

The Study of Law as an Academic Discipline

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1. Introduction

The topic of this paper is the study of law as an academic discipline,¹ in two ways. First, I want to make clear that the study of law as an academic discipline, that is within the university, does not speak for itself. Second, as an academic discipline, the methods available to the students of law, if law is conceived in a broad sense, are diverse: in comparison with other academic disciplines, as these have developed over the last 2,500 years, law can be characterised as a topic that can be studied with the help of methods comparable to the ones used both in the natural sciences as well as in the humanities.

This paper thus does not contain a search for the one ‘right’ method to study a specific understanding of law in a particular jurisdiction, however valuable such a search might be in its own right.² It does not offer an expression of resignation either, in the sense that the study of law would be ‘lacking an explicitly defined scholarly method’.³ On the contrary, this paper contains a plea for a broader understanding of what the study of law can – perhaps even ought to – imply, in terms of the various methods available to it. It is thus addressed at those academic lawyers, who may not be accustomed to thinking about the study of law in terms of method, let alone in terms of the variety of methods that the study of law can involve. In this broad understanding, the study of law can even contribute to the overall, all-round educational goal, which Wilhelm von Humboldt called *Bildung*.⁴ This goal has been set in the university colleges, which have now become popular in various countries, including the Netherlands, to which courses on law can thus by their very nature contribute perfectly.⁵

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1 Academic goes back to Academy, which originally refers to the research centre, just outside Athens, founded by Plato (c. 427-347), in an ancient grove dedicated to the hero *Akadēmos*, who allegedly had saved Athens from destruction. In the 15th century, upon the rediscovery of Plato’s work in western Europe, Marsilio Ficino (1433-1499) and other Florentine admirers of Plato used it for their Academy in Fiesole. The popularity of this institution has turned it into a term that is at least on the European continent often used interchangeably with university.

2 J. Smits makes a case for the study of law as an ‘argumentative’ discipline, for which reference can be made to his ‘Redefining Normative Legal Science: Towards an Argumentative Discipline’, in F. Coomans et al. (eds.), *Methods of Human Rights Research* (2009), pp. 45-58, as well as his *The Mind and Method of the Legal Academic* (2012), pp. 58-99, esp. p. 82.

3 C. Stolker, *Rethinking the Law School* (2014), p. 100.

4 See – most famously – W. von Humboldt, ‘Wie weit darf sich die Sorgfalt des Staats um das Wohl seiner Bürger erstrecken?’, (1792) 2 *Neue Thalia*, p. 131 (posthumously published in *Ideen zu einem Versuch, die Grenzen der Wirksamkeit des Staat zu bestimmen* [1851], reprinted in A. Flintner & K. Giel (eds.), *Werke in fünf Bände* (2010), Vol. 1, 64): ‘Der wahre Zweck des Menschen, nicht der, welchen die wechselnde Neigung, sondern welche die ewig unveränderliche Vernunft ihm vorschreibt, ist die höchste und proportionierlichste Bildung seiner Kräfte zu einem Ganzen.’ Since R. Rorty, *Philosophy and the Mirror of Nature* [1979] (2009), pp. 357-394 (see also H. Hastedt, *Was ist Bildung?* (2012), p. 47), *Bildung*, ‘edification’ in Rorty’s translation, ‘formation’ is another one, it has become a popular notion in English, too.

5 Instead of ‘university college’ the term ‘liberal arts and sciences college’ is also used. Both names denote the same contemporary phenomenon: colleges offering a broadly orientated education at the highest academic level for the best students. From a classical point of view, the term ‘liberal arts’ (which goes back to Cicero’s *artes liberales*, see *On Invention* 1.35) is somewhat confusing, for two reasons. First, liberal arts need not necessarily be connected to education at the highest level: e.g. for Cicero the notion ‘liberal arts’ simply refers to the education of a ‘free’ citizen, that is a citizen of independent means. Second, *artes liberales* is closely related to the Greeks’ *enkuklios paideia*, a ‘rounded off education’, and will thus already include education in the natural sciences. For the broad

As for the structure of the paper, I will first deal with some historical approaches to the study of law, among which the development towards its study as an academic discipline was not at all a matter of course. Second, I will offer some comparative reflections about the methods available for studying law, starting out from theories about what C.P. Snow referred to as the ‘two cultures’ within the university, that are the natural sciences and the humanities,⁶ and will compare these with theories on object and method that go with the study of law.

