1. Introduction

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Lawyers are notorious amongst scholars of the humanities and social sciences for failing to engage in detailed analysis of methodology. This perception is justified. As lawyers often – and in some cases exclusively – write to be read by aspiring and 1. practicing lawyers (including judges), there is no need to discuss methodological matters. The legal community of English-speaking common lawyers has its own understandings of what makes for sound legal argumentation and, as these understandings having been inculcated in members of the community in their law studies, little would be gained by spending precious time and space elaborating upon them in scholarly work.

Increasingly, however, lawyers are coming under pressure to be more open about methodology. In part, the pressure results from the increasing sophistication and ambition of legal scholarship. Where lawyers were writing to develop arguments about how other participants in the legal community should develop the law, shared understandings about methodology could safely be taken for granted: the ultimate question was “would a judge find this convincing?” Instinct and experience allowed lawyers to answer this ultimate question.

But legal scholarship is, more and more, directed at other scholars and, sometimes, scholars in other fields. Shared understandings about methodology can no longer be taken for granted. Indeed, a scholar proposing a particular approach to a problem might well meet with questions such as, “Why should I care?” or “Why should I agree with you?” Persuasive answers to such questions often require some discussion of methodology. Even if much legal scholarship is still directed at achieving practical change in the legal community, even the scholars engaged in such work will find themselves being asked these questions. For when questions begin to be posed – by examiners of doctoral theses, peer reviewers, editors at publishing houses, colleagues, and students – they create expectations about the norms of legal scholarship: it would not be fair to insist on methodological rigour from one doctoral student and let another pass based on unarticulated shared understandings about methodology. Even successful authors of widely read treatises might therefore find themselves asked difficult questions about methodological approaches.

It is difficult to be certain about why legal scholarship has become increasingly sophisticated and ambitious. But there are some obvious contributing factors.

First, a doctoral degree is now a de facto prerequisite for an academic appointment in common law jurisdictions. Typically, the degree can only be awarded if the author of the doctoral thesis has made a significant contribution to knowledge in a particular domain. It is much easier to satisfy this criterion with a more sophisticated and ambitious thesis. And having started out one’s academic career with a sophisticated and ambitious thesis, one will typically attempt to continue in the same vein.

Second, access to research funding is a marker of professional success. Winning research funding increases the status both of members of law faculties or departments and the faculty/department as a whole. More importantly, allows researchers to pursue more ambitious work than they would otherwise be able to. But research funding is, mostly, distributed by interdisciplinary panels of which the legal members will be a minority (if they are present at all). Sophistication and ambition go a long way to writing a strong funding application.

Third, in many countries, funding of law faculties or departments is tied to the production of high-quality, impactful research. “Impact” and “quality” are typically defined in broad terms and interpreted by interdisciplinary panels. Traditional legal scholarship can certainly qualify as impactful and of high quality, but in terms of the “quality” metric in particular it is easier to make the case for a high score in respect of scholarship which is self-consciously sophisticated and ambitious.

Fourth, the sheer number of legal scholars has increased dramatically, as more and more universities around the world have opened law faculties. (This also has led to a dramatic increase in the number of legal scholars who have doctoral degrees.) This provokes competition, both in terms of upward mobility (moving from an institution with less desirable terms and conditions to one with better terms and conditions) and publication. With more legal scholars writing articles (in part because they will fare poorly in research assessment exercises if they do not), law journals have more submissions to choose from. Sophistication and ambition are powerful tools both in the hunt for more desirable jobs and accessing high-quality publication outlets.

Fifth, the increasing sophistication and ambition of legal scholarship makes for a clearer divide between legal scholarship and legal practice. A young lawyer hesitating between the academy and legal practice faces a fairly stark choice between the increasing sophistication and ambition of academic cloisters and the practical, problem-solving role of a practicing lawyer. Over time, the result is that those interested in producing sophisticated and ambitious scholarship self-select into the academy, with the more practically minded tending to practice.

