

## MAPPING LEGAL RESEARCH

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**ABSTRACT.** *This article aims to map the position of academic legal research, using a distinction between “law as a practical discipline”, “law as humanities” and “law as social sciences” as a conceptual framework. Having explained this framework, we address both the “macro” and “micro” level of legal research in the UK. For this purpose, we have collected information on the position of all law schools within the structure of their respective universities. We also introduce “ternary plots” as a new way of explaining individual research preferences. Our general result is that all three categories play a role within the context of UK legal academia, though the relationship between the “macro” and the “micro” level is not always straight-forward. We also provide comparisons with the US and Germany and show that in all three countries law as an academic tradition has been constantly evolving, raising questions such as whether the UK could or should move further to a social science model already dominant in the US.*

**KEYWORDS:** *Legal Scholarship; Legal Research; Universities; United Kingdom*

### I. INTRODUCTION

What do you call a person who does research in law at a university? In languages such as German there is one single clear word for it (*Rechtswissenschaftler*) but in English the picture seems to be more confused: are you an “academic lawyer”, a “legal scholar”, a “legal researcher”, a “legal academic”, or even a “legal scientist”? All of these terms are used more or less frequently,<sup>1</sup> along with more general terms like “law lecturer” and “law professor”. The preference for a particular

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<sup>1</sup> In Google Scholar “legal scholar” is the most popular term (34,200 hits) and “legal scientist” the least popular one (594 hits) [search on 3 July 2012].

term is not only of terminological importance but it indicates a sense of belonging.<sup>2</sup> For instance, calling yourself an academic lawyer may emphasise the fact that you are primarily a lawyer, affiliating yourself with solicitors, barristers and judges. Conversely, the other terms put more emphasis on the university affiliation, but here there are further differences as well. For instance, someone who researches law from a historical perspective may want to be called a legal scholar, whereas someone who empirically tests hypotheses in law may prefer terms such as legal academic or legal (or social) scientist.<sup>3</sup>

In this article we use a conceptual framework of “law as a practical discipline”, “law as humanities” and “law as social sciences” in order to map legal research. The classification of legal research is of interest for a variety of reasons.<sup>4</sup> It may determine where law is located within the often complex mix of faculties, schools and other subunits of universities. Such disciplinary barriers can matter, for instance, for whether and how legal scholars collaborate with other academics and practicing lawyers and how future legal scholars are trained and recruited. The question is also important as it can contribute towards an appreciation of the dominant paradigm (if one exists): individual academics may not want to be regarded as outsiders in their scholarly community, and, more tangibly, they may feel induced to pursue the type of research that funding agencies see as “relevant”, “acceptable” or within their scope.<sup>5</sup>

Our article also fills a gap in the literature. While being aware of the extensive previous writing about research methods in law,<sup>6</sup> the originality of this contribution lies both in the method of analysis and in its discussion of the interplay between “macro” structures and “micro” choices within which researchers operate. More specifically, in Part III, we offer new insights in how at the “macro-level” law fits within the modern university structure, research funding system and the concept of broad disciplines. In particular, we have collected information on the position of all UK law schools within the structure of their respective universities, which has not been done in the previous literature; we also explain the reasons for drawing attention to this data. Part IV on the “micro-level” presents a new way of explaining individual research preferences, introducing and promoting the use of “ternary plots”. We also address the relationship between individual

<sup>2</sup> Similar, but focussed on teaching: Patricia Leighton, Tony Mortimer and Nicola Whatley, *Today's Law Teachers: Lawyers or Academics?* (London 1995).

<sup>3</sup> But note Twining's contention that even empirical legal studies is “qualitative” and “humanistic”: William Twining, *General Jurisprudence* (Cambridge 2009), 259.

<sup>4</sup> For details see III. and IV., below.

<sup>5</sup> Richard Collier, “The Liberal Law School, the Restructured University and the Paradox of Socio-Legal Studies” (2005) 68 *Modern Law Review* 475, 488 (referring to the RAEs).

<sup>6</sup> See the references in the following Parts.

academics and university structures in a comparative context. First, however, the conceptual framework of this article will be explained.

## II. CONCEPTUAL FRAMEWORK

This article is based on a distinction between three types of legal research: (i) a research tradition which emphasises law as a practical discipline, and approaches which position law as an aspect of (ii) the humanities or (iii) of the social sciences. This is not the only way of classifying legal research,<sup>7</sup> yet, for the purposes of this article it offers a suitable conceptual framework for mapping legal research.

To clarify, these three categories should be seen as “ideal types” of legal research that can potentially be applied to different legal systems.<sup>8</sup> Thus, this Part outlines conceptions of how legal research *can* be pursued, not a description of how this *is* done in a particular legal or academic system. This rationale also explains the choice of our three categories: as they refer to generic terms (“practical”, “humanities”, “social sciences”); they enable us to map, in the subsequent parts, how far institutions, individuals and legal cultures belong to one or more of those categories.<sup>9</sup>

Law as a practical discipline can refer to research that is valuable for legal practitioners in drafting contracts, advising clients and mediating conflicts. It can also be closely related to the work of the courts. According to Susan Bartie the aim of such research is to examine the “internal puzzles raised by the judge’s reasoning process” and to “unveil uniform principles”.<sup>10</sup> Legal research is then about a comparatively value-free analysis of legal rules, with the effect that law is an applied discipline where legal academics are “academic lawyers” who share the ethics of practicing lawyers.<sup>11</sup> This can be seen as beneficial since practical research may fulfil an obligation, held jointly with legal practice, to “serve the system of justice” through training future practitioners and addressing important issues for the legal system.<sup>12</sup> A possible weakness is that such academic lawyers may be “more familiar with legal professionals than with their colleagues from other

<sup>7</sup> For distinctions similar to the one of this article: Sanne Taekema, “Relative Autonomy: A Characterisation of the Discipline of Law” in Bart van Kling and Sanne Taekema (eds.), *Law and Method: Interdisciplinary Research into Law* (Tübingen 2011), 33–53; Edward L. Rubin, “Law and the Methodology of Law” [1997] *Wisconsin Law Review* 521. For different ones see, e.g., Christopher McCrudden, “Legal Research and the Social Sciences” (2006) 122 *Law Quarterly Review* 632; Mathias Siems, “Legal Originality” (2008) 28 *Oxford Journal of Legal Studies* 147.

<sup>8</sup> For differences between legal systems see IV. A and C., below.

<sup>9</sup> Of course, this also allows mixtures: see, eg, IV. A and B., below.

<sup>10</sup> Susan Bartie, “The Lingering Core of Legal Scholarship” (2010) 30 *Legal Studies* 345, 348.

<sup>11</sup> See Tony Becher, *Academic Tribes and Territories, Intellectual Enquiry and the Cultures of Disciplines* (Milton Keynes 1989) 8, 30–1, 155.

<sup>12</sup> Harry T. Edwards, “The Growing Disjunction between Legal Education and the Legal Profession” (1992) 91 *Michigan Law Review* 34, 38–9. See also Neil Duxbury, *Jurists and Judges* (Oxford 2001) 43–5.

faculties”, leaving the law school divided between the academic and legal worlds.<sup>13</sup>

Following Peter Birks, practical legal research can be research that “criticises, explains, corrects and directs legal doctrine”.<sup>14</sup> Yet, doctrinal legal research is not identical to practical legal research. This can be seen in Mark Van Hoecke’s taxonomy where he identifies legal doctrine “as a mainly hermeneutic discipline, with also empirical, argumentative, logical and normative elements”.<sup>15</sup> Some of these elements have a practical dimension but they also go beyond it: for instance, practitioners may have no interest in deep hermeneutical questions but they are of core interest to scholars in humanities, to which we now turn.

Frequent parallels are drawn between law and humanities and it has even been said that “(t)ypically, the discipline of law is regarded as part of the humanities”.<sup>16</sup> This follows from the view that positive law is composed of legal ought-propositions.<sup>17</sup> Legal scholars are therefore concerned with the understanding of these stipulations, i.e. the text of the law and its underlying ideas, or, to use Peter Goodrich’s words, “the origins of the discipline of legal science are to be sought in a textual past”.<sup>18</sup> This view relates this approach to legal scholarship to interpretative disciplines such as history, philosophy, theology and literature which are generally recognised as having a primary affiliation with the humanities. In particular, claims are made as to the importance of legal texts:

“(t)he law is not simply a set of forensic or procedural skills. It is a vast body of knowledge, compounded of historical material, modes of textual analysis and various philosophical concerns. It is a formal inquiry into our behavior and ideals that proceeds essentially through language. It is a humanistic study – both as a body of material wrought of words and a set of analytic skills and procedural claims involving linguistic mastery”.<sup>19</sup>

<sup>13</sup> Notker Hammerstein and Dirk Hierbaut, “Social Sciences, History and Law” in Walter Rüegg (ed.), *A History of the University in Europe, Volume IV* (Cambridge 2011) 371, 414. See also William Twining, *Blackstone’s Tower: The English Law School* (London 1994) 52 (distinguishing between professional and academic models of law school).

