought" in legal scholarship, legal scholars admit that inductive method has its limits and that the actual practice is not attesting its own correctness. The empirical knowledge of practice can undergo scrutiny by legal scholars where they perceive the practice to be misleading and not in line with the principles or systematic nature of legal order. The 'opinions' of legal scholars are then in fact their claims based on the ideals of systematic nature of law, where each 'opinion' must be perfectly fitting the overall system of law. It is thus 'opinions' that must respect the formal dogmatic method, based on formal logic.

However, here one must also clearly realize the difference between law in practice and legal scholarship again. Namely, legal scholar argues precisely and solely in line with the formal dogmatic method, while legal practitioners may be inclined to argue in favour of their clients or employers, seeking to support their position in a specific situation by disregarding the systematic arguments and empirical knowledge speaking against their interests. Still, in cases of providing legal advice and expert opinions, or in case of being an independent judge, the position of legal scholar and position of a legal practitioner requires to observe the same formal dogmatic method even by the practicing lawyer – to provide an objective

advice to the client or to proclaim an objectively acceptable court decision. That is basically the moment when a legal practitioner acts as a legal scholar.

However, this identification of lawyers and legal scholars in turn serves as another argument against the scientificity of legal scholarship – namely arguing that legal scholars do not maintain a distance from the object of their research, themselves often being practicing laywers and researching their own activity (Rottleuthner, 2017, p. 252). This argument can in fact be disregarded here due to the already explained difference between the approach that legal scholars and legal practitioners are taking in selecting their tools and arguments. Still, closely connected to this counter-argument is another claim – that "methodology of legal scholarship" (methodology of legal research) is not sufficiently separated from the so-called "legal methodology", which represents a set of methodological instruments and standard operations serving for the practical creation of law (legislation), application of law (adjudication) and daily implementation of law (compliance). This might have been true in times when legal scholarship was conceived "narrowly" by legal positivism, especially by the normative school of law from the Czech Republic (impersonated by František Weyr) or by Kelsen's pure theory of law, referred to as legal normativism. Normative theory rested only on the foundations of so-called legal statics, i.e. it dealt only with the interpretation of already existing legal norms and their mutual relations. It did not include approaches of legal dynamics, i.e. issues of creation and finding (application) of law, which normativism considered to be meta-normative and essentially extralegal (Jestaedt, 2011, p. 202). A complete picture of scientific knowledge of law, however, requires a broader view than just normativist view. For example, Weinberger's legal neo-institutionalism emphasizes that the legal order is a social institution, and therefore, according to him, questions of the functioning of this institution, including questions of law-making and of application of law belong to legal scholarship as well. This view is sometimes called the "external" approach to legal scholarship (Harvánek, 2008), in contrast to the internal, normativist view. Similar opinions can be found today in the writings of the German theorist Matthias Jestaedt, who insists on distinguishing between legal scholarship (*Rechtswissenschaft*) and legal scholarship theory (*Rechtswissenschaftstheorie*), where the former focuses only on the internal view of law, while the latter specifically on the external view of law (Jestaedt, 2017).

External perspectives thereby often use the methodology of other sciences to investigate law as a specific phenomenon. Therefore, one might arrive at the paradoxical conclusion that external approaches (e.g. economic analysis of law) might be considered more scientific than the internal approach. Nevertheless, the exter-

nal views often equated with empirical legal scholarship or interdisciplinary legal scholarship (Gestel et al., 2012, p. 2) are often descriptive in their nature and not able to provide the actual guidance to legal practitioners (unlike legal dogmatics preferring internal approach). This is the reason why these approaches are not at the core of legal scholarship in Central and Eastern Europe, where legal scholarship is still focused mostly on the internal, dogmatic views of law.

The complex view of legal scholarship today is thus that the subject-matter of research is both law as a normative system (which is examined by legal dogmatics, built on formal dogmatic, logical and linguistic methods), as well as legal phenomena that are linked to law – i.e. also questions of the creation (legislation), implementation (compliance) and judicial application of law (adjudication), where also empirical and other interdisciplinary legal scholarship comes to the fore.

Still, it is important to take into account that in legal practice too, one can come across "difficult cases", which often require the application of a combination of dogmatic, empirical and other interdisciplinary approaches in order to provide for an answer that is generally acceptable and fitting into the overall system of legal scholarship and legal practice. This is to prove that even legal practice can make use of an external approach to law – it suffices to give an example of a lawyer who has to prepare a suitable wording of a contract for the client. A lawyer must take into account not only the text of legal norms that regulate a given area of social life, but she must also anticipate various possible extralegal circumstances, motives and goals of the contracting parties (cf. Dalberg-Larsen, 1983, p. 493). That is why it would not be wise to neglect completely the external approaches to law within the legal scholarship.