2. The academic study of law

I will now move on to the first part of this paper, on the traditional ways in which law has been studied in different western legal traditions. As we will see, law as an object of the study of law at a tertiary level, or even as an object of study at all, is not a matter of course. I will restrict myself to two examples. The first example is perhaps of historical importance only (although even here a revival can be discerned); the second one is certainly not.

The first example is classical Athens of around 400 BCE, where legal conflicts were decided by a jury consisting of randomly chosen citizens, usually 501, at least in cases where a public interest was involved, as in the impiety trial against Socrates (c. 470-399).⁷ (Of course, the well-known *caveats* apply to Athenian citizenship: in Athens’ direct democracy slaves, women and the poor could not participate in the business of the city-state.) This large jury listened to both parties, and voted on the outcome. The party that obtained the votes of the majority won the case, with – as a further consequence – no reason being given for the verdict. While the jurors were laymen, the role of experts was limited in other ways, too. Parties themselves best presented their side of the story; intervention by others, let alone experts, was considered a sign of weakness, of not being able to participate as a citizen. (Incidentally, in his *Against Elections*, Van Reybrouck offers a plea for a revival of sorts of this type of participation.⁸) As a result of this system in which the citizens themselves decide on matters of justice, in classical Athens neither a body of judgments came into existence, nor became the study of law a matter of higher education,⁹ apart from the study of how to present one’s case, i.e. rhetoric, or of abstract thinking about the concepts of law, justice etc., i.e. the philosophy of law.¹⁰

The second example is law as it developed in England following the Norman invasion of 1066.¹¹ In their attempt to gain control over the vast realm they had acquired, William the Conqueror (1028-1087), duke of Normandy and Scandinavian in origin, and his successors, notably his fourth son Henry I (1068-1135) and above all Henry II (1133-1189), developed a supplementary system of adjudication, alongside the existing Anglo-Saxon institutions.¹² This new type of conflict resolution thus did not infringe upon ancient arrangements, but turned out to be so successful that in the end it replaced them.

In the supplementary system of adjudication the King’s civil servants played a vital role. These servants were ordered to resolve conflicts in the name of the Norman king, not only in London, but above all ‘on eyre’, in the old French expression, which goes back to the Latin *iter*, that is, journey. Judges thus travelled round, and offered their services throughout the country.¹³ In doing so, by giving parties the opportunity

scope of *paideia* see Isocrates 4.118-121, Plato, *Republic* bks. 2-4 (on education in general), bks. 6-7 (on education for the expert ruler), Aristotle, *Politics* bk. 8 (on Plato and Aristotle see further A.N. Nightingale, ‘Liberal Education in Plato’s *Republic* and Aristotle’s *Politics*’, in Y.L. Too (ed.), *Education in Greek and Roman Antiquity* (2001), pp. 133-173); for the first occurrences of *enkuklios paideia*, probably in the 4th century BCE, see the 3rd century CE biographer and doxographer Diogenes Laertius, at 2.79 and 7.32, in relation to, respectively, Aristippus of Cyrene (c. 435-356), the founder of the Cyrenaic school, and Zeno of Citium (c. 333-264), the founder of the Stoic school; see also H.-I. Marrou, *Histoire de l’éducation dans l’Antiquité*, Paris 1948, pp. 264-266.

6 C.P. Snow, *The Two Cultures* [1959], with an introduction by S. Collini (1998).

7 See J. Lipsius, *Das attische Recht und Rechtsverfahren* (1905-1913), p. 149, S.C. Todd, *The Shape of Athenian Law* (1993), p. 83. Jury selection occurred with a *klerotêrion*, described in the Aristotelian *On the Constitution of the Athenians*, at 63-65, and excavated in the vicinity of the court house on the agora; see further Lipsius, pp. 145-148, 85-87.

8 D. van Reybrouck, *Against Elections* [2013], translated by L. Waters (2016).

9 See also, alongside Lipsius, supra note 7 and Todd, supra note 7, G.E.R. Lloyd, *Disciplines in the Making* (2009), pp. 122-133.

10 See F. Schulz, *Geschichte der römischen Rechtswissenschaft* (1961), pp. 84-91 (see also the less elaborate English edition *History of Roman Science* (1946), pp. 69-75), who speaks of a topic that goes beyond the frontiers (‘Grenzen’) of the study of doctrinal law.

11 See H.P. Glenn, *Legal Traditions of the World* (2014), pp. 237-260, who offers an inspiring account, with further references.

