The epistemological status of law

Julian Hermida[1], Laura Quintana[2]

ABSTRACT

The article discusses the epistemological status of law. From an epistemological perspective, law is a science, as members of the legal community are engaged in the same social practices as other scientific communities, which falls within the concept of science held by the French tradition of historical epistemology. The methods used in the legal disciplinevary according to the different epistemological contexts. Like in other sciences, in the context of discovery, theorists use a wide variety of methods. Inthe context of justification, the community of legal scholars and researchers use a hermeneutical approach known as the doctrinal legal method to validate the production of legal knowledge. In the context of application, legal practitioners use theso calledlegal method, consisting of deriving conclusions from legal norms through deductive reasoningin order to predict the outcome of a court decision or to determine how a court ought to rule in a case.

Keywords: Epistemology; law, science; legal method

RESUMEN

El artículo analiza el estatuto epistemológico del derecho. Desde una perspectiva epistemológica, el derecho es una ciencia, ya que los miembros de la comunidad jurídica participan de las mismas prácticas sociales que otras comunidades científicas, lo que se enmarca dentro del concepto de ciencia sostenido por la escuela francesa de epistemología histórica. Los métodos utilizados en la disciplina jurídica varían según los diferentes contextos epistemológicos. Como en otras ciencias, en el contexto del descubrimiento, los teóricos utilizan una amplia variedad de métodos. En el contexto de la justificación, la comunidad de juristas e investigadores utiliza un enfoque hermenéutico conocido como doctrina jurídica para validar la producción de conocimiento jurídico. En el contexto de la aplicación, los profesionales del derecho utilizan el llamado método dogmático, que consiste en derivar

[1] Professor of Law, Algoma University (Sault Ste. Marie, Canada) & UFLO Universidad (Buenos Aires, Argentina). Doctor of Civil Law (DCL), Master of Laws (LL.M), McGill University (Montreal, Canada). julian.hermida@algomau.ca. 1520 Queen Ste. East, Sault Ste. Marie, ON, Canada.

[2] Professor of Psychology, UCES (Buenos Aires, Argentina). lquintana@uces.edu.ar. Paraná 817, Buenos Aires, Argentina.

conclusiones de las normas legales a través del razonamiento deductivo para predecir el resultado de una decisión judicial o para determinar cómo un tribunal debe fallar en un caso concreto.

Palabras claves: Epistemología; derecho; ciencia; método legal

I. Introduction

The debate about whether law is a science or not is still unsettled among scholars in both epistemology and law. For many, particularly those who subscribe to empirical and positivist epistemological conceptions of science, law is not a science (Markey, 1984). However, many legal scholars hold that law is a science and that it has a distinct method, which shares many of the features of the scientific method of empirical sciences (Langdell, 1870).

The objectives of this article are twofold. First, the goal is to discuss the epistemological status of law as a science. Second, the goal is to identify the method or methods used in the legal discipline.

Even though law as a discipline is quite diverse, at least, in common law and civil law jurisdictions, law can be considered a science. Law has distinct methods, which depend upon the different epistemological contexts.

II. Critiques of the scientific status of law

Both legal professionals and epistemologists, many of whom are enrolled in the positivist tradition of science, have criticized the proposition that law is a scienceon a wide array of diverse grounds.

Some reject the scientific status of law by arguing that law is a branch of practical reason (Kronman, 1985, Perelman, 1980). Other scholars find that law is an art, either the art of argumentation (Fidel & Cantoni, 2004) or the art of social governance by rules of conduct (Posner, 1988). Others emphasize the fact that the law "has remained Aristotelian, while science has built up a new world of analyzed, systematized, and recorded facts (Morse 1923). The scientific status of law has also been discarded for the reasons that law is a normative phenomenon (Roos, 2014), a social ordering instrument (Fuller, 1975), a body of applied learning (Cowan, 1948) or a product of custom, legislation, and judicial development (Roos, 2014). It has also been rejected for being pragmatic, i.e., for being a set of principles and maxims that aim to clarify concepts and hypotheses and to identify and solve disputes (Morse, 1923).

Popper's followers have also refused to recognize law as a science by virtue of the normative character of law (O'Connor, 1995). For positivists, norms are not susceptible of being falsified because their nature is not descriptive but prescriptive, i.e., they are not formulations that refer to explanations about the world, but rather formulations about how people's behavior ought to be in the world (Escobar-Jiménez, 2018).