Comparison with natural sciences

In the following, second part of the paper, we will approach legal scholarship from a different angle. Namely, from the position of natural sciences, in order to research to what extent are natural sciences comparable with legal scholarship and whether the natural sciences themselves meet all the criteria of scientificity being imposed on other types of sciences. We shall thereby investigate first the realist and anti-realist approaches within the methodology of science, then continue with the problem of induction, and finally end up with the problem of demarcation – all three being issues of methodology of science and of philosophy of science widely discussed and problematized even in natural sciences.

Realism or anti-realism?

Realism in scientific thinking is perceived in terms of the possibility of knowing the actual reality surrounding us. Its opposite position is that of anti-realism, which does not recognize the possibility of knowing all the reality and limiting scientific research only to empirically verifiable facts (Schmidt, Taliga, 2013). Scientific positivism, which gained popularity from the second half of the 19th century, falls under the category of anti-realism, as it recognizes only empirically observable facts as the basis and the only object of proper scientific knowledge. In legal scholarship, this partly corresponds to the focus on the text of legal norms and on the study of actual legal relations (perceived as social facts).

However, science certainly researches also empirically ungraspable facts, which the positivists avoided as objects that were not empirically proven, and thus "unreal". This is the realist approach which believes that even such empirically incomprehensible facts can be considered as real. Thus, unlike anti-realism, realism assumes even the existence of reality, which is not directly observable and empirically provable, but is nevertheless researched with the use of scientific methodology. Thus, scientific realism also recognizes non-empirical, theoretical entities (such as mathematical values, formulas and relationships). If we would like to further specify or divide these entities in some way, we can use a classification which divides them into detectable by scientific devices and undetectable by devices (Schmidt, Taliga, 2013, p. 17). While, for example, mitochondria are detectable, although imperceptible to the senses, mathematical knowledge is both undetectable by instruments and imperceptible to the senses.

If at this point we return to the problem of legal science and its position on the scale between realism and anti-realism, we can probably accept that the anti-realist positivist legal concept focusing only on the legal norms contained in legal texts or on the legal relationships considered as social facts, no longer describes the sole essence of today's legal scholarship. Even if it were to work exclusively with legal norms, it would no longer find these exclusively in legal texts, but also in sources such as, for example, the natural law concept of human rights, or legal principles and the like. Legal norms, at least those resulting from such specific sources, thus have a nature similar to mathematical entities or axioms (1 + 1 = 2). Legal scholarship thus in fact works both with empirically unobservable and undetectable entities (for example, "objective and subjective property rights") as well as with empirically observable and detectable facts (for example actual behavior as a social fact, judicial decisions, or texts of laws). Of course, in situations where legal scholars rank among scientific realists, working with empirically unobservable

and undetectable but scientifically recognized entities (in addition to empirically observable and detectable facts), such an approach understandably requires mature scientific theories that are constantly further tested, whereby new, previously unknown entities are often predicted, the existence of which is subsequently confirmed (such as, for example, new legal principles or new legal norms). However, it is also true that entities postulated in this way can later be denied or refuted, as it sometimes happens even in natural sciences – for example, in the past, this happened with theories about the existence of phlogiston as a specific substance. Even in law and legal scholarship, there are legal regulations and theories that have not proven themselves, were never introduced in practice or have been abandoned in the meantime. On the contrary, new theories, concepts and legal institutes have often been created in the place of abandoned ones, striving for better regulation and achieving more successful predictions of the future behavior and actions of the addressees of law.

An argument used in the methodology of science against the indicated realistic approach is often the argument of so-called indeterminacy, which means that some phenomena can also be explained by competing theories, which may only prove to be true in the future (Schmidt, Taliga, 2013, p. 24). Thus, as an example, while we believe we are regulating human behavior by legal norms adopted by designated authorities, in reality, the behavior and action can be motivated by completely different factors than by the legal regulation, e.g. by economic interests. Due to this criticism, a sort of a compromise between realism and anti-realism in science is currently being suggested by the so-called structural realism, which is based on the fact that individual elements of the structure (for example, legal institutes) can be changed, abandoned, or replaced, but the basic structure of the scientific theory (i.e. contemporary scientific paradigm) remains preserved – for example, in legal science, it could be an effort to regulate human behavior via special "legal" instruments with the possibility of enforcing them by the designated authorities, while the contents of the laws may change and evolve. Still, according to contemporary anti-realists, such as constructivists, even these structures do not really exist, and can anytime be simply abandoned in Kuhn's sense of paradigm shifts. The choice between them and the transition from one to the other is dependent on the consensus of the scientific and professional community. In this sense, legal scholarship has rich historical experience with several paradigm shifts – starting from ancient Rome to present days (Varga, 2012).

Finally, there is also another anti-realist strand in the methodology of science, which is called constructive empiricism. It is relatively close to structural realism. Instead of objective truth, it only suggests empirical adequacy of theories, but

at the same time recognizes that we confront the theories with actual empirical data and try to squeeze the data into our structures and models. If this works, the theory is empirically adequate. If not, we change the structures and models, or we abandon them. This approach could also work well in both natural sciences as well as in legal scholarship, not building any strict barriers between the sciences.