Notice, lastly, that all of the above factors have a self-reinforcing quality, as they alter expectations about legal scholarship. For instance, the more law faculties or departments are composed of the scholarly sophisticated and ambitious, the more they will rend to reproduce these tendencies over time: all things being equal, legal academics will hire colleagues who share similar interests. Similarly, if submissions to funding rounds, research assessment exercises and publishers are increasingly sophisticated and ambitious, increasingly sophisticated and ambitious scholarship will come to be expected by those bodies. And the starker the divide between academic lawyers and practitioners, the more academic lawyers will be expected to conform to the archetype of the academic lawyer.

If nothing else, our analysis suggests that academic sophistication and ambition are here to stay. And even if our analysis is wrong or overblown, it remains the case that being a successful academic lawyer today – as a doctoral student, job candidate, funding applicant and so on – requires more attention than it did before to methodology. Attention to methodology is important in order to be successful in hunting for jobs, funding and publications.

To these pragmatic considerations can be added principled justifications for taking methodology seriously. At root, methodology speaks to how we know what we know (or what we think we know). There is no downside to learning about methodology and considering how exactly the author of an academic endeavour achieves its objective—save for the risk we may become too distracted by the specifics of methodology. And there is significant upside: deliberation on methodology might prompt work which is more careful and sophisticated, even in relatively traditional areas of scholarship. It may also provide new wasy to understand and analyse questions. We suggest, therefore, that deliberating on how we conduct legal research can generate valuable insights about the approaches we take to producing scholarly work and may end up enhancing the quality of our work.

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The analysis above is directed at legal scholarship generally. But this book is about methodology in public law in the English-speaking common-law world. To date, there is no general collection which speaks to methodology in public law. Therefore, this book fills a large and important gap in the legal literature by providing an overview of research methodologies in public law—a broad field of research comprising constitutional law, administrative law, legislation, regulation, and legal theory. We do not seek to define “public law” any further than this, for pragmatic and principled reasons. From a pragmatic perspective, any attempt to define public law is apt to upset at least some readers: a definition cannot, by definition, include everything; and some researchers might feel excluded by our definitional choices. If attention to methodology is as important as we think it is, we should construct as big a tent as possible, to ensure that a multiplicity of voices and a plurality of perspectives are included. From a principled standpoint, defining “public law” in the common law tradition might be impossible and any attempt to do so would be highly contestable. Whereas civilian systems have a fully worked-out category of “public law”, common lawyers have no equivalent. Public law exists in the ether and cannot be distilled to its pure essence. The best we can do, therefore, is to focus our attention on the legal aspects of the creation and regulation of public power.[[1]](#footnote-1)

Our concern is with methodology used by those who consider themselves to be public lawyers, not definitional debates about “public law”. Broadly speaking, the traditional approach to methodologies in public law is for them to go unspoken and hidden. This has often made public law a difficult subject for new researchers to approach as there is no “guide” to the key methodological approaches taken to public law. Our goal is to ensure that questions about methodology in public law are no longer unspoken and hidden, facilitating high-level research at every level of academia.

Without an account of public law methodology, it is often difficult to convince academics from other fields of the desirability of funding research in public law, the impact and quality of public law scholarship, the need to hire public law scholars as colleagues, and so on. Using this collection as a guide will, we hope, enable public law academics to make stronger arguments about the importance of their scholarship, which is vital both for the career progression of individuals and the health of research in public law.

In what follows, you will find short and accessible chapters on distinct methodological approaches within particular areas of public law, written by leaders in the field. Each chapter will provide a thorough introduction to the key features, characteristics, and challenges of a public law methodology. Students and scholars of public law will be able to look to this collection as a guide on the variety of ways of conducting research in public law. Each chapter will address three central questions. First, what unique perspective/insight does the approach provide? Second, what are the key features of this approach to public law research, i.e. how is this research conducted? Third, what are the key challenges facing a researcher adopting this approach? We could not hope to include all methodologies which have been or could be applied to studying public law, but we have sought to include many of the most common approaches and, beyond that, a diverse range.