<sup>14</sup> Peter Birks, *What are Law Schools For?* (Oxford 1996). See also Peter Birks, “The Academic and the Practitioner” (1998) 18 *Legal Studies* 397.

<sup>15</sup> Mark Van Hoecke, “Legal Doctrine: Which Method(s) for What Kind of Discipline?” in Mark Van Hoecke, *Methodologies of Legal Research* (Oxford 2011) 1 at 17. See also John Bell, “Legal Research and the Distinctiveness of Comparative Law”, in Van Hoecke, *ibid.*, 155 at p. 157 (no bright line between descriptive and normative questions).

<sup>16</sup> International Legal Centre (Committee on Legal Education in Developing Countries), *Legal Education in a Changing World* (Uppsala: International Legal Centre, 1975), para 90. See also Becher, above n. 11, at p. 2 (academic law as a “humanities related profession”).

<sup>17</sup> The background is Hans Kelsen, *The Pure Theory of Law* (Berkeley 1967).

<sup>18</sup> Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (Houndsmills 1987), 33. See also Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London 1990) (references to linguistics, philosophy, semiotics etc).

<sup>19</sup> A. Bartlett Giamitti (1982), then President of Yale, quoted in Austin Sarat, “On the Margin: Humanities and Law” (1998) 10 *Yale Journal of Law and the Humanities* 401, 407.

Thus, according to this view, the main commonality of law and disciplines of the humanities is that they have a shared interest in hermeneutics.<sup>20</sup> It is also possible to contrast law as humanities with the view that law should be primarily a practical discipline. Though both are interested in interpretation, the law-as-humanities scholar approaches the law with the pure aim of *understanding*, whereas the law as practical-legal-research scholar is interested in how it may be *applied* in practice.<sup>21</sup> To illustrate, Austin Sarat supports the turn to humanities to counter what he terms the “value-neutral and technocratic approach” of professional legal education, suggesting that legal scholarship should not be judged by its contribution to law practice and that it may well ignore lawyering except as an object of inquiry.<sup>22</sup>

Turning now to our final category, law as a social science, we find a similar scepticism about merely finding out how to apply the law in practice. Treating law as a social science offers the opportunity to challenge the usefulness of court decisions and pieces of legislation from an external and often empirical perspective.<sup>23</sup> Reference can also be made to the common Enlightenment origins of legal systems and of social research.<sup>24</sup> Yet in order to discuss law as a social science more closely, we must look at particular branches of the social sciences and how they relate to legal scholarship.

For example, Richard Posner writes about “economists and economics-minded lawyers, who view law as a social science”,<sup>25</sup> constructing models of legal rules and evaluating their potential effect on overall social welfare. A view of law as a branch of political science would emphasise the way it exercises power and allocates resources.<sup>26</sup> Furthermore, legal research may benefit from approaches associated with sociology, and can be engaged with the empirical aspects of the social sciences. For example, such research may challenge legal doctrine by raising the question how and why judges actually decide cases.<sup>27</sup> A socio-legal scholar may also want to examine the “social origins, social conditions of existence, and social consequences” of legal ideas.<sup>28</sup> This may extend to quantitative empirical legal research

<sup>20</sup> Similar Taekema, above n. 7, at pp. 33–53.

<sup>21</sup> For the distinction between applied and pure research see also below n 73.

<sup>22</sup> Sarat, above n. 19, at pp. 403–4.

<sup>23</sup> Geoffrey Samuel, “Is Law Really a Social Science? A View from Comparative Law” (2008) 67 Cambridge Law Journal 288. See also Bell, above n. 15, at pp. 159–160.

<sup>24</sup> Sharyn Roach Anleu, *Law and Social Change* (London 2010), 248.

<sup>25</sup> Richard A. Posner, *Law and Literature* (Cambridge, Mass. 1998), 6.

<sup>26</sup> See Jack Stark, “Using Literature to Imagine Other Cultures” (1997) 44/1 Federal Lawyer 54, 56 (rejecting such an approach).

<sup>27</sup> Prominently Jerome Frank, “Are Judges Human?” (1931) 80 University of Pennsylvania Law Review 17 and *ibid.*, *Courts on Trial* (Princeton 1949).

<sup>28</sup> Roger Cotterrell, *Law’s Community* (Oxford 1995), ix.

that applies statistical and econometric methods in order to test whether and how legal rules matter in the real world.<sup>29</sup>

Such empirical testing may have the aspiration to transform legal research to a hard social science, aiming to replicate the methods of natural sciences but in respect of social phenomena.<sup>30</sup> A similar linkage to natural sciences, such as biology, may be suggested if one wanted to construct law as a non-contradictory all-inclusive system of legal rules.<sup>31</sup> It may even be argued that “like any human or life science we cannot study parts of the law outside their organic context”.<sup>32</sup> Yet, overall, it is clear that natural scientists and legal scholars do not share the same methods. Thus, for the purposes of this article, we call our final category simply “law as a social science”, being aware that some social scientists may themselves be inspired by the methods of the natural sciences.<sup>33</sup>

### III. MACRO-LEVEL: HOW DOES LAW FIT WITHIN THE UNIVERSITY STRUCTURE?

Published and peer-reviewed legal scholarship typically takes place in universities or other research institutions. Thus, this part examines the legal research environment in the UK. The first section explains that law schools have an ambiguous position within the structure of universities. Subsequently, we provide a comparison with the way how research councils and professional associations have dealt with the classification problem of legal research. Finally, we discuss how such affiliations matter, both in terms of practical consequences and of wider implications regarding the role of disciplines and inter-disciplinary collaborations.

#### A. Mapping law schools within UK universities

There is some degree of pluralism regarding university structures, a matter which is within the control of an individual institution.

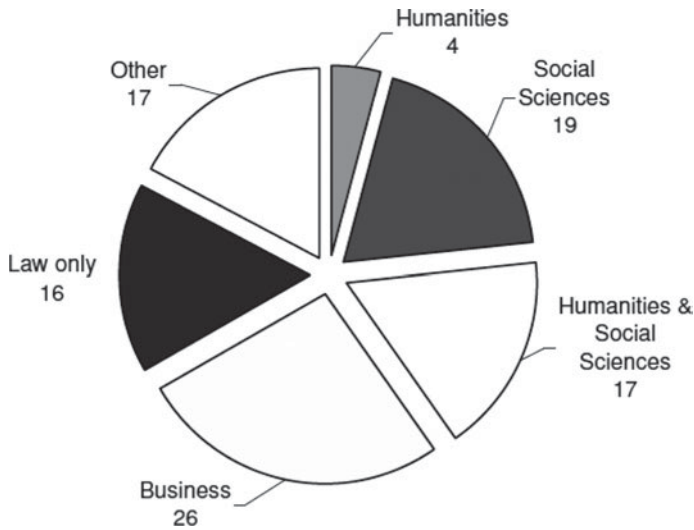
<sup>29</sup> See, e.g., Robert M. Lawless, Jennifer K. Robbennolt, and Thomas S. Ulen, *Empirical Methods in Law* (New York 2009); Mathias Siems, “Measuring the Immeasurable: How to Turn Law into Numbers”, in Michael Faure and Jan Smits (eds.), *Does Law Matter? On Law and Economic Growth* (Cambridge 2011), 115.

<sup>30</sup> For the similarity between social and natural sciences in the Anglo-Saxon tradition see E. K. Francis, “History and the Social Sciences: Some Reflections on the Re-Integration of Social Science” (1951) *The Review of Politics* 354, 356–7 (contrasting it with the German distinction between *Naturwissenschaften*, natural sciences, and *Geisteswissenschaften*, sciences of the mind).

<sup>31</sup> Howard Schweber, “The ‘Science’ of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education” (1999) 17 *Law and History Review* 421. See also Twining, above n. 3, at 260 (on whether an empirical science of law is possible). A related view – though closer to humanities – is that of law as a logical discipline. See Julius Moór, “Das Logische im Recht” (1927–28) *Revue Internationale de la Théorie du Droit* 157; Ulrich Klug, *Juristische Logik*, 4th ed. (Berlin 1982).

<sup>32</sup> Bell, above n. 15, at p.161 (referring to the institutional character of the law).

<sup>33</sup> However, some may aim for a closer connection to humanities, e.g., Philip Selznick, *A Humanist Science: Values and Ideals in Social Inquiry* (Stanford 2008).