12 R.C. van Caenegem, *The Birth of the English Common Law* (1988), pp. 20-28.

13 See e.g. J. Hudson, *The Formation of the English Common Law* (1996), pp. 33-34, H. Potter, *Law, Liberty, and the Constitution* (2015), pp. 44-45 (under Henry I), pp. 47-50 (under Henry II).

to express their side of the case, by making the common customs of the people of England explicit, by instructing twelve local bystanders to judge on the facts of the case (the origin of the jury system¹⁴), these civil servants, as specialists in the law, made the English people participate in and accept the rule of the king. The development of the doctrine of *stare decisis* or binding precedent made law even more into an expertise. Over time, finding a similar earlier case, on the basis of which the conflict at hand could be decided, became a tricky business, even to the point that the specialists themselves were at a loss, as satirised in a superb way by Dickens in his novel *Bleak House*. The training of these specialists was on the whole vocational: English lawyers received their first legal training largely outside an academic realm, in the context of the legal practice at the Inns of Court, in the vicinity of the royal courts. Even today where the study of English law has become an important part of the academic curriculum, it is still a more marginal phenomenon, at least in comparison to the study of law on the continent. Prospective English lawyers do not need a law degree; with a university degree of whatever kind, they can also attend a conversion course, which lasts only a year, and in which they are taught the most important aspects of English law.¹⁵

This might all have been very different if the Normans had not crossed the English Channel in 1066. For, around the same time, developments took place elsewhere that made the study of law an eminent part of the academic system of tertiary education. On the European continent, teachers and students assembled in colleges, which formed the basis of what came to be known as universities. From the beginning the study of law was part of this development, as teachers and students started to sit together in order to study a Byzantine compilation of the rich legal material produced in ancient Rome.¹⁶

Here we need to take a step back in time and direct our attention to classical Rome. In a markedly different approach from classical, democratic Athens, in Republican Rome legal experts did play an important role in the system of adjudication. In this non-egalitarian society, in which the values of 'authority' (*auctoritas*) and 'dignity' (*dignitas*) were considered to be of overriding importance, legal conflicts were decided by respectable citizens, who were thought to embody these values. These citizens were at first priests, but, from the 3rd century BCE, could be laymen too. If confronted with complicated conflicts, they started to ask for advice before deciding. Their legal advisers came to be known as *iurisconsulti*, and it were their written answers or *responsa* that brought into being a whole body of rich, learned legal material.

Only at the beginning of the 6th century CE, Justinian, the ambitious and ruthless ruler of what had remained of the Roman empire in the East, ordered that this material should be preserved for later generations in a more systematic manner. After all, by then, it had been accumulating over more than seven centuries, written in what had already become a foreign language, Latin as opposed to Greek. To a *Digest* of the *responsa*, a *Codex*, a collection of imperial statutes, as well as a teaching manual were added. This teaching manual was in fact an adaptation of a 2nd century CE textbook written by Gaius.¹⁷ Teaching manuals of this kind had been developed from the 1st century BCE onwards as a result of the interaction between Roman lawyers and Greek, especially Stoic, philosophers.¹⁸ These works, in fact the result of the efforts of Justinian's chancellor, Tribonian, and his collaborators,¹⁹ form the core of the *Corpus iuris civilis*.

In western Europe in the 11th century, copies of these texts resurfaced or – after centuries of neglect – were simply put to use again. These manuscripts were considered to be valuable indeed, as the struggle over, and the afterlife of, the late 6th century *littera Pisana* attests: after the conquest of Pisa by the Florentines in 1406, this manuscript was taken as booty to Florence, where it was renamed the *littera Florentina*, at

14 Van Caenegem, *supra* note 12, pp. 62-84 focusses on another aspect of the jury system: its reliability as a mode of proof in comparison with more primitive modes, such as the ordeal of cold water.

15 In the US the traditional, practical emphasis is expressed in the term 'law school'. Unfortunately, for reasons that will become clear below, the term is now also used on the European continent.

16 See P.G. Stein, *Römisches Recht und Europa* (1996), pp. 76-85 (published in English as *Roman Law in European History* (1999), pp. 43-49) for an engaging account.

17 A palimpsest containing Gaius' *Teaching Manual* was rediscovered in Verona at the beginning of the 19th century (on the rediscovery see M. Varvaro, *Der Glücksstern Niebuhrs und die Institutionen des Gaius* (2014)); this *Teaching Manual* is referred to in one of Justinian's introductory statutes to the *Digest*, in the *Constitutio Omnem*, at 1, as one of the six books 'out of two thousand books and three million lines' (*in librorum quidem duo milia, versuum autem tricies centena extendebatur*) still in use by students, 'on the advice of their teachers' (*a voce magistra*). On this passage see T. Honoré, *Gaius* (1962), pp. 126-130 and O. Stanojevic, *Gaius noster* (1989), pp. 13-14.