The interpretations of Thomas Khun's epistemological postulates (Vann Spruiell, 1983) consider the law to be in the pre-paradigmatic phase, i.e., the stage prior to the development of normal science where there is a state of confusion; and different ideas compete with each other (Khun, 2012).

Most of the critiques of the lack of scientific status, however, revolve around the fact that law does not follow the scientific method (Harvey, 1944). According to these critiques, the legal method consists of finding justifiable solutions for a particular case by exploring general principles and rules and by proper argumentation of these solutions (Maczonkai, 2015). For these scholars, the legal method does not meet the requirements to be considered scientific, as it does not coincide with the representation that these critics have of the method followed

by scientists. According to Harvey (1944), "law is not a science at all. There is no analogy between the lawyer's study and the laboratory. Law does not discover new elements or principles, or put new instruments or knowledge at the service of humanity".

Other authors who reject the scientific status of the law even advocate for the supremacy of law and its values over science, as they consider science and the scientific method be a threat to the transcendental ethical values of law (Markey, 1984).

All these criticisms of the non-scientific nature of law share a positivist and empiricist view of science and ignore that sciences lack a common structure (Feyerabend, 2010) and that they are a human product that depends on the historical, cultural, and social context in which they emerge and develop (Chalmers, 2015). Furthermore, these criticisms ignore the fact that these positions also reflect an attempt to impose the method that scientists believe they use in the natural sciences on to other disciplines (Bourdieu, 2008). Likewise, these positions ignore the fact that there are no criteria which will permit a clear differentiation between science and non-science (Follari, 2007). Furthermore, there are no epistemologicalcriteria whichall sciences possess and that are exclusive to them. At the same time, these critiques distort the legal method, presenting it as a process that does not allow for external controland where legal professionals come up with arbitrary interpretations to advance their clients' interests (Bowman, 2002).

III. Science as institutionalized social practices

According to the French tradition of historical epistemology (Althusser, 1999, Bachelard, 2002, and Bourdieu, 2008) and to some central aspects of Thomas Khun's contributions (2012), science can be conceptualized on different considerations than those sustained by empiricists and positivists. Thus, a discipline is considered scientific when the members of a disciplinary community, grouped around a common paradigm (Khun, 2012) or a research tradition (Laudan, 1978), recognize their disciplinary practice as scientific and engage in institutional social practices that members of other scientific communities also take part in, such as research, communication of results through peer-reviewed publications, participation in conferences, and university teaching, among others. Follari (2007) adds the recognition of other scientific communities, although he admits that this social recognition is a flexible criterion that would be fulfilled with the recognition of some –and not necessarily all– scientific communities. In this way, science –even the natural sciences– is a social construction; and scientific knowledge is conquered, constructed, consented, and epistemologically watched (Bourdieu, 2008), which implies an epistemological break with previous knowledge (Bachelard, 2002).

IV. Law as a science

Clearly, law meets all of the above mentioned elements of the notion of science. First, law has a well-defined community of legal scholars made up of faculty members, researchers, authors, and even some legal practitioners who see law as scientific.In effect, there is a long history of scholars who have held that law is a science (Mayesem, 1833). These go from Bacon, who argued that law was "a science much like astronomy or chemistry and was susceptible to the application of reason and the new scientific method" (Hoeflich, 1986), to present-day jurists who see their every day research and jurisprudential scholarship as scientific (Holtermann & Madsen, 2020).

Furthermore, law and legal scholarsplayed a pivotal role in the creation and expansion of modern science. Many of those who contributed to the creation of modern science were also jurists who were influential in the construction of the modern legal paradigm that emphasized the application of reason to solve legal problems in the same way as other –natural– sciences (Hoeflich, 1986).

Additionally, there are literally thousands of associations devoted to the research of law around the world. Most of these associations, together with university law departments, faculties of law, and law schools, organize conferences and congresses, and run peer-reviewed journals devoted to the publication of research findings and essays on legal scholarship. Law has also been taught at the higher education system since its inception, even long before the emergence of most other sciences. In effect, the modern university emerged in the XI century in Western Europe with the creation of the University of Bologna in Italy, which incorporated the teaching of both cannon law and civil law. Since then, virtually all prestigious universities around the globe have included the teaching of law (Axtell, 2016). Legal research in and the production of legal knowledge also have a very long and rich tradition, which dates back several millennia. For example, research about Roman law began centuries ago and continues even today. In the last centuries, legal research and scholarship have grown exponentially and are regarded as hallmarks of progress within members of the academic legal profession.This shows both a certain recognition of other scientific disciplines, and, at the same, a demarcation of boundaries with other disciplines in the production of scientific knowledge.