**Figure 1:** Position of Law School within Faculty Structure (n=99)

For example, some institutions have a “flat” structure with a high number of single-discipline schools or departments, whereas others have implemented an intermediate structure of faculties, divisions or colleges. Further distinctions exist according to the precise allocation of responsibilities between the university, the faculty and the school level.<sup>34</sup>

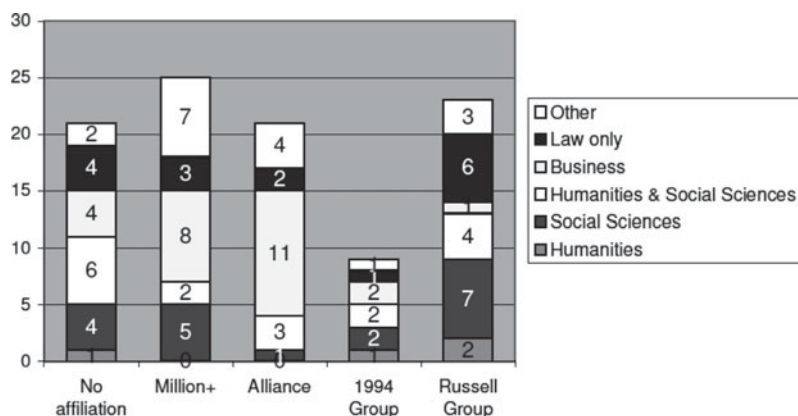
For the purpose of this article, we have examined all 99 UK universities in which academic units for law (schools or departments) are found.<sup>35</sup> As far as there exists an intermediate level, some universities have a joined faculty of social sciences and humanities (and/or arts), whereas others have separate faculties. There are also some universities with idiosyncratic faculty structures which we classified as “others”.<sup>36</sup>

Figure 1 reports our general results. It can be seen that a wide range of models are used, and that rather than a clean division between law as humanities on the one hand, and law as social science on the other, 33% of all institutions either treat law as a unit of its own, potentially reflecting its *sui generis* character, or have already put humanities and social science together as one faculty, therefore avoiding a need to specify whether law is properly affiliated with humanities or with social science. Interestingly, a number of institutions include law in an academic unit of business or management, or a faculty of business and

<sup>34</sup> For this point see also III C, below.

<sup>35</sup> The dataset, with further explanations, is available at <http://ssrn.com/abstract=2097698>.

<sup>36</sup> For instance, Southampton Solent’s Faculty of Business, Sport and Enterprise, or the University of Gloucestershire’s Faculty of Business, Education and Professional Studies.



**Figure 2:** Position of Law School within Faculty Structure in Different University Groups (n=99)

law (or, vice versa). In this respect it is helpful to distinguish between the approaches of so-called “mission groups”, i.e. the Russell Group, 1994 Group, University Alliance, and Million+.<sup>37</sup>

Figure 2 shows that the allocation of law to business schools is concentrated in the University Alliance and the ex-polytechnic Million+ institutions. The 1994 Group of smaller research-intensive universities is the group that has the highest proportion of law schools belonging to a faculty of social sciences. In the larger and older research-intensive Russell Group institutions law is frequently a faculty or school not belonging to an intermediate unit, and there are also two instances where it belongs to a faculty of humanities.

What explains these diverse classifications? According to Donald Campbell, writing about disciplinary distinctions in general, the “present organization of content into departments is highly arbitrary, a product in large part of historical accident”.<sup>38</sup> Thus, it is useful to outline the emergence and development of law schools in UK universities. Traditionally, English lawyers were not trained at university but in an apprenticeship system.<sup>39</sup> Law was seen as “a practical

<sup>37</sup> University Groups at <http://www.ucas.com/students/wheretostart/heexplained/universitygroups>. It should be noted that during the time that this article was prepared, some movement between groups was in progress. The data is based on the membership of the groups as of 1 August 2012 but further change is not unlikely.

<sup>38</sup> Donald T. Campbell, “Ethnocentrism of Disciplines and the Fish-Scale Model of Omniscience” in Muzafer Sherif and Carolyn Sherif (eds.), *Interdisciplinary Relationships in the Social Sciences* (Chicago 1969) 3, 8.

<sup>39</sup> See J. H. Baker, *The Third University of England: The Inns of Court and the Common-Law Tradition* (London 1990); Jonathan A. Bush and Alain A. Wijffels, *Learning the Law: Teaching and the Transmission of Law in England, 1150–1900* (Cambridge 1999).



subject which can only be learnt by practice and not by systematic, scholarly instruction".<sup>40</sup>

Although from their earliest days Oxford and Cambridge taught some Roman law,<sup>41</sup> and Oxford established the Vinerian Professorship of Common Law in 1758, it was only in the early 19th century that the significant development of legal education began. This process led to the development of law schools similar to those currently in operation. The first "modern English law school" is said to have been established at University College London (UCL) in 1826, though this was initially not very successful with only three graduates with a degree in English law in 1839.<sup>42</sup> Thus, despite this innovation, in 1846 a Select Committee of the House of Commons felt the need to inquire into the state of legal education in England and Ireland. Its main recommendation was that:

The universities should teach law and should give degrees in the subject, but the legal education given by them should be 'comparative and philosophical' in character, whereas the Inns of Courts and the Law Society should establish a system of professional education.<sup>43</sup>

Thus, at its origins, there was a close link to a field of humanities – philosophy – not legal practice. This is also reflected in the fact that in 1850 the first law school of the University of Oxford was a School of Law and Modern History, which only became a separate "final honour school of Jurisprudence" in 1872.<sup>44</sup> Still, the 19th century also saw a tendency towards making legal education more relevant for legal practice since Roman law teaching was gradually supplemented and replaced by English law.<sup>45</sup>

In the 18th century, Scottish universities (under the influence of continental European ideas) developed an earlier interest in "scientific" legal thinking.<sup>46</sup> Yet, in Scotland too, more extensive university-based teaching of law only started in the 19th century. Initially, the approach to teaching was mainly "philosophical", although the University of Edinburgh began to offer a course in conveyancing in 1825.<sup>47</sup> In 1864

<sup>40</sup> J.W. Bridge, "The Academic Lawyer: Mere Working Mason or Architect?" (1975) 91 *Law Quarterly Review* 488, 490. See also Albert Venn Dicey, *Can English Law Be Taught At The Universities?* (London 1883).

<sup>41</sup> See Christopher N. L. Brooke, *A History of the University of Cambridge, Volume IV 1870–1900* (Cambridge 1993), 216 (since 13th century).

<sup>42</sup> Twining, above n. 13, at p. 25.

<sup>43</sup> Cited in Barry Nicholas, "Jurisprudence" in M. G. Brock and M. C. Curthoys (eds.), *The History of the University of Oxford, Volume VII: Nineteenth-Century Oxford, Part 2* (Oxford 2000), 385 at p. 385.

<sup>44</sup> Nicholas, above n. 43, at 385, 389. See also Frederick Henry Lawson, *The Oxford Law School, 1850–1965* (Oxford 1968); Duxbury, above n. 12, at p. 70 (for Oxford and Cambridge).

<sup>45</sup> See Brooke, above n. 41, at p. 216 (for Cambridge).

<sup>46</sup> See John W. Cairns, "The Origins of the Edinburgh Law School: the Union of 1707 and the Regius Chair" (2007) 11 *Edinburgh Law Review* 300.

<sup>47</sup> See Robert D. Anderson, Michael Lynch and Nicholas Philipson, *The University of Edinburgh* (Edinburgh 2003), 97.

Edinburgh introduced an LL.B. degree to encourage “academic studies of law”, and it appointed James Lorimer to the vacant chair of public law. Robert Anderson and colleagues describe the situation as follows:

Lorimer believed that law should be a scholarly and liberal study, not just a training for practitioners, and he argued that an expanded legal education could give a broad preparation, as in continental countries, for public service, diplomacy, journals and similar careers. But this idea never caught on in Britain. The LL.B. proved too advanced to attract more than a handful of candidates (...).<sup>48</sup>

Thus, both in England and Scotland we observe a similar tension between legal practice and law as humanities at the very origins of law faculties. The next hundred years saw the emergence of social sciences as an academic field,<sup>49</sup> as well as the establishment of the “red brick”, “glass plate” and modern universities, sometimes with newer structures going beyond departments and disciplines.<sup>50</sup> There was also the trend to expand university legal education. This followed a growing demand for lawyers but also demonstrated that the trend to make law a subject that can be studied at university was continuing.<sup>51</sup>

As far as the structural position of law within the university is concerned, however, in the early 1990s most UK universities still had a relatively “flat” structure, with law being a separate faculty and not part of an intermediate unit.<sup>52</sup> Thus, the integration of law schools into joined faculties has mainly been a development of the last twenty years.<sup>53</sup> The main reason why universities have moved towards intermediate faculties, combining various schools, has been the desire to save costs, for instance, by way of centralising administrative tasks and building “critical mass”.<sup>54</sup> From a critical perspective, this has been explained as a trend towards a restructured, corporatised and entrepreneurial university, aiming to contribute to the “knowledge economy”.<sup>55</sup> There have also been concerns that the humanities have

<sup>48</sup> Anderson et al, above n. 47, at 124.

<sup>49</sup> See Asa Briggs, “History and the Social Sciences” in Walter Rüegg (ed.), *A History of the University in Europe, Volume III* (Cambridge 2004) 459, 479.