18 See R. Brouwer, *Law and Philosophy in the Late Roman Republic* (in preparation).

19 On Tribonian and the hard work see T. Honoré, *Tribonian* (1978) and T. Honoré, *Justinian's Digest* (2010) respectively.

first safely kept in a tabernacle in the town hall, and subsequently, from 4 October 1782, in the Biblioteca Medicea Laurenziana. In Bologna a set of manuscripts known as the *Bolognese Vulgate* turned up.²⁰ In the last decades of the 11th century the collective reading of this *Vulgate* by students from different nations would result in the foundation of the first ‘university’. From Bologna this type of institution would slowly spread out over the whole of Europe, including – almost a century later – England. Moreover, this reading resulted in a revival of Justinian’s version of Roman law as law, at least on the European continent, where this *ius commune* would have a profound and lasting influence on the manner in which conflicts would be resolved. In England, at the universities of Oxford (founded around 1167) and Cambridge (1209), the influence of the study of these texts was limited: by the 13th century the Norman manner of resolving conflicts had been firmly established, or as the English legal historian Baker put it: ‘The common law withstood the waves of Romanist influence which swept across the Continent’.²¹

When in the 15th and 16th centuries some continental jurists started to realise that the Roman legal arrangements and solutions to legal problems were not a product of ‘natural’ reason only, but also of the historical circumstances, Roman as well as Byzantine, in which they had been developed, these lawyers felt the need to adapt them for their own times. Hence national versions of Justinian’s *Teaching Manual* were devised, in the vernacular, such as Grotius’ *Introduction to Dutch Law*, written between 1619-1621,²² and above all the grand codifications of the 19th century, Napoleon’s *Code civil* or – following the French example – the Dutch and Belgian *Civil Codes*, but also – at the beginning of the 20th century – the German *Bürgerliches Gesetzbuch*. In other words, most European nation states adopted their own versions of Justinian’s systematic overview of Roman law. Once these codifications were completed, the task of the academic lawyer, in Benjamin Lahusen’s flamboyant formulation, has since been reduced drastically: ‘The lawyers, until then the kings of the law, have since been condemned to drudgery.’²³

In conclusion: different from classical Athens, where no tradition of substantive law came into being, different from Norman England, where the study of the common law was practice-orientated, on the European continent the study of law became part of the system of tertiary education from the very beginning of the university system, with the university as one of the thriving forces behind the development of the legal system itself.

3. The study of law among the disciplines

Whereas the academic study of doctrinal law is thus anything other than a matter of course, reflection about law, or the ‘philosophy’ of law,²⁴ has been considered a subject worthy of study almost from the beginning of the western tradition, as the extant fragments of the 6th century BCE writings by the Ionian thinkers Anaximander and Heraclitus attest. Anaximander of Miletus (c. 610-546) explains the coming into being and the destruction of all beings with the notions of penalty, retribution and injustice.²⁵ Heraclitus of Ephesus (c. 535-475) discusses human laws in relation to divine law, thus: ‘All human laws are nourished by one law, the divine one’ (tr. Most).²⁶ In the 5th and 4th centuries BCE the debate on the origins of justice continued, whether it can be found in nature, a doctrine held by Plato (c. 427-347), or rather is based on convention, as

20 On the manuscripts see T. Mommsen (ed.), *Digesta Iustiniani Augusti* (1870), Vol. 1, pp. xii-xiv (*Florentina*), pp. xxxv-liii (*Vulgate*), the helpful overview in L. Wenger, *Die Quellen des römischen Rechts* (1953), pp. 591-595, and – on the *Florentina*, with full documentation and illustrations – D. Baldi, ‘Il Codex Florentinus del Digesto e il ‘Fondo Pandette’ della Biblioteca Laurenziana (con un’ appendice di documenti inediti)’, (2010) 8 *Segno et testo*, pp. 99-186.

21 J.H. Baker, *An Introduction to English Legal History* (2002), p. 28.

22 For the standard edition in the original Dutch see F. Dörring et al. (eds.), *Hugo de Groot. Inleiding tot de Hollandsche rechts-geleerdheid* [1951] (1965); for an English translation see R.W. Lee (ed. and tr.), *Hugo Grotius. The Jurisprudence of Holland* [1926] (1953).

23 B. Lahusen, *Alles Recht geht vom Volksgeist aus* (2013), p. 106: ‘Die Juristen, bis dahin die Könige des Rechts, sind seither zur Kärrnerarbeit verdammt.’