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We have separated the chapters into four categories: the traditional, the institutional, the technical, and the critical. The labels are, hopefully, self-explanatory. Traditional scholarship is doctrinal, historical and interpretive. Institutional scholarship focuses on institutions – we have chosen the well-known branches of government as the objects here (the legislative, judicial, and executive arms), though our lessons could be applied to other organs of public power as well. By technical, we mean approaches which involve a degree of abstraction from the concerns of traditional scholarship, by engaging in theoretical reflection, comparative analysis or using empirical means. Lastly, in the critical section, we group contributions which seek to challenge the received wisdom generated by other methodological approaches.

In the **traditional** category, we place three chapters: John Allison on historical approaches to public law; Farrah Ahmed and Adam Perry on interpretation; and Jason Varuhas on doctrinal scholarship.

Allison’s contribution is a reprint of his 2013 article – already a classic – entitled “History to Understand, and History to Reform, English Public Law”.[[2]](#footnote-2) An obvious starting point is the proposition that understanding English public law requires an appreciation of history, both to understand key concepts (such as “the Crown”) and constitutional change. This proposition, we would add, applies just as much to other jurisdictions as it does to England. Allison notes that an “orthodox historical account” of legal history can be an aid to understanding. But such accounts are exceedingly difficult to produce, for they require significant time and resources, especially to uncover the “self-understanding” of the key actors in producing legal change. Those who wish to do so must meet a demanding set of criteria:

Such an account is here characterised by the care, thoroughness and objectivity of its enquiry, the quality of its evidence, the accuracy with which it is communicated, and its attention to the self-understanding, for example, of those responsible for bringing about legal change, and the reasoning by which they justified it, whether in legislative innovation, the setting of precedent or the evolution of convention. An orthodox historical account of this kind derives its reliability from its character but is subject to constraints of time, resource and interest. It is difficult to produce, particularly where the available evidence is insubstantial, self-understanding is obscure and the extent of past complexity raises the risk of oversimplification.

It has become more common, Allison observes, for public lawyers to invoke history in support of arguments for or against a particular position in contemporary debates about public law: “political, social and normative” concerns about particular issues have prompted resort to history to reform public law “by reshaping its history, and thus our sense of the outcome, in the reconstruction of historic authorities or reappraisal of historical sources”. Done badly, such public law legal history leads to accusations that those engaged in it are simply cherry-picking sources which seem to support their positions.

Allison argues for a more robust approach. There are three ways in which resort to legal history can be useful for public lawyers: to liberate us from the constraints of the past by demonstrating that the basis for the constraints has been eroded; to liberate us from the “tyranny of the new” by justifying opposition to novel innovations; and to liberate us from the “hold of tradition, myth and prejudice”. These are perfectly valid ways for public lawyers to use history. But they come freighted with baggage. First, the traditional, Whig approach to English legal history, which is highly selective, purposive and oriented towards the needs and concerns of the present. This is not problematic *per se*, as long as the Whig is “transparently reconstructive”, because then their approach can “readily be assessed”. Second, the lawyer’s preoccupation with authority, which leads them to use historical sources “to serve the lawyer’s practical legal purposes”. Again, this is not problematic *per se*: there is a law/history divide and, as long as the public lawyer remains on the right side of the line, resort to historical sources is appropriate on condition that it is transparent.What is inappropriate is to reconstruct history to serve practical legal purposes and then present the history as “historically evident”. Ultimately, Allison argues for deliberative legal history in public law: deliberate in its choice of sources; transparent in its use of those sources; and deliberative in its thorough reflection on the difficulty of deriving from the past arguments to support positions developed for the present.

Interpretation is an important part of Allison’s approach to legal history.[[3]](#footnote-3) Accordingly, Farrah Ahmed and Adam Perry’s chapter, devoted to interpretation, follows logically from it. Just as the public lawyer doing legal history aims to achieve a rational reconstruction of the law, so too does a public lawyer using interpretive methodology aim “at a rational reconstruction of the law”. The first step is to identify the relevant legal materials, which are “pre-theoretically thought to belong together”. This is a pre-interpretive stage, at which the interpreter relies on intuition and shared understandings about legal categories to identify the relevant legal materials.[[4]](#footnote-4) Next, the interpreter posits a principle or set of principles which relates factors in the materials to legal consequences. This is commonly described as the dimension of ‘fit’. But what if more than one principle or set of principles ‘fits’ the materials? Then the interpreter “must decide which is most morally correct or sound” – the dimension of ‘justification’. Where fit and justification diverge, it is necessary to choose which to privilege: some prefer fit, some justification, and still others prefer to “engage in reflective equilibrium between the existing case law and morally ideal law, settling on a rationale which both fits and justifies the law to some extent”.