<sup>50</sup> Malcolm Tight, *The Development of Higher Education in the United Kingdom Since 1945* (Maidenhead 2009) 100.

<sup>51</sup> See Twining, above n. 13, at 25–42.

<sup>52</sup> See International Association of Universities, *International Handbook of Universities* (13th ed., 1993), 900–942.

<sup>53</sup> This point is made in general terms by Mary Kenkel, “Policy Change and The Challenge to Academic Identities” in Jurgen Enders and Egbert de Weert (eds.), *The Changing Face of Academic Life: Analytical and Comparative Perspectives* (London 2009), 78, 87.

<sup>54</sup> Mary Henkel, *Academic Identities and Policy Change in Higher Education* (London 2000), 57.

<sup>55</sup> See, eg, Richard Collier “‘We’re All Socio-Legal Now?’ Legal Education, Scholarship and the ‘Global Knowledge Economy’ – Reflections on the UK Experience” (2004) 26 *Sydney Law Review* 503.

become marginalised because, allegedly, they do not provide clear economic returns to society.<sup>56</sup>

These considerations may be most clearly seen in the universities of Million + and the University Alliance. They often have a general focus on practical and business-oriented education.<sup>57</sup> Typically, they also have relatively small law units: thus, there can be a valid case of “critical mass” in combining law and business. This contrasts with the relative conservatism of the universities of the Russell Group where a high proportion of law schools stand as independent academic units with a direct relationship with the university. Yet there is no easy answer to the question why in these and other universities law has become part of a faculty of social sciences or a faculty of humanities or a joined faculty. To some extent, the age of universities may play a role because older universities may have already had a faculty of humanities before social sciences became popular in the 20th century,<sup>58</sup> but other factors, such as the size, structure and focus of the specific university, are also likely to matter, alongside the research methods employed by legal academics, as considered below.

### B. Comparison with external classifications

In addition to universities, organisations such as research councils and professional associations have been faced with the question of how to classify law. Research councils in the UK now cover the complete academic landscape, albeit with a recognition that there may be some issues at the boundaries between two or more councils.<sup>59</sup> For an individual academic unit the councils are important sources of income and of recognition, and are a distinct source of policy and of funding (i.e. alongside HEFCE and similar agencies in Scotland, Wales and Northern Ireland, which are responsible for the REF (Research Excellence Framework)<sup>60</sup> and for QR (quality-related) research funding). Law is one of the disciplines that causes difficulty as to which council should fund a given project, with the main councils in question being the Arts & Humanities Research Council (AHRC) and the

<sup>56</sup> For a recent defence of humanities Stefan Collini, *What Are Universities For?* (London 2012); similarly Anthony T. Kronman, *Education's End* (New Haven 2007) and John Henry Newman, *The Idea of a University* (London 1852). For legal education see also Anthony Bradney, *Conversations, Choices and Chances: The Liberal Law School in the Twenty-first Century* (Oxford 2003).

<sup>57</sup> Henkel, above n. 54, at p. 32.

<sup>58</sup> For this point see Gabriele Griffin, Pam Medhurst and Trish Green, *Disciplinary Barriers between the Social Sciences and Humanities, National Report on the UK*, January 2005, available at [http://www.york.ac.uk/res/researchintegration/National\\_Report\\_UK.pdf](http://www.york.ac.uk/res/researchintegration/National_Report_UK.pdf), at 16.

<sup>59</sup> See also <http://www.rcuk.ac.uk/research/xrcprogrammes/Pages/home.aspx> (for funding of “cross-council research”); a recent example (with law as a key component) is the funding of the Centre for Creativity, Regulation, Enterprise & Technology by the AHRC, ESRC and EPSRC: <http://www.create.ac.uk>.

<sup>60</sup> Formerly, the RAE. See <http://www.hefce.ac.uk/research/ref/>.

Economic and Social Research Council (ESRC)<sup>61</sup>. By way of clarification, the councils have stated that:

The AHRC supports research into the content, procedures, theory, philosophy and history of the law. This includes studies of legal systems and legislation in all periods of history and in all parts of the world. ESRC supports socio-legal studies, which are concerned with the social, political and economic influences on and impact of the law and the legal system.<sup>62</sup>

The statement in which this passage appears also considers other borderline disciplines, including area studies, education, linguistics, cultural and media studies, and even history. Nonetheless, it does not explain what the basis of distinction is, such as, the research methods employed, the scope of the research, or other points of differentiation. Looking a little closer, it can be observed that the AHRC includes law in a review panel (Panel A) alongside history, philosophy and religion, while the ESRC includes “Social Legal” in a panel with sociology, political studies and anthropology, to name but a few.<sup>63</sup>

Many disciplines are also represented by a learned society or professional association of some description.<sup>64</sup> As well as organising conferences, circulating news bulletins and issuing public statements, these organisations are called upon to represent the interests of the discipline, including for the nomination of peer reviewers for the REF. Law, however, has not one but three such associations, as well as a now-defunct Centre for Legal Education (formerly funded by the Higher Education Academy) and an association of Heads of School, CHULS. The three associations are the Society of Legal Scholars, the Association of Law Teachers, and the Socio-Legal Studies Association. The first two are different because the SLS once limited membership to scholars at established universities (thus excluding the former polytechnic institutions), so the ALT catered to the ineligible scholars. However, both organisations now welcome members from all institutions.<sup>65</sup> The SLSA presents a particularly interesting study for this article. It describes socio-legal research as:

embrac(ing) disciplines and subjects concerned with law as a social institution, with the social effects of law, legal processes,

<sup>61</sup> Previously called the Social Science Research Council (SSRC). For its history see Robert Lee, “Socio-Legal Research – What’s the Use?”, in Philip A. Thomas, *Socio-Legal Studies* (Aldershot 1997) 76.

<sup>62</sup> AHRC/ESRC Joint Statement, available at <http://www.ahrc.ac.uk/FundingOpportunities/Pages/Subjectstatement.aspx>

<sup>63</sup> Interaction with research councils has been identified as a key aspect of *discipline formation and identity*, despite the autonomy of universities regarding the *recognition or configuration* of disciplines and academic units: Griffin et al., above n. 58.

<sup>64</sup> On the importance of the learned society in the construction of the discipline, see Henkel, above n. 54, at p. 189.

<sup>65</sup> More generally on the history of the SLS see Fiona Cownie and Raymond Cocks, *A Great and Noble Occupation!': The History of the Society of Legal Scholars* (Oxford 2009).

institutions and services and with the influence of social, political and economic factors on the law and legal institutions, (...) covering a range of theoretical perspectives and a wide range of empirical research and methodologies.<sup>66</sup>

It is therefore apparent that, comparing the position of law within university structures with the external classifications of research councils and professional associations, only the latter organisations respond to the ambiguous status of law by purporting to split it into two parts – although what the two parts are is not the same between the councils and the associations, and many scholars join more than one association or apply to both research councils. This may demonstrate that, in principle, it is possible to develop substantive (albeit fairly generic) criteria for such a distinction.<sup>67</sup> Nonetheless, no UK university has attempted splitting law into two (or three) separate schools<sup>68</sup> while there are examples of law units dividing along other lines in Japan and Canada.<sup>69</sup> This raises the question about the relevance of the internal university structure for legal research, as there are competing influences on the self-identification of an individual researcher.

### *C. The influence of university structures on legal research*

The trend towards intermediate faculties, combining various schools, has been driven in part by the desire to save costs.<sup>70</sup> Yet, internal university structures do not only matter in financial terms. In the following we distinguish between more practical and more abstract aspects, while also indicating how problems may be overcome.

First, such structures can have practical consequences for the research that academics pursue. For instance, if in its integration into a faculty of social sciences the law school is re-located within a joined faculty building, this may foster communication with academics from the other schools. There can also be linkages between financial incentives and collaboration across disciplines. For example, if it is assumed that fields such as business studies are better able to generate income than humanities, this may lead to research collaborations on

<sup>66</sup> SLSA Statement, also available at [www.kent.ac.uk/nlsa/images/slsadownloads/slsaexec/minutes%2520slsa%2520e%252014.01.2010.doc](http://www.kent.ac.uk/nlsa/images/slsadownloads/slsaexec/minutes%2520slsa%2520e%252014.01.2010.doc).

<sup>67</sup> But for the problems of defining “socio-legal” see, e.g., Philip A. Thomas, “Socio-Legal Studies: The Case of Disappearing Fleas and Bustards” in Philip A. Thomas, *Socio-Legal Studies* (Aldershot 1997) 1.

<sup>68</sup> Though law schools may consist of separate departments (e.g., the School of Law at Queen Mary, University of London, consisting of the Department of Law and the Centre for Commercial Law Studies).