24 For this ‘Kantian’ understanding of philosophy see R. Brouwer, *The Stoic Sage* (2014), p. 2.

25 DK (= H. Diels & W. Kranz (eds.), *Die Fragmente der Vorsokratiker* (1952)), fragment 1 or LM (= A. Laks & G.W. Most (eds.), *Les débuts de la philosophie* (2016) or *Early Greek Philosophy* (2016)), fragment D6: ‘The things out of which birth comes about for beings, into these their destruction happens, according to obligations: for they pay the penalty and retribution to each other for their injustice’ (ἐξ ὧν δὲ ἡ γένεσις ἐστι τοῖς οὖσι, καὶ τὴν φθορὰν εἰς ταῦτα γίνεσθαι κατὰ τὸ χρεῶν. διδόναι γὰρ αὐτὰ δίκην καὶ τίσιν ἀλλήλοις τῆς ἀδικίας, tr. Most).

26 DK, supra note 25, fragment 114 or LM, supra note 25, fragment D105: τρέφονται γὰρ πάντες οἱ ἀνθρώπειοι νόμοι ὑπὸ ἐνὸς τοῦ θεοῦ.

defended by ‘sophists’, like Protagoras of Abdera (c. 490-420) and Antiphon of Rhamnous (c. 480-411).²⁷ This type of abstract thinking also became part of the system of tertiary education in western Europe, again in the form of reading together texts from classical antiquity, notably Aristotle’s lecture notes. In English this type of reflective academic activity is referred to as jurisprudence or legal philosophy, a cause of endless confusion among lawyers on the European continent, who use the same term, which after all in its original Latin simply means ‘knowledge of the law’, in another specialised sense as ‘case law’.

This reflection on law is possible in a variety of ways. One way could be to focus on an analysis of the various concepts used in legal discourse, such as law, equity, rights etc. Here I will reflect on the methods that go with the study of law, doing so in a comparative manner, in relation to C.P. Snow’s ‘two cultures’,²⁸ that is both the natural sciences as well as the humanities.²⁹ It is here that the special, interdisciplinary position of law, in between these two other academic disciplines, can be discerned.

3.1 Humanities

The comparison with the humanities is perhaps most obvious. Of course, the notion ‘humanities’ can refer to a wide variety of pursuits. If we take it in one of its standard meanings, as *Geisteswissenschaften* in Dilthey’s original sense, it refers to the study of the products of the human mind.³⁰ These products include in the first place texts, but nowadays go beyond this type of object, so as to include history, languages, cultures etc. Interpretation is the standard term for the method by which these products are studied. As for the various theories of interpretation that have been developed, in a traditional, strict sense ‘interpretation’ refers to meticulous philological activity, as undertaken by e.g. Lorenzo Valla (1406-1457), who unmasked the document of Constantine’s ‘gift’ of worldly territory to the pope as a forgery,³¹ by Friedrich Schleiermacher (1768-1834) on the Bible,³² by Johan Nicolai Madvig in his 1873 edition of Cicero’s *On Ends*,³³ another text of fundamental importance in the western tradition, or – more recently – in 2013 by Tiziano Dorandi in his monumental edition of Diogenes Laertius’ *Lives of Eminent Philosophers*, one of our main doxographies of Greek thought.³⁴ It can also be understood in a broader sense, as by Hans-Georg Gadamer (1900-2002). In Gadamer’s hermeneutics, interpretation is the result of a dialogue, in which the ‘speakers’ (including, but not restricted to reader and text) become aware of their prejudices and reassess their original positions, such that they come to an understanding, or – in Gadamer’s metaphorical language – the horizons of both speakers merge.³⁵

The comparison with the study of law is easily made. If law is considered as a set of more or less abstractly formulated rules, out of which a particular rule needs to be applied in a specific situation, e.g. in order to resolve a conflict, then the rule may sometimes have to be subjected to a form of interpretation. Especially within the European continental civil law tradition, in which law is above all understood as a set of systematised rules embodied in codes, as we saw in the previous section, theories of how to interpret these rules have been developed at great length, *pace* the legalistic interpretation of Montesquieu’s doctrine that judges are only ‘the mouthpiece of the law’.³⁶ Whereas at first the Glossators, as the first students

27 For Protagoras see e.g. DK, supra note 25, fragment 1 or LM, supra note 25, fragment D9: ‘Of all things the measure is man’ (πάντων χρημάτων μέτρον ἐστὶν ἄνθρωπος); for Antiphon see DK, fragment 44 or LM, fragment D38: e.g. col. 1: ‘What belongs to the laws is the product of an agreement’ (τὰ μὲν γὰρ | τῶν νόμων | [ἐπιθ]ετα, tr. Most).