This exercise in reconstruction does not involve establishing causal relationships, nor is it evaluative. It does not seek, as descriptive or orthodox historical work does, to demonstrate a causal relationship between principles or a set of principles and the legal rules used in particular cases. Nor does it seek to evaluate legal rules by reference to a benchmark developed independently of an analysis of the relevant legal materials. Moreover, an interpreter does not identify the law either, for ultimately that power resides in the hands of the judge (or other authoritative law-maker). What *do* interpreters do, then? For Ahmed and Perry, an interpreter provides, first, a “prediction” as to how the law will develop: judges should be mindful of fit and justification and, as such, have a duty to develop the law in a way which is consistent with a rational reconstruction of the law. The interpreter also provides, second, “prescriptions” about how the law should be developed: “[t]he theorist stands in the judge’s shoes and suggests the way in which he or she can fulfil his or her duty *qua* judge”. Through consideration of three interpretive approaches – Colin Campbell on monopoly power; Christopher Forsyth on the void/voidable distinction; and Yoav Dotan on policies – Ahmed and Perry describe how an interpretive approach works and how fruitful it can be when done well.

Jason Varuhas picks up the interpretation thread too in his chapter on doctrinal methods, as he sees interpretivism as the highest form of doctrinal scholarship. Varuhas distinguishes four forms of doctrinal scholarship: description; derivation; systematization; and interpretativism. Regardless of the particular form engaged in, the scholar must adopt an “internal” point of view, “seeking to understand the law on its own terms, in the way that participants in the practice of law, such as lawyers and practitioners, understand it” and to bring “order” to what may appear as “chaos”. As a consequence, doctrinal scholarship in all its forms is committed to the dual propositions that the law is continuous over time and that it is rational (propositions with which more critical observers might disagree).

Description is suggested to be the least scholarly of doctrinal approaches. Involving the production of case bulletins or other information about decided cases, recent statutes and so on, it merely involves providing an account of what has happened.

Derivation is a refined version of analogical reasoning. Factual analogical reasoning is capable of creating streams of cases which are materially similar but it is not capable of revealing the normative basis for a judge deciding a case one way rather than another. This is where derivation comes in: it involves the “identification of legal propositions from legal materials”; this can be inductively, from individual decisions or streams of decisions and give “shape and structure” to a previously “formless mass” of legal materials. The limits of derivation lie in the fact that the semantic content of legal propositions is often debatable, with judges and lawyers endlessly disagreeing about the precise way to formulate a given proposition. One way, Varuhas suggests, to support a particular formulation is to demonstrate that it coheres within a system of related principles – this is the essence of systematization.

Systematization is based on “the idea that legal propositions do not exist in isolation but form part of a broader network of interconnected norms”. The “paradigm” example is the legal treatise, the authors of which conceptualize each derived legal proposition as part of a “larger whole”. These propositions are grouped horizontally, by their similarity to other propositions, and vertically, by their hierarchical relationship to other propositions. In this way a “map” of the law is presented. Whether this map represents reality is, ultimately, a question for members of the legal profession, who form an interpretive community[[5]](#footnote-5) charged with deciding what is plausible and what is not. Systematization can render the law coherent and accessible – what it cannot do, however, is provide a convincing normative basis for the law. This is where interpretivism comes in.