<sup>69</sup> For Japan see Setsuo Miyazawa, Kay-Wah Chan and Ilhyung Lee, “The Reform of Legal Education in Asia” (2008) 4 *Annual Review of Law and Social Science* 333 (division between undergraduate law faculties and postgraduate US-style law schools). For Canada see the two “sections” of the University of Ottawa’s Faculty of Law: <http://www.commonlaw.uottawa.ca> and <http://www.droitcivil.uottawa.ca/> (both of which are bilingual).

<sup>70</sup> See Section A above.

topics such as law & finance, while reducing “the exploration of life’s mystery and meaning”<sup>71</sup>. The institutional arrangements of a higher education institution can also affect research more directly. Research training may be provided to doctoral students at a faculty-wide level, something which is fostered by the ESRC funding of doctoral training centres.<sup>72</sup> Often there are research offices at the faculty level. Here, it is not unrealistic to assume that a faculty research office located in a faculty of social sciences may advise legal academics quite differently on topics such as good research (in terms of RAE/REF) and research grants than a research office located in humanities.

Second, university structures influence the status and self-identification of academics. It has been said that there are different “academic tribes and territories” closely associated with identity and accounting for disciplinary barriers between social sciences and humanities, or more generally hard and soft disciplines and pure and applied ones.<sup>73</sup> Thus, if law is housed in a faculty of social sciences or a business school, an academic like Gary Watt, who is interested in “the soul or humanity of law”, may understandably say that such a “marriage between law and the humanities (is) something of a forbidden love”.<sup>74</sup>

Of course, the benefits of collaboration between law and other disciplines are often emphasised. Transgressing disciplinary boundaries has been described as a rebellious, or even romantic, activity in the service of a greater truth.<sup>75</sup> Yet, this is easier said than done. Academic disciplines may be “intellectual silos”,<sup>76</sup> or tribes employing “devices geared to the exclusion of illegal immigrants”.<sup>77</sup> This is partly blamed on the way universities are structured: according to Becher, “if interdisciplinary specialisation is required in order to develop an innovation, the organisation of university departments often inhibits it”.<sup>78</sup>

Specifically with respect to law, there is the further complexity of the relationship to legal practice. Thus, from the perspective of the law

<sup>71</sup> Kronman, above n. 56, at p. 6.

<sup>72</sup> Accredited Doctoral Training Centres, available at <http://www.esrc.ac.uk/funding-and-guidance/guidance/postgraduates/doctoral-training-centres.aspx>.

<sup>73</sup> See Becher, above n. 11, at p. 151; Griffin et al., above n. 58; Sheldon Rothblatt, “Curriculum, Students, Education” in Walter Rüegg (ed.), *A History of the University in Europe, Volume IV*, 238, 245.

<sup>74</sup> Gary Watt, “The Soul of Legal Education” (2006) 3 Web Journal of Current Legal Issues, at <http://webjcli.ncl.ac.uk/2006/issue3/watt3.html>

<sup>75</sup> Jack M. Balkin, “Interdisciplinarity as Colonization” (1996) 53 *Washington and Lee Law Review* 949, 957. See also Douglas W. Vick, “Interdisciplinarity and the Discipline of Law” (2004) 31 *Journal of Law and Society* 163; Mathias M. Siems, “The Taxonomy of Interdisciplinary Legal Research: Finding the Way Out of the Desert” (2009) 7 *Journal of Commonwealth Law and Legal Education* 5.

<sup>76</sup> See Dame Hazel Genn, Martin Partington and Sally Wheeler, *Law in the Real World: Improving Our Understanding of How Law Works: Final Report and Recommendation* (London 2006) 2.

<sup>77</sup> Becher, above n. 11, at p. 24.

<sup>78</sup> Becher, above n. 11, at p. 136.

school, the problem may be that it has “two masters” since, at least, it has to coordinate with professional bodies in terms of teaching as well as the normal internal requirements of a university.<sup>79</sup> From the perspective of the legal profession it may be seen as a problem that it has to “compete (...) with other disciplines in the university for the attention of legal scholars”.<sup>80</sup> It has therefore be observed that there are ongoing tensions between university law schools and the legal profession on the respective roles of each, while the quality of the common law may depend on a strong relationship between legal scholars and judges.<sup>81</sup> There is also the apparent risk of a bifurcation between teaching and research, because taking account what is of interest for legal practice may be more important for the former than for the latter.<sup>82</sup>

To foster collaboration within universities, a possible way forward may be to move away from the focus on monolithic and self-contained disciplines, schools and faculties.<sup>83</sup> Rather, there may be chains and networks of mutual appreciations,<sup>84</sup> and a sliding scale of similarities ranging from some shared ground to trade relations to common frontiers.<sup>85</sup> More specifically, it has been suggested to shift from “disciplines” to “specialisations”. These specialisations would retain the benefit of division of labour, but they could be structured more flexibly, for instance, in being grouped according to theories, methods or subject matter specialities.<sup>86</sup>

In the UK, this is not merely an idea. At various universities there are interdisciplinary centres between law and (other) fields of social sciences or humanities, as well as between law schools and legal practice,<sup>87</sup> thus, again, showing the ambiguity of law’s intellectual position. However, the RAE and REF has relied on a “unit of assessment” approach, which may encourage institutions to design academic

<sup>79</sup> See Tim Vollans, “The Law School with two Masters?” (2008) 2 Web Journal of Current Legal Issues, available at <http://webjcli.ncl.ac.uk/2008/issue2/vollans2.html>.

<sup>80</sup> Janet Gail Donald, “The Commons: Disciplinary and Interdisciplinary Encounters” in Carolin Kreber (ed.), *The University and its Disciplines: Teaching and Learning Within and Beyond Disciplinary Boundaries* (Abingdon 2009) 35, 41.

<sup>81</sup> For the first point see Fiona Cownie, “Contextualising Stakeholders in the Law School” in Fiona Cownie (ed.), *Stakeholders in the Law School* (Oxford 2010) 1, 9. For the second one Alexandra Braun, “Professors and Judges in Italy: It Takes Two to Tango” (2006) 26 *Oxford Journal of Legal Studies* 665, 666–670.

<sup>82</sup> Collie, above n. 55 at p. 530. See also Thomas, above n. 67, at p. 17 (most legal scholars try to link their fields of teaching and research, according to a survey).

<sup>83</sup> On the challenge to the discipline as the “primary form of epistemological organisation for the development and regulation of advanced knowledge”, see Kenkel, above n. 53, at 85. See also Geoffrey Lockwood, ‘Management and Resources’, in Walter Rüegg (ed.), *A History of the University in Europe, Volume IV*, 124, 131.

<sup>84</sup> Michael Polanyi, “The Republic of Science: Its Political and Economic Theory” (1962) 1 *Minerva* 54.

<sup>85</sup> Becher, above n. 11, at p. 36.

<sup>86</sup> See Becher, above n. 11, at pp. 44–48.

<sup>87</sup> See, e.g., <http://www.uea.ac.uk/ccp>, <http://www.bbk.ac.uk/law/our-research/centre-for-law-and-the-humanities>, and <http://www.londonmet.ac.uk/depts/lgir/research-centres/centre-for-family-law-and-practice/>.

units that match REF units,<sup>88</sup> and law remains a discrete unit of assessment for the forthcoming REF 2014.

#### IV. MICRO-LEVEL: IDENTIFYING PREFERENCES OF LEGAL ACADEMICS

Legal research is subject to a range of competing influences. These concern the university structures, research councils and professional associations, discussed in the previous part, as well as other factors, such as the influence of heads of schools and other senior academics in steering early career colleagues in a particular direction. Yet, the individual researcher is not wholly dependent on these structures. It is therefore also necessary to identify more precisely how at the “micro-level” individual legal academics respond to the perspectives of law as a practical discipline, law as humanities, and law as social sciences. The first section of this part outlines previous research on this issue. Subsequently, we suggest that a ternary plot can be a useful conceptual tool to show individual, and often mixed, preferences of legal academics. Finally, we use such a plot to compare (based on literature) the development of UK legal scholarship with that in the US and Germany, also returning to the relationship between the macro- and micro-level (faculty structure compared with the preferences of individual academics), and consider possible future paths for the UK.

##### *A. Studies on the affinity of contemporary legal research*

This article is not the first one which tries to identify the predominant approach to current legal research. There are different ways how this question can be approached. To illustrate, three examples (from England, the US and the Netherlands) will be provided.

Based on interviews, Fiona Cownie examined the culture and identity of legal academics at English universities. In her approach she was inspired by Tony Becher’s book on academic tribes and territories which explored the linkages between academic cultures (“tribes”) and disciplinary knowledge (“territories”) in twelve academic disciplines.<sup>89</sup> One chapter of Cownie’s book deals with the preferred research methods of legal scholars, distinguishing between black-letter law, socio-legal studies, critical legal studies, and legal feminism.<sup>90</sup> Her main finding is that about half of the respondents described themselves as black-letter lawyers and the other half as belonging to one of the other approaches. Cownie also reports that many academics mix approaches, and that there is a gradual move away from pure black-letter law.