28 See above note 6.

29 On this distinction as a unique characteristic of the western tradition, which would have been invented by the Greeks, see P. Descola, *Par-delà nature et culture* (2005) (English translation by J. Lloyd as *Beyond Nature and Culture* (2013)).

30 See W. Dilthey, *Einleitung in die Geisteswissenschaften* (1883).

31 For a modern edition of this 1440 text with English translation see G.W. Bowersock (ed. and tr.), *Lorenzo Valla. On the Donation of Constantine* (2007).

32 F. Schleiermacher, *Hermeneutik und Kritik mit besonderer Beziehung auf das Neue Testament*, edited by F. Lücke (1838) (Engl. translation by A. Bowie as *Hermeneutics and Criticism and Other Writings* (1998)).

33 J.N. Madvig (ed.), *M. Tullii Ciceronis De finibus bonorum et malorum libri quinque* (1876).

34 T. Dorandi (ed.), *Diogenes Laertius. Lives of Eminent Philosophers* (2013).

35 See H.-G. Gadamer, *Wahrheit und Methode* (1960) (revised English translation by J. Weinsheimer & D.G. Marshall as *Truth and Method* (2004)). C. Taylor, ‘Gadamer on the Human Sciences’, in R.J. Dostal (ed.), *The Cambridge Companion to Gadamer* (2002), pp. 126-142 offers a concise and illuminating discussion.

36 For the expression see Montesquieu, *De l’esprit des lois* (1748), Bk 11, ch. 6: ‘Les juges de la nation ne sont que (...) la bouche qui prononce les paroles de la loi’. In the legalistic interpretation, the role of the judge is to apply the relevant article from the code to the facts, or – in terms of the ‘practical’ syllogism (developed after Aristotle) – to apply the *major* as the general rule to the *minor* of the

of the *Corpus iuris civilis*, simply noted the meanings of the expressions in the margins of their copies, in contemporary theories more elaborate approaches have been formulated. In US jurisprudence Ronald Dworkin (1931-2013) even devised two theories of interpretation. In his early *Taking Rights Seriously*, he offered a theory closely aligned to the operations of the US legal system, with particular emphasis on its civil law elements, such as the Constitution, statutes, and above all the liberal methods by which these can be interpreted.³⁷ In his later book *Law's Empire*, Dworkin compared the process of the development of the law to the writing of a chain novel, to which various authors add their own part on the basis of their reading and interpretation of the earlier instalments.³⁸ In Dutch jurisprudence, an influential theory of legal interpretation has been developed by Paul Scholten (1875-1946). In a volume which was intended as an introduction to a series on private law, hence its somewhat peculiar title *General Part*, he offered the now classic division into grammatical, historical and teleological methods of how to interpret statutory provisions, so easily applied by lawyers on the continent,³⁹ to the dismay of English lawyers, who standardly interpret statutory rules in a literal manner, from which they deviate only in exceptional cases, as in *Pepper v. Hart*.⁴⁰

With regard to interpretation, the comparison of the study of law with the humanities is thus perhaps most obvious in the legal tradition as it developed on the European continent, with its strong emphasis on law as a system of rules implemented from above by a lawgiver, which can be interpreted in a liberal manner by the courts. It may be less obvious, but still very much a worthwhile pursuit in the common law tradition, where the embedded customs of the English people lie at the core of the law, and which will have to be made explicit, squeezed out through the 'interstices', in Patrick Glenn's expression,⁴¹ in the opinions of the judges.

Whereas in these comparisons the focus is on texts, the broader approach with regard to the possible objects of study in the humanities has its parallel in the study of law, too. An example of this is Nussbaum's 'internal essentialism', where in order to promote social justice she studies the basic qualities that go with being human, by means of how human beings have come to understand themselves, taking into account or interpreting their own historical experiences.⁴²

3.2 Science

The other culture, to use C.P. Snow's expression again, with which the study of law can be compared, is science or the study of nature. In English, science has this narrow, now standard meaning, which it acquired in the 18th century only as a result of what is often referred to as the Scientific Revolution.⁴³ Whereas from a contemporary point of view the objects of these types of study may thus appear miles apart, it is good to remember that in the beginning of the western tradition the objects were considered closely connected. According to, perhaps, Heraclitus,⁴⁴ and at any rate after him the Stoics (from the 3rd century BCE onwards), law has to be understood as the physical force that brings about order in the world, and it is in relation to this force that human laws should be understood.⁴⁵ Knowledge, *epistēmē* in Greek, or *scientia* in Cicero's Latin translation, is the condition in which perfect human beings live in accordance with this force.⁴⁶ It is not even necessary to be as radical as Heraclitus or the Stoics in identifying law and nature; more down-to-earth

specific facts of the case, such that the conclusion automatically follows. The format of the case law of the French Supreme Court is still the best example of this: 'Vu l'article ... (*major*), en attendu que ... (*minor*), casse ... (*conclusion*)'.