All this clearly shows that law has all the elements that constitute a science according to the notion of science that derives from the French tradition of historical epistemology, i.e., the recognition of the scientific character by its own members, the realization of certain institutional social practices, an epistemological break with non-legal knowledge, and epistemological watch.

V. The scientific method

Before delving into the discussion of the methods used in law, it is necessary to make certain clarifications about the scientific method that is allegedly used in the natural sciences. First, no scientist actually follows the so-called scientific method, which is supposed to consist of observing facts from a neutral and objective perspective, then inductively deriving theories from those facts and, finally, deducing predictions and explanations (Gower, 1997). This is so, among other factors, because it is not humanly possible to observe facts without a prior theory. The history of philosophy of knowledge is the history of the tension between those who argue that we can experience the world through our senses and those who believe that it is not possible, as our senses are not reliable (Lupyan, 2017). While this debate will probably never be settled definitively, there is enough evidence that shows that our prior knowledge, whether innate or acquired, influences our sense perception (Chalmers, 2015). Second, neither inductive nor deductive logic can guarantee real, valid, and true conclusions (Chalmers, 2015). The former cannot discard the possibility that a new fact (observation statement) will not conflict with the conclusion (law). Additionally, the validity of an inductive argument ultimately depends on the validity of a prior knowledge, which, in turn, also requires an inductive argument to justify it. Deductive reasoning can only guarantee the validity of the inferential process but not the truth of its conclusions if the premises are not valid. So, the scientific method is not actually followed by natural scientists. Nor can it be regarded as infallible.

VI. The methods used in law

Much has been written about the legal method (McLeod, 2013). While there seems to be consensus about the predominant structure, the logical reasoning, and the purpose of the legal method, there is alsoconfusion about and discontent with this method. First, there is an erroneous perception that this method applies in all situations and contexts that deal with the production of legal knowledge. In effect, the method has been conceived to deal, almost exclusively, with legal practice in general and, in particular, with judicial practice. Its main objective in common law jurisdictions is to predict how judges will decide cases; and in the civil law world, the objective is to demonstrate how judges ought to decide cases. Thus, this method does not describe what legal researchers and scholars do, since the purpose and content of their research differs from those of legal practice. Second, there is no agreement as to the content of the object of study of the legal method, i.e., there is no consensus about what data are employed in the legal method.

This confusion originates because there are actually three different –albeit interrelated– levels or contexts in which legal knowledge is produced. These are the context of discovery, the context of justification, and the context of application (Reichenbach 1938).

VI. 1. Context of discovery

The context of discovery refers to the way in which a new theory is generated, i.e., the way in which scientists propose new ideas, concepts, hypotheses, and principles. In Popper's terms (1959), the context of discovery has to do with the way in which the ideas that lead to the development of a theory occur. The generation of a new theory does not have a logic or a particular method nor does it follow any pattern. What allows the creation of a science in a certain case may not necessarily work in other situations (Feyerabend, 2010). Bourdieu (2008) shows that every discovery has an irrational element or a creative intuition and calls for abandoning the idea that research consists of a systematic succession of steps that lead to a conclusion (Bourdieu, 2008). Like other theories, legal theories are created by individuals who produce knowledge in very different ways. They take ideas from social practice, governmental policies, cultural artifacts, other theories, other disciplines, legal texts, and even their own personal lives and experiences, among many other sources. Like in any other science, some theories are the product of serendipity; others are the result of rigorous reflection. All these situations, sources, and experiences constitute the genesis of legal knowledge and, legal science. Thus, the legal method does not play any role in the context of discovery.

VI. 2. Context of justification

The context of justification implies the validation of the theory, i.e., the determination of the epistemological validity of the knowledge so produced (Reichenbach 1938). This context answers questions such, as: "Can a claim be justified? And if so, how? Is it verifiable? Does it logically depend on some other claims? Or does it contradict them?" (Popper, 1959). Beyond these questions of a general nature, and given that there are no external criteria and validation objectives applicable to all sciences, each scientific community adopts its own method of justification. In the context of justification, the community of legal researchers and legal scholars does not use the legal method that predominates in legal practice. Legal researchers are not interested in predicting the outcome of a court decision or in determining how a judge ought to rule in a specific case. Their main interest lies in interpreting