<sup>88</sup> Henkel, above n. 54, at p. 122.

<sup>89</sup> Becher, above n. 11. See now also Tony Becher and Paul Trowler, *Academic Tribes and Territories: Intellectual Enquiry and the Culture of Disciplines* 2<sup>nd</sup> edn, (Buckingham 2001).

<sup>90</sup> Fiona Cownie, *Legal Academics* (Oxford 2004) 49–72.



Furthermore, Cownie finds that the shift of research paradigms is not without problems. The desire to engage with more interdisciplinary work is often challenged by the way lawyers are trained in the British tradition.<sup>91</sup> With respect to the output of their research, some academics regret that the Research Assessment Exercises (RAEs) have meant that descriptive research, such as publications and textbooks intended for use by legal practitioners, are increasingly regarded as second rank activity.<sup>92</sup> Overall, Cownie observes that legal academics are somewhere in a no man's land, with minimal contact with academics from other disciplines and with members of the legal profession.<sup>93</sup>

Robert Ellickson took a different approach; his work includes a statistical analysis of US law review articles, for the purpose of examining the use of particular legal methods between 1982 and 1996.<sup>94</sup> A much wider range of methods were analysed, namely doctrinal, law & economics, critical, postmodern, feminist, empirical, socio-legal, historical, psychological, philosophical and civic republicanism. In order to establish the prevalence of these methods, key words or phrases were used as proxies. Ellickson's main finding was that there has been only little decline in doctrinal analysis, a modest rise in law and economics, and a boom and subsequent bust in critical approaches. He also examined the mainstream journals of the five leading law schools (Chicago, Columbia, Harvard, Stanford, and Yale) but the results were very similar.

Ellickson comments that the stable ratio between doctrinal research on the one hand and law and economics on the other may be regarded as a surprise. There is no denying that law and economics has gained in significance from the 1960s to the early 1980s.<sup>95</sup> Yet, even in the interdisciplinary climate of US legal scholarship, practical legal research remains a significant player. Thus, the complaint raised by judge Harry Edwards that academics of US elite law schools are intrinsically disdainful of the practice of law<sup>96</sup> seems to be an exaggeration.

A quantitative approach is also used by Hervé Tijssen in examining the approaches of 90 Dutch law PhD theses.<sup>97</sup> In particular, Tijssen was

<sup>91</sup> Ibid., at p. 66.

<sup>92</sup> Ibid., at p. 136. See also Fiona Cownie, "The Death of the Textbook Tradition" (2006) 3 European Journal of Legal Education 79.

<sup>93</sup> Cownie, above n. 90, at p. 198. In addition, there is the risk of factional disputes see also *ibid.*, at p. 59 ("The existence of those fundamentally different approaches to law clearly brings with it the possibility of conflict between legal academics, of a kind which is not unknown to law schools.").

<sup>94</sup> Robert C. Ellickson, "Trends in Legal Scholarship: A Statistical Study" (2000) 29 Journal of Legal Studies 517.

<sup>95</sup> See William Landes and Richard Posner, "Heavily Cited Articles in Law" (1996) 71 Chicago-Kent Law Review 825; Richard Posner, "The Decline of Law as an Autonomous Discipline: 1962–1987" (1987) 100 Harvard Law Review 761.

<sup>96</sup> Edwards, above n. 12, at p. 35.

<sup>97</sup> Hervé Tijssen, *De Juridische Dissertatie Onder de Loep: De Verantwoording van Methodologische Keuzes in Juridische Dissertaties* (PhD Thesis Tilburg, 2009), available at <http://arno.uvt.nl/show.cgi?fid=94878>.

interested in how well the authors justify their research problem, the selected sources and the methods used. With respect to methods, his main criteria are document analysis, historical study, other types of desk research, interviews, questionnaires and experiments. The overall result is that most of the PhD theses explain the research problem but do not justify the sources selected and the methods used in sufficient detail.<sup>98</sup> Tijssen also shows that a number of interesting distinctions can be drawn. Empirical research is better in justifying its method and sources than what he terms “classical” legal research. Similarly, distinguishing between five fields of study, interdisciplinary theses provide better justifications than theses on private law, public law, criminal law and international law. As far as authors use comparative methods, the choice of countries but not the method of comparative analysis tends to be sufficiently explained.

Cownie, Ellickson and Tijssen use classifications of research methods which are not identical to the three main categories of this article;<sup>99</sup> yet, overall, they confirm our approach since many of the former classifications can be regarded as sub-categories of our main categories: for instance, law and economics, socio-legal and empirical legal studies are part of law as social science; critical, post-modern or historical approaches would typically belong to law as humanities; and – in the context of a civil law tradition – “classical” legal research incorporates practical and humanities-related aspects<sup>100</sup>.

However, a problem with these three studies can be observed: legal academics often tend to mix approaches. For instance, it is not uncommon that a legal researcher starts with an historical introduction, then turns to an analysis of the relevant case law and finally engages with socio-political considerations. The following section presents a conceptual tool that allows for this problem to be addressed.

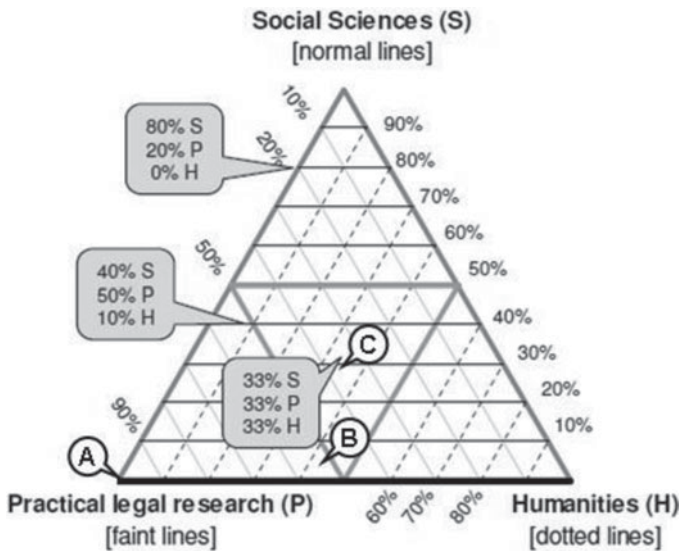
### *B. Showing preferences with a ternary plot*

The Cartesian coordinate system (with X and Y axes) works well when only two variables are of interest. When there are three variables, it is possible to plot them on a three dimensional Cartesian coordinate system; yet, it is difficult to visualise the precise values of the third dimension on a two-dimensional object such as a piece of paper or a computer screen. Thus, when the values of the three variables add up to 100%, a ternary plot (also called a Finetti diagram) is a better tool to show the relationship between the three components.

<sup>98</sup> Similar, for UK scholarship, McCrudden, above n. 7, at p. 646: “legal academics, in my experience at least, seldom appear to talk about methodology in the context of their research, whereas other social scientists often place particular importance on methodological issues”.

<sup>99</sup> See Part II above.

<sup>100</sup> For Germany, see Section C below.



**Figure 3:** Ternary Plot Showing Individual Research Preferences

Ternary plots are relatively common for scientific observations (e.g., the relative presence of three elements in a sample) and they are occasionally also found in other disciplines.<sup>101</sup> With respect to law, few examples are available, including an article by Ugo Mattei who suggests that legal systems can be plotted on such a diagram in terms of their affinity to representing the rule of traditional, political and professional law,<sup>102</sup> and a book by Werner Menski where the diagram illustrates the relationship between state, society and ethics.<sup>103</sup>

We propose that a ternary plot can be used to show the “balance” between the three approaches we and others have suggested are the main categories of legal research. Figure 3 provides an example of how a ternary plot can visualise how far legal academics are more inclined to practical legal research, law as humanities, or law as social sciences. A corner point represents 100% at the category in question, with the line opposite the point representing 0%. For instance, someone who regards himself as belonging 80% to law as social science and 20% to law as practical legal research, would be plotted at the cross between the 80% social science line, the 20% practical legal research line, and the 0% humanities line. Someone whose interests are equally split would be at

<sup>101</sup> David Cesarini et al, “Heritability of Cooperative Behavior in the Trust Game” (2008) 105 PNAS 3721–3726 (on genetic, shared environment and unshared environment in the context of trust).

<sup>102</sup> Ugo Mattei, “Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems” (1997) 45 *American Journal of Comparative Law* 5, 44.

<sup>103</sup> Werner Menski, *Comparative Law in a Global Context* 2<sup>nd</sup> ed. (Cambridge 2006), 185.

the centre of the triangle. Figure 3 also includes a reverse smaller triangle inside the larger one. The borders of this triangle are the three 50% lines. Thus, being inside this inner triangle shows someone with mixed research methods since none of the three approaches reaches the overall majority.