37 R. Dworkin, *Taking Rights Seriously* (1977). The importance of the influence of the civil law tradition on the legal system of the US is often underestimated. An example is M. Adams & D. Broeren, 'Rechterlijke argumentatie en transparantie: een rechtsvergelijkende exercitie', in D. Broerders et al. (eds.), *Speelruimte voor transparantere rechtspraak* (2013), pp. 167-206, who without further ado present the US legal system as part of the common law tradition.

38 R. Dworkin, *Law's Empire* (1986).

39 P. Scholten, *Algemeen deel* (1931), for an English translation of this first edition see <www.paulscholten.eu> (last visited 4 December 2017).

40 *Pepper v Hart* [1992] UKHL 3, (1993) AC 593.

41 Glenn, *supra* note 11, p. 250.

42 See e.g. M. Nussbaum, *Creating Capabilities* (2011).

43 See the *Oxford English Dictionary* (2017), s.v. science 5b: 'The most usual sense since the mid 19th cent. when used without any qualification'.

44 See further C.H. Kahn, *The Art and Thought of Heraclitus* (1979), p. 15, with reference to DK, *supra* note 25, fragments 50, 80, 114 or LM, *supra* note 25, fragments 46, 63, 105. For another, more mundane, interpretation see M. Schofield, 'Heraclitus on Law (Fr. 114 DK)', (2015) 3 *Rhizomata*, pp. 47-61.

45 See further R. Brouwer, 'On Law and Equity: the Stoic View', (2011) 128 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, pp. 20-29.

46 Brouwer, *supra* note 24, pp. 29-41.

theories about the object of science and how it should be studied show clear parallels with theories about what law is and how it should be studied. I will offer three examples here.

The first example is positivism. The parallels between positivism in science on the one hand and positivism in law on the other hand are that both types of positivism impose severe restrictions on their respective objects of study. In both types of positivism similar restrictive methods have been proposed. For logical-positivists, like Rudolf Carnap (1891-1970), science can only deal with propositions that are meaningful, that is sentences that can be brought back to what Carnap called ‘protocol sentences’ that express unmediated empirical data. Propositions that cannot be thus deduced from protocol sentences are meaningless, and dismissed as metaphysics. It is one of the tasks of the scientist to organise meaningful statements in a systematic whole, such that an understanding of the world is brought about that is freed from tradition or prejudice.⁴⁷

As for the comparison with law: for legal-positivists,⁴⁸ like Herbert Hart (1907-1992) and Hans Kelsen (1881-1973), law needs to be studied in its ‘pure’ form, that is, in the manner as it is recognised or posited within a society. Hart introduced the term ‘rules of recognition’, by means of which legal rules can be distinguished from other kinds of norms.⁴⁹ Kelsen introduced the notion of a ‘basic norm’ (*Grundnorm*): norms are legal norms only if their authority can be derived from this basic norm. For Kelsen, then, and contrary to Hart, it is one of the tasks of the lawyer to clarify the systematic, syntactical relations between the norms, in line with the lawyer’s training within the European continental legal tradition.⁵⁰ An important aim can thus be achieved: by these criteria, whether they are called rules of recognition or basic norm, law is separated from e.g. morality, and thus liberated from what Neurath and other members of the Vienna Circle in the final pages of their *Manifesto* referred to as the traditional ‘debris of millennia’ (‘Schutt der Jahrtausende’).⁵¹

The second example is Popper’s critical rationalism. Karl Popper (1902-1994) criticised the logical-positivists for their focus on the scientist’s task of systematically ordering the basic sentences in which the sense data can be expressed. According to Popper, the typical activity of a scientist in fact consists in coming up with exciting theories, which are risky, but in the end turn out to be unfalsifiable, and thus contribute to the growth of knowledge.⁵² In the realm of law Popper’s critical rationalism has also been applied, e.g. by the Dutch lawyer Maurits Barendrecht: rather than formulating imprecise norms that may have broad ranges of application, lawyers should formulate norms that are as precise as possible. Their risky formulations make them prone to debate, which would serve the overall end of justice.⁵³