Induction

Bringing legal scholarship closer to natural sciences is not a heretical idea nowadays. It is related to the shaking of some basic methodological starting points of the natural sciences themselves, such as the method of induction, which has been fundamental for natural sciences from the Middle Ages until recent times. Still, traditionally, induction was always a dubious approach from the methodological point of view, since it is a process of thought in which the conclusion exceeds the premises. This can namely take the form of an inductive conclusion about the existence of only white swans based on the observed high number of white swans and the hitherto unobserved black swan. Similarly, it can take the form of expectation of a future conclusion from past experiences – for example, if we extend the previous experience of sunrise to the expected sunrise tomorrow as well. The truth of the premises does not guarantee the truth of the conclusion, and the conclusion thus exceeds the premises.

The indicated problem is the one that legal scholarship is very well aware of. It traditionally denies the possibility of inductive reasoning in order to predict future behavior – it refuses to derive "ought" from "is". The starting point of induction is namely the assumption of uniformity – either of the nature in general, or of the people specifically. Albeit this famous Hume's induction dilemma is well known to all sciences (Holländer, 2012, p. 260), in spite of that, it is specifically legal scholarship that takes this problem explicitly into account in its scholarly theories.

The problem of demarcation

Another general problem of all sciences, including natural sciences, is the so-called problem of demarcation, which means the problem of distinguishing scientific from non-scientific knowledge. Obviously, given the problem of induction, neither previous experience nor experiments can represent a fully-fledged demarcation criterion. Therefore, the methodology of science connects the problem of demarcation instead with the concepts of verification and falsification as scientific procedures typical for the natural sciences. To what extent this approach is used

and can be used also in legal scholarship, including dogmatic scholarship and not only in its empirical or other interdisciplinary offshoots will be examined below.

While verification problem was investigated and promoted as a criterion of scientific knowledge mainly by logical positivists, Karl R. Popper, as the founder of critical rationalism, on the contrary brought the concept of falsification into the methodology of science – precisely for the purpose of demarcating scientific knowledge from non-scientific knowledge. Indeed, verifiability required confirmation by empirical experience, or experiment, which, however, ran into the already mentioned problem of induction, due to which verifiability is not possible to full extent. Moreover, even in the natural sciences, there are also such statements and conclusions that go beyond empirically built premises, and therefore are not verifiable in fact. Falsification as Popper's contribution to the methodology of science, on the other hand, is based on the fact that if there are at least potential falsifiers against empirical claims, these claims can be considered scientific despite their impossibility of verification. And even if falsification will indeed lead to the rejection of a scientific claim, that does not take anything away from its previous scientificity – precisely due to the given scientific possibility of its falsification. On the other hand, however, this only works with empirical claims, while there are still, even in natural sciences, existential claims that are not falsifiable (for example, because one cannot search the entire world looking for a single black swan). Their scientificity then depends rather on the falsifiable theories from which they are derived, the theory of falsification claims.

The same probably applies to legal scholarship – the fact that there are statements (especially those going beyond the wording of the law) that cannot be empirically verified or empirically falsified in practice does not mean that all legal scholarship is unscientific and should be considered only 'magic' or empty words. What is more important here is whether the theories and constructs of legal scholarship are based on falsifiable foundations, which in the case of law can be the fundaments according to which, e.g., legal norms are rules of behavior created by a designated entity and enforced by designated entities. Additionally, all claims of legal scholarship that speak about the real world, about the text of laws and of judgments, as well as about the logical pyramid of legal dogmatics, are fundamentally falsifiable. It is also possible to falsify legal regulations by not actually complying with them, or by generally accepting illegal behaviour by the enforcement authorities. Still, here also applies what Kuhn already claimed in relation to constructivism as a theory of paradigm shifts – that even in the case of individual falsifications, discrediting the whole theory or the current paradigm of science requires the falsification (refutation) of the entire system, or of the major part of its

fundaments, not only individual statements. The partial non-correspondence of the theories of legal scholarship with the reality does not mean the falsification of the entire legal scholarship, or the necessity to abandon its current paradigm – as long as its foundational theories still remain unfalsified.

Conclusion

Legal scholarship and its object of research cannot be limited only to legal norms, as legal positivists, who were close to logical positivism, did. Nor can it be identified with sole research of social fact (legal relations) as legal empiricists of sociological school of law claimed. Legal scholarship in all its shapes (dogmatic, empirical and other interdisciplinary approaches) is closely related to external reality and legal practice. It creates falsifiable constructs, models and structures into which the facts of the external world are supposed to fit. However, even if all the facts do not fit into the theories (i.e. the practice fails), this is not enough to reject the entire constructed structure or model. Only when a model or construct is proven to not work at all, it is about time to abandon the construct in favour of new constructs and models that will prove to be more successful. This approach, accepted in the natural sciences, can apply equally also to legal scholarship. Nothing can thus in any way detract from the scientific nature of legal scholarship; on the contrary, while it features basically the same characteristics and problems as the natural sciences, it is in fact more open to accepting all the challenges and caveats voiced by the general methodology of science than natural sciences do.

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