In contemporary UK legal academia most scholars fall within this inner triangle. At its very origins, of course, English law (and, for most parts, Scots law) evolved as a practical discipline outside universities, and as such would fall close to the point A in Figure 3. But this gradually changed in the late 19th and early 20th century.<sup>104</sup> Here, the dominant paradigm was initially that of “exposition, conceptualisation, systematisation and analysis of existing legal doctrine”.<sup>105</sup> This moved legal scholarship into the direction of humanities,<sup>106</sup> for instance closer to point B, though also keeping a practical dimension to legal scholarship and teaching.<sup>107</sup> But since the early 1960s the social sciences also had an impact on UK legal scholarship. The emergence of socio-legal, socio-legal and other interdisciplinary forms of legal research has been well documented.<sup>108</sup> Of course, there has also been resistance:

The centrality of private-law, legal doctrine, courts and cases was strenuously defended for its practical and educational virtues, and for its objectivity, and it was claimed that the development of the social sciences threatened objectivity and law’s singular claims to respect.<sup>109</sup>

All this means that today legal scholarship in the UK can be positioned as in-between the three categories, around point C in Figure 3. For example, conceptual research by Christopher McCrudden and William Twining found that “legal research now embraces a pluralism of methodological approaches” and that “(t)oday, academic law is pluralistic, involving a bewildering diversity of subject-matters, perspectives, objectives and methods”.<sup>110</sup> Empirical research points in the same direction: Becher’s work from the mid-1980s distinguished between

<sup>104</sup> See Section III C above.

<sup>105</sup> David Sugarman, “Legal Theory, the Common Law Mind and the Making of the Textbook Tradition”, in William Twining (ed.), *Legal Theory and Common Law* (Oxford 1986) 26, 31. See also Dicey, above n. 40, at p. 18: the task of law professors is to set forth law as a coherent whole.

<sup>106</sup> For the nature of doctrinal research see text accompanying n. 15, above.

<sup>107</sup> See William T.S. Stallybrass, “Law in the Universities” (1948) 1 *Journal of the Society of Public Teachers of Law* 157, 160 (advocating for a shift from “education for Law” to “education in Law”).

<sup>108</sup> See, e.g., C. M. Campbell and Paul Wiles, “The Study of Law in Society in Britain” (1975–76) 10 *Law and Society Review* 551; Roger Cotterrell, *Law’s Community* (Oxford 1995) 71–90 (on sociology of law in Britain); Anthony Ogus, “Law and Economics in the United Kingdom: Past, Present, and Future” (1995) 22 *Journal of Law and Society* 26.

<sup>109</sup> David Sugarman, “Beyond ignorance and complacency: Robert Stevens’ journey through Lawyers and the Courts” (2009) 16 *International Journal of the Legal Profession* 7, 20.

<sup>110</sup> McCrudden, above n. 7, at p. 642.; Twining, above n. 13, at p. 123. See also William Twining, *Law in Context: Enlarging a Discipline* (Oxford 1997), 338–9: “legal scholarship today is generally more varied, more lively, more sophisticated, and more self-confident (...) than fifty years ago”.

convergent and divergent academic disciplines. A convergent discipline has a “tightly knit community” whereas a divergent one tolerates “a greater measure of intellectual deviance”. Law was seen as being in the intermediate ground due to the divide between black letter law and more contextual approaches.<sup>111</sup> Cownie’s more recent research,<sup>112</sup> as well as our own pilot study at a medium-sized law school where none of the three categories of this paper turned out to be dominant,<sup>113</sup> reaches similar conclusions. As for the future, there are concerns that university legal education and scholarship may be “transformed into an industry preoccupied with economic rationalism, efficiency and the generation of income”.<sup>114</sup> In addition, it needs to be discussed whether and how foreign models of legal scholarship may have an impact, which we will do in the next section.

### C. Comparison with developments in the US and Germany

The ternary plot used in this section (Figure 4, below) illustrates how legal thinking has evolved in the UK, the US and Germany. UK developments were considered in the previous section: law started as a practical discipline and moved then closer to other academic fields, first humanities and subsequently the social sciences. Some of these trends can also be found in the US and Germany but there are also important differences.

The initial historical development of US legal thinking can be regarded as similar to the UK one: starting from an affiliation with legal practice, but subsequently influenced by humanities and social sciences. Yet, throughout the 20<sup>th</sup> century the US has moved further in the direction of social sciences, with the first main trends being legal realism, law and society, but now predominantly law and economics and empirical legal studies.<sup>115</sup> These approaches have also had some impact on UK legal scholarship, for instance, through academics spending parts of their careers in the US.<sup>116</sup> But differences remain: for instance, Susan Bartie contends that today “the main point of distinction is that in America there is a growing band of scholars who proclaim that the discipline can abandon its link with the profession and should boldly shape its interdisciplinary studies to meet broader conceptions of the law”.<sup>117</sup>

<sup>111</sup> Becher, above n. 11, at p. 156.

<sup>112</sup> See Section A above.

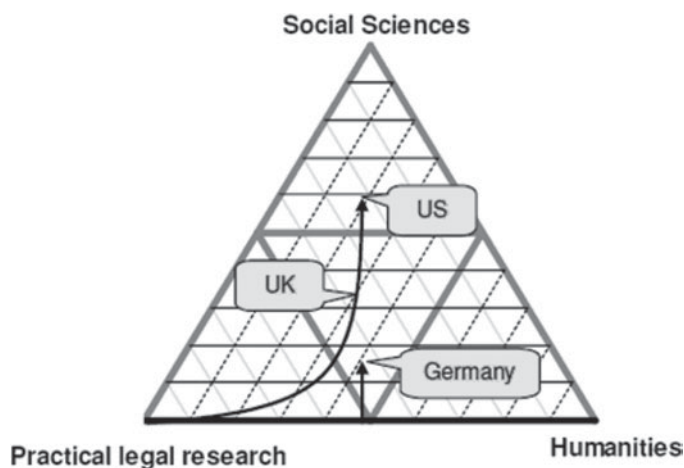
<sup>113</sup> The pilot study is available at <http://ssrn.com/abstract=2097698>.

<sup>114</sup> Collier, above n. 55, at p. 534.

<sup>115</sup> For an anthology see David Kennedy and William W. Fisher (eds.), *The Canon of American Legal Thought* (Princeton 2006). See also Anthony T. Kronman, *The Lost Lawyer* (Cambridge, Mass. 1993) and the references above n. 27–29 and 94–96.

<sup>116</sup> See David Sugarman, “A special relationship? American influences on English legal education, c. 1870–1965” (2011) 18 *International Journal of the Legal Profession* 7.

<sup>117</sup> Bartie, above n. 10, at p. 367.



**Figure 4:** Illustration of Development of Legal Thinking in Three Countries

Legal thinking in Germany offers a striking contrast. Starting with the reception of Roman law, law was part of university-based teaching and research. However, it was, and still is, also deeply practical, with law professors having had an influence on both law-makers and courts.<sup>118</sup> Thus, for centuries law was firmly located in-between practical legal research and humanities. To illustrate, Hermann Kantorowicz' famous manifesto on the "Struggle for Legal Science" criticised in vain that the "dogmatic" nature of legal research in Germany was similar to orthodox theology: accepting authority while trying to develop a coherent normative structure.<sup>119</sup> The emergence of social sciences in the late 19th and 20th century had some impact on legal thinking, in particular in constitutional, administrative and competition law.<sup>120</sup> Yet, in contrast to the US, changes have been very modest, for instance, in terms of the limited impact of law and economics.<sup>121</sup>

<sup>118</sup> See, e.g., Stefan Vogenauer, "An Empire of Light? Learning and Lawmaking in the History of German Law" [2005] *Cambridge Law Journal* 481; Michael Bohlander, "Radbruch Redux: The Need for Revisiting the Conversation between Common and Civil Law at Root Level at the Example of International Criminal Justice" (2011) 24 *Leiden Journal of International Law* 393, 405 (emphasising the similarity between academic and judicial methods in Germany).

<sup>119</sup> Hermann Kantorowicz (Gnaeus Flavius), *Der Kampf um die Rechtswissenschaft* (Baden-Baden 2002 [originally published 1906]).

<sup>120</sup> See also Briggs, above n. 49, at p. 480 (*Staatswissenschaft* as including constitutional and public law, political economy, administration and fiscal science).

<sup>121</sup> See Martin Gelter and Kristoffel Grechenig, "The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism" (2008) 31 *Hastings International and Comparative Law Review* 295; Mathias Siems, "A World Without Law Professors" in Mark Van Hoecke, *Methodologies of Legal Research* (Oxford 2011) 71.