and validating legal knowledge. They deal with the assessment of the internal consistency of legal theories and with the elaboration of legal concepts (Laudan, 1978). This knowledge may be useful for predictive purposes and for legal practice in general, but this is an indirect effect of this type of legal research, not its main objective. Thus, legal researchers who work within the parameters of the legal discipline –as opposed to those who rely on another social science to analyze the law– (Posner, 1988) employ a kind of hermeneutical approach sometimes referred to as doctrinal legal analysis.[3] This is a systematic process of interpretation, analysis, and critical evaluation of the legal norm, i.e., laws, principles, concepts, and doctrines. Through this method, the researcher discerns, hierarchizes, classifies, and critically reviews the legal norm, places it within a certain legal category, and evaluates its place within the legal order. The crucial question that the legal researcher asks with respect to a legal norm is whether it is valid in light of itslogical relation to other norms (Holtermann & Madsen, 2020).

VI. 3. Context of application

The context of application deals with the application of the theory. In law, this context is highly connected to legal practice, in particular, with the settlement of disputes in court. While there is no consensus about the content of the object of study of the legal method, most scholars do agree about the way the method works. In other words, there is agreement that the object of study in law can be reduced to a set of first principles (which are equivalent to the facts of natural sciences) and that through deductive reasoning a valid conclusion can be reached (Hoeflich, 1986), i.e., a uniquely correct result for the case in question (Wells, 1994).

Disagreement ensues about the content of the object of study, i.e., the facts or data that are contained in those first principles. For Christopher Columbus Langdell, Dean of Harvard Law School in the late 19th century who was pivotal in shaping contemporary legal education in North America, the data are legal facts to be found –through empirical observation– in appellate cases (Langdell, 1870). For Holmes (1997), the object of study is made up of "a body of reports, of treatises, and of statutes". For Natural Law scholars, the object of study are principles of natural law. For Ross, it is the ideology that animates the judges and motivates their actions which can be inferred through the doctrine of the sources of law, i.e., "the sum total of the factors exercising influence on the judge's formulation of the rule on which he (sic) bases his (sic) decision" (Ross 2019). For Savigny, it is the rules of conduct derived from –Roman– history and society (Hoeflich, 1986). For European Legal Realists, it is the *homo juridicus* and his/her practices and what drives his/her conduct (Holtermann & Madsen, 2020). For positivist scholars, the object of study is the body of laws in effect in a given jurisdiction (Kelsen, 1934).

Legal practitioners and scholars have used all these phenomena –and a variation of these phenomena– as the data to observe through the legal method. Judging from the success of the contributions to legal practice of all these alternatives it is clear that the legal method can be used to observe and analyze all these phenomena (Danner, 2013).

[3] The legal method used in the context of application has sometimes been referred to as doctrinal legal method, which adds to the confusion about the methods used in law. When used as a synonym of legal method it simply aims to predict or influence a court case. In the context of justification, doctrinal legal analysis has the purpose and meaning discussed in this section.

VII. Conclusion

The debate about whether law is a science or not has been dominated by empirical and positivist conceptions of science. These conceptions have forced legal scholars to try to artificially explain their discipline in terms of a positivist conception of science instead of focusing on the social practices associated with scientific communities. An epistemological conception of science that regards science as a social construction and that emphasizes internal recognition rather than adherence to a certain method demonstrates that law is a science, as it shares the characteristics, elements, and practices of other scientific communities. These include a long history ofresearch, university teaching, peer-reviewed publications, organization of conferences, and both internal and external recognition of the work of legal scholars as scientific.

There is ample confusion with respect to the methods used in legal science. Confusion arises from the fact that there is a tendency among some scholars to equate the method used in legal practice to the so called scientific method. Confusion is compounded when the same scholars erroneously ascribe this method to the one used to validate legal knowledge.

A look at the different epistemological contexts demonstrates that there is no single method used in the context of discovery, which is consistent with what happens in all other sciences (Feyerabend, 2010). In the context of justification, members of the scientific legal community employ the doctrinal legal method, a type of hermeneutical approach aimed to determine the validity of a legal norm vis-à-vis other norms within the same legal order (Quintana & Hermida, 2019). The method used in the context of application is the legal method, whose purpose is to predict –or find the correct– outcome of a judicial case. There is consensus as to the way the method works and the purpose of the method, but there is no agreement on the data that the method analyzes. It has been proposed that a wide variety of phenomena such as legal facts, reports, treatises, statutes, principles, ideologies, rules of conduct, practices, and positivist laws, among many others, are the object of study of the legal method.

References

Althusser, L. (1999). *Writings on Psychoanalysis*. New York: Columbia University Press.