My third example is perhaps best captured under the heading ‘naturalist turn’. ‘Naturalist’ may sound odd in relation to science (after all, it is just another term related to the study of nature), but here a renewed interest in essentialism and realism can also be discerned. Without intending to return to Aristotle’s metaphysical essentialism, these naturalists argue that science does not deal so much with ordering statements about empirical data, but is better characterised as a search for essences in nature, as in Hilary Putnam’s or Saul Kripke’s essentialism.⁵⁴ Within the study of law this naturalist turn has also taken place: according to the legal naturalists, law cannot be studied as a set of rules, independent of its natural or social settings. According to e.g. the American Legal Realists, the study of law needs to focus on the actual behaviour of legal actors, such as that of judges in appeal courts, rather than on the, in the end, indeterminate reasons

47 See R. Carnap, ‘Überwindung der Metaphysik durch logische Analyse der Sprache’, (1931) 2 *Erkenntnis*, pp. 219-241 (translated by A. Pap as ‘The Elimination of Metaphysics Through Logical Analysis of Language’, in A. Ayer (ed.), *Logical Positivism* (1959), pp. 60-81).

48 See B. Lahusen, *Rechtspositivismus und juristische Methode* (2011) and esp. J. Schröder, *Recht als Wissenschaft* (2012), two fascinating accounts of how positivism developed in reaction to natural law theory.

49 H.L.A. Hart, *The Concept of Law* [1963] (2012).

50 H. Kelsen, *Reine Rechtslehre* (1934) (English translation by S.L. Paulson as *Introduction to the Problems of Legal Theory* (1992)).

51 O. Neurath et al., ‘Wissenschaftliche Auffassung der Wiener Kreis’ [1928], reprinted in e.g. M. Stöltzner & T. Uebel (eds.), *Wiener Kreis* (2006), pp. 3-29 (English translation as ‘The Scientific Conception of the World: The Vienna Circle’, in M. Neurath & R.S. Cohen (eds.), *Empiricism and Sociology* (1973), pp. 299-318).

52 K. Popper, ‘Science: Conjectures and Refutations’ [1957], as reprinted in his *Conjectures and Refutations* (1972), pp. 33-65.

53 M. Barendrecht, *Recht als model van rechtvaardigheid* (1992).

54 H. Putnam, ‘The Meaning of ‘Meaning’’, in K. Gunderson (ed.), *Language, Mind, and Knowledge* (1975), pp. 131-193 (reprinted in his *Philosophical Papers 2* (1983), pp. 215-271), S. Kripke, *Naming and Necessity* (1980). See further A. Chakravarty, ‘Scientific Realism’, *Stanford Encyclopedia of Philosophy* (2017).

which these judges give for their decisions.⁵⁵ According to Martha Nussbaum, justice needs to be related to human nature, where she reinterprets Aristotle's function argument from the first book of his *Nicomachean Ethics*, at 1097a24-8a21, that happiness or the good life needs to be based on an account of the typical 'function' (*ergon*) of human beings, which she turns into an argument about social justice, which is best served if a list of basic human 'capabilities' is observed.⁵⁶ While this *rapprochement* may thus be clearest among those familiar with the common law tradition, even within the civil law tradition, among students in the field of private law, there are signs that Savigny's project of bringing the system of the Byzantine version of Roman law to perfection is not that finished after all, and that this system of civil law needs to be studied in closer connection with its social or naturalist settings.⁵⁷

4. Conclusion

These comparisons, brief as they are, can only offer some idea of how study of law as an academic discipline can be regarded as occupying a central position amidst the other academic disciplines. More perhaps than is the case with any other discipline, apart from philosophy if understood in its original Platonic or Stoic sense as the overarching discipline of striving for wisdom,⁵⁸ legal scholars have a range of different methods available to them. Awareness of these different methods should allow them to connect with other disciplines, such that law is can be more fruitfully studied amidst the other academic disciplines. ■

55 B. Leiter, 'American Realism', in M.P. Golding & W.A. Edmundson (eds.), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2005), pp. 50-66, B. Leiter & M.X. Etchemendy, 'Naturalism in Legal Philosophy', *Stanford Encyclopedia of Philosophy* (2017).

56 See e.g. Nussbaum, supra note 42.

57 W.H. van Boom et al. (eds.), *Civilologie* (2012). In this volume the fact-value dichotomy is taken for granted, the naturalist approach is missing.

58 Brouwer, supra note 24, pp. 2-3, with further references.