Comparing the UK with the US and Germany, one may wonder how this is related to the “macro-level”, i.e. the structure of universities. It was found above that in the UK, there is a trend to create faculties of humanities and/or social sciences at the intermediate level combining various schools, including law.<sup>122</sup> Something similar is neither happening in the US, where law schools are separate postgraduate institutions, nor in Germany where only few universities have multi-disciplinary faculties.<sup>123</sup> Yet in US law schools (but not in German law faculties), interdisciplinary research has become the norm. Thus, it seems that the creation of joined faculties may not matter that much for collaboration across disciplines. Rather, with respect to the US, the fact that US law professors tend to have one or more degrees in disciplines other than law may well have played a role. This is rare in Germany and the UK where, conversely, the academic staff of law schools tends to have more extensive legal qualifications, be it at the professional level or a doctorate in law.<sup>124</sup>

However, there is also an important difference between Anglo-Saxon and continental European universities. In their comparative report on disciplinary barriers between social sciences and humanities, Nicky Le Feuvre and Milka Metso write about Anglo-Saxon universities:

In this model, the universities tend to be organised according to a ‘problem-solving’ logic. There is, in theory at least, quite a lot of room for interdisciplinarity, since the expertise of the academic community and its ability to communicate with a vast range of social actors tends to be evaluated on the basis of their capacity to address and, if possible, solve a certain number of ‘social problems’.<sup>125</sup>

For UK law schools, and legal academics, the question may now be whether to “go American” in moving closer to social sciences, or “go German” in remaining closer to both humanities and legal practice. The Europeanisation of legal education and research may point to the direction of Germany; yet, realistically, legal thinking in most countries is moving in the American direction.<sup>126</sup> In terms of law’s evolution, this

<sup>122</sup> See Section III A, above.

<sup>123</sup> Few universities (e.g., Bonn) still have Faculties for *Staatswissenschaften* (see above n. 120), and even fewer (e.g., Lüneburg) have Faculties for Social Sciences.

<sup>124</sup> For the UK see Leighton et al., above n. 2, at pp. 19–20 (large-scale study found that in 1995 almost half of all law teachers, including university degrees and professional courses, has significant experience of legal practice); SLSA discussion, (2011) 64 Socio-Legal Newsletter 4–5 (on the impact of the development of the PhD as an entry qualification on the type of legal research carried out in law schools). Different still Becher, above n. 11, at p. 108 (in the early 1980s in one of the leading law faculties only 5 out of 32 staff were Ph.D. graduates).

<sup>125</sup> Nicky Le Feuvre and Milka Metso, *Disciplinary Barriers between the Social Sciences and Humanities, Comparative Report, The Impact of the Relationship between the State and the Higher Education and Research Sectors on Interdisciplinarity in Eight European Countries*, June 2005, 11.

<sup>126</sup> See, e.g., Haim Sandberg “Legal Colonialism – Americanization of Legal Education in Israel” (2010) 10/2 Global Jurist art. 6, available at <http://www.bepress.com/gj/vol10/iss2/art6>.

may be the final paradigm shift: having started with a practical approach, and having “flirted” with humanities, the social sciences may prove an eventual disciplinary consensus, turning law into a mature science.<sup>127</sup>

However, one also needs to be aware of the implications of such a development. The choice between one of the three approaches can be thought as depending on the nature of one of three threats:<sup>128</sup> if legal scholars fear that academic legal research becomes irrelevant for lawyers, they may want to return to practical legal studies; if they regard current and past approaches as too sterile, they may favour a shift towards humanities; and if legal research is felt to be not scientific enough, empirical approaches of the social sciences seem to be the way forward. Thus, individual legal researchers face the trilemma that favouring any of the three approaches may lead to accusations of being too impractical, shallow or unscientific.

It is also important to consider that the broad academic traditions of humanities and social sciences have distinctly different ways of thinking and reasoning. For instance, an analysis of textual practices found that humanities scholars tend to emphasise individual variations, whereas social scientists aim for general explanations.<sup>129</sup> There are also differences in what is regarded as good and original research: whereas humanities tend to value originality in approach and data, social scientists care more about originality in method,<sup>130</sup> often requiring special skills and training.<sup>131</sup> Thus, since moving ever closer to social sciences would require adherence to this new and more uniform paradigm, legal academics may well feel that they do not want to give up the current pluralism to the way legal research is and can be conducted.

## V. CONCLUSION

Most UK law schools have identified research as a key part of their mission, recruiting and promoting staff with research performance as a key criterion, and pointing to results of the past RAE (and in future the REF) to demonstrate the success or status of the school. Universities develop research at the level of the permanent academic staff but also

<sup>127</sup> For the evolution of disciplines see Becher, above n. 11, at pp. 10, 21, 68. The original idea of paradigm shift is Thomas S. Kuhn, *The Structure of Scientific Revolutions* 2nd ed. (Chicago 1970).

<sup>128</sup> We thank Chris Hanretty for pointing us towards this problem.

<sup>129</sup> See Susan Peck MacDonald, *Professional Academic Writing in the Humanities and Social Sciences* (Carbondale, Ill. 1994). For law see Douglas M. Coulson, “Legal Writing and Disciplinary Knowledge-Building: A Comparative Study” (2009) 6 *Journal of the Association of Legal Writing Directors* 160.

<sup>130</sup> See Joshua Guetzkow, Michèle Lamont, and Grégoire Mallard, “What is Originality in the Humanities and the Social Sciences” (2004) 69 *American Sociological Review* 190 (based on interviews).

<sup>131</sup> For problems facing legal researchers see, e.g., Genn et al, above n. 76; Lee Epstein and Gary King, “The Rules of Inference” (2002) 69 *University of Chicago Law Review* 1.



through contract research staff and postgraduate research students, and institutional arrangement such as research centres and research support offices.

Yet legal research faces the challenge that its conceptual nature and its position within the context of university disciplines are not entirely clear: should law be thought of as a practical discipline, is it part of humanities, or part of social sciences? In this article we have presented a fresh picture of what legal research is (or could be), distinguishing between “micro” and “macro” aspects, and discussing the relationship between those. At the “micro-level”, the situation of current legal research can be described as mixed since all three types are common in UK academia, and often also within the research of individual academics. Thus, much appears to be left to personal choice. Normatively, this can also be supported by the concept of academic freedom<sup>132</sup> and the apparent advantages of academic tolerance in allowing, or even encouraging, plurality of methods.<sup>133</sup>

But adding the “macro-level” to the picture complicates the position. Law is a discipline that does not fall squarely in a particular category. This can have profound practical consequences. For instance, a law-as-a-practical-discipline researcher may find it difficult to convince the funding organisations of humanities and social sciences (ie the AHRC and ESRC) that her research is worth pursuing. A law-as-humanities researcher who is based at a faculty of law and business may feel that her type of research is not duly appreciated, for instance, in the making of decisions about promotion and REF submission. And a law-as-social-sciences researcher based at a law school which is not part of a faculty of social sciences may feel that she does not get adequate the support, for instance, for fieldwork or statistical work, and doctoral students with an interest in this approach may choose institutions where training in social science methods is readily available.

Of course, legal researchers can also shift between different types of research. For example, someone whose research is both related to humanities and social sciences may decide strategically whether the AHRC or the ESRC provides more funding and higher success rates for bids on research grants.<sup>134</sup> Such a researcher may also want to know more precisely which projects conducted by legal academics have received funding in the past. Unfortunately, the current search tools of

<sup>132</sup> Bradney, above n. 56, at pp. 123–6. See also Collier, above n. 55.

<sup>133</sup> As explained in Siems, above n. 7, at p. 148.

<sup>134</sup> See, e.g., the 2011/12 data of the AHRC and ESRC annual reports for research grants (including early career, speculative and small research grants), available at <http://www.esrc.ac.uk/publications/annual-report/index.aspx> (p. 35) and <http://www.ahrc.ac.uk/News-and-Events/Publications/Pages/Annual-report-and-accounts.aspx> (p. 78): AHRC: 307 applications, 82 grants awarded (i.e. success rate 27%); amount awarded circa £29.7m ESRC 779 applications, 108 grants awarded (ie success rate 14%); total amount awarded circa £26.7m.

the research council websites do not provide such information since it is not possible to search according to departmental affiliation. However, it is interesting to see that the Department for Business, Innovation and Skills (BIS) has asked the research councils to develop a new web based “Gateway to Research” that has the aim to provide “ready access to Research Council funded research information and related data”.<sup>135</sup>

Having compared the UK with the US and Germany, we have also seen that the preferences of individual researchers may well diverge from university structures. This section of our article has also shown that law as an academic tradition has been constantly evolving. At the moment, legal research in the UK may still be in a transitional phase, with some trend to move further to a social science model dominant in the US. What is more, the world of universities is changing with higher education and research increasingly becoming globalised and commercialised.<sup>136</sup> It can be expected that developments in this area will also have an impact on both the “macro” and the “micro” level of legal research, though in which precise direction legal research is to evolve remains to be seen.

<sup>135</sup> See <http://www.rcuk.ac.uk/research/Pages/gtr.aspx>. An example of this data can be found (for selected ‘subject areas’ such as regenerative medicine) at <http://bis.clients.talis.com>

<sup>136</sup> Becher and Trowler, above n. 89, at pp. 8–9.