Axtell, J. (2016). *Wisdom's Workshop: The Rise of the Modern University*. Princeton: Princeton University Press.

Bachelard, G. (2002). *The Formation of the Scientific Mind. A Contribution to the Psychoanalysis of Objective Knowledge*. Manchester, UK: Climamen Press.

Bourdieu, P., Chamboredon, J.C. & Passeron, J.C. (2008). *El oficio del sociólogo*. Buenos Aires: Siglo XXI Editores.

Bowman, M. (2002). *The Last Resistance. The Concept of Science as a Defense against Psychoanalysis*. New York: State University of New York.

Chalmers, A, F. (2015). *What is this thing called Science?.* 4th ed. St. Lucia, Queensland: Hacket.

Cowan, T. A. (1948). "Relation of Law to Experimental Social *Science"*. In. *U. Pa. L. Rev.* (96), 484.

Danner, R. A. (2013). "Oh, the Treatise!". In *Mich. L. Rev.* 821, 111.

Dawson, B. T. (1992). "Legal Research in a Social Science Setting: The Problem of Method". In *Dalhousie Law Journal*, 14 (3) 445.

Escobar-Jiménez, C. (2018). "Criterios de Demarcación, Pseudociencia y Cientificidad en el Derecho". En *Cinta de moebio*, (61), 123-139.

Feyerabend, P. (2010). *Against method.Outline of an anarchistic theory of knowledge.* London: Verso.

Follari, R. (2007). *Epistemología y Sociedad. Acerca del debate contemporáneo*. Rosario: Homo Sapiens Ediciones.

Fuller, L. (1975). "*Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction*". In *BYU L. Rev.* 89.

Glenn, H. P. (2014). *Legal Traditions of the World: Sustainable diversity in law*. 5th ed. Oxford: Oxford University Press.

Gower, B. (1997). *Scientific Method: An Historical and Philosophical Introduction. London and New York: Routledge.*

Holmes, Jr. O. (1897). "The Path of the Law". In *Harvard Law Review*, 10, 457.

Holtermann, J. & Madsen, M. (2020). "European New Legal Realism: Towards a Basic Science of Law". In *Courts Working Paper Series*, Nº 215.

Kelsen, H. (1934). *Pure Theory of Law*. Berkeley, CA: University of California Press.

Khun, T. (2012). *The Structure of Scientific Revolutions: 50th Anniversary Edition*. 4th ed. Chicago: University of Chicago University Press.

Langdell, C. C. (1870). *A Selection of Cases on the Law of Contracts*. Boston: Little Brown.

Laudan, L. (1978). *Progress and Its Problems. Towards a Theory Scientific Progressive Growth*. Berkeley & Los Angeles: University of California Press.

Lupyan, G. (2017). "How Reliable Is Perception?". In *Philosophical Topics, 45* (1), 81-106.

Maczonkai, M. (2015). "Legal argumentation. Is it a science or art?". In Acta Juridica Hungarica, 56 (2-3), 114-128.

McLeod, I. (2013). *Legal Method*. London: Palgrave Macmillan.

O'Connor, S. (1995). "The Supreme Court's Philosophy of Science: Will the Real Karl Popper Please Stand Up?". In *Jurimetrics*, 35, 263–276.

Popper, K. (1959). *The Logic of Scientific Discovery*. London: Hutchinson.

Quintana, L. & Hermida J. (2020a). "A Comparative Analysis of Undergraduate Thesis Courses in Canadian and Argentine Universities". In *International Journal of Research and Review*, 7(4), 30-37.

Quintana, L. & Hermida, J. (2019). "El método hermenéutico y la investigación en Ciencias Sociales". In *Aportes al Derecho*, Vol. 1, Nº 3, pp. 1-18.

Quintana, L. & Hermida, J. (2020b). "La hermenéutica como método de interpretación de textos en la investigación psicoanalítica". In *Perspectivas en Psicología. Revista de Psicología y Ciencias Afines*, 73-80.

Reichenbach, H. (1938). *Experience and Prediction. An Analysis of the Foundations and the Structure of Knowledge*. Chicago: The University of Chicago Press.

Spruiell, V. E. (1983). "Kuhn's 'Paradigm' and Psychoanalysis". In *The Psychoanalytic Quarterly*, 52 (3), 353-363.

Wells, C. P. (1994). "Holmes on Legal Method: The Predictive Theory of Law as an Instance of Scientific Method". In *Southern Illinois University Law Journal*, 18, 329-345.