Interpretivism involves, as Ahmed and Perry described in the previous chapter, the rational reconstruction of the relevant legal materials (relevancy here being determined by the members of the interpretive community). For Varuhas, it is the “highest form” of doctrinal scholarship, seeking to provide a “worked-out explanatory theory of propositions or fields”. Reflection is a key part of the interpretive process as it “involves explicit interrogation of the normative justification for particular propositions or fields, and refinement of one’s account of those propositions or fields by reference to that justification”. This is the key difference between interpretivism and systematization, as the interpretive approach “involves revealing doctrinal patterns, *and* then also explaining the reasons that underpin those patterns” (emphasis added). Moreover, echoing Ahmed and Perry, Varuhas observes that interpretivism can provide predictions and prescriptions about the development of the law. As against this must be weighted the risks of ‘normative capture’ and ‘the temptation of elegance’. In both cases, justification overwhelms fit – a danger, Varuhas suggests, with “values-based” interpretive approaches, but less so with “narrative” interpretive approaches.[[6]](#footnote-6)

In the **institutional category**, we place three more chapters, each targeting one of the central features of a common-law system: the executive, the legislature and the judiciary.

In our own chapter, we tackle the administrative state by particular reference to the distinction between internal and external perspectives. This well-worn distinction has a respectable pedigree in analysis of public administration and remains helpful, though, as Daly and Tomlinson observe, more recent scholarship traverses the internal/external divide.

The external perspective involves looking at public administration from the outside, from the point of view of the judiciary (developing and applying the law of judicial review of administrative action), from a political standpoint (observing how the executive branch operates, by the application of raw power or tools such as cost-benefit analysis), or from a vantage point to focus on accountability mechanisms, such as ombuds or independent watchdogs. Academic work produced from the internal perspective is often descriptive or doctrinal but can also be normative; depending on the scholar’s orientation, different methodological tools may be appropriate.

Scholars of the internal perspective, meanwhile, take as their typical starting point the proposition that administrative officials “are the primary actors in implementing public law”. Such work may involve evaluating the implementation process or relating the decisions of front-line actors to grander questions of constitutional theory and institutional design. It is common for those adopting the internal perspective to use empirical, or socio-legal methodology. This work shines much-needed light on the inner workings of bureaucracy and, sometimes (if not often) demonstrates significant gaps between the ‘law in the books’ and the ‘law in action’, prompting reorientation of academic discussion from the external perspective.

More recently, some scholars have adopted perspectives which are neither strictly internal nor strictly external. For example, socio-legal and empirical approaches have been deployed to shed light on the law of judicial review of administrative action: insights from the internal perspective have thereby influenced the external perspective on public administration. Accordingly, the internal/external distinction is no barrier to carrying out innovative work which blends methodological approaches.

Political scientist Louise Thompson describes public law and legislative studies as sharing the goal of developing “an enhanced understanding of parliament’s contribution to the legislative process and to the spaces within which there may be tension between politics and law”. Put another way, there are public lawyers who are interested in legislative studies and scholars of legislatures who are interested in public law. Thompson’s chapter describes the challenges for those working at the intersection of public law and legislative studies (from one side or the other) and sets out the different possible methodological approaches.

There is, to begin with, some conceptual undergrowth to clear: what is a legislature for? Although Thompson focuses on Westminster, this is a key question for a researcher in any jurisdiction, and may receive different answers from country to country. With an answer in hand, the scholar may turn to the work of the legislature. But this work is abundant, as legislatures sit for long hours, in the chamber and in committee rooms, and produce reams of material, from laws to delegated legislation to committee reports and accounts of parliamentary debates. Furthermore, there is a “parliamentary spider’s web” of different actors, both within the legislature (the clerks responsible for good institutional governance) and outside it (government officials who control the legislative agenda). And the work is often hard to decipher: the drafting of statutes has been described as an “arty science”[[7]](#footnote-7) and is difficult to understand without an appreciation of the artistic and scientific aspects of the drafter’s product.

In order to meet these challenges, the scholar must begin with careful consideration of methodological approaches and case selection. Generally, one can distinguish between empirical studies which emphasize breadth and those which prefer depth: large versus small datasets, with conclusions cut to meet the measure of the sample size. Either way, researchers must “carefully contain their studies so as to alleviate the risks of being overwhelmed and to enable more rigorous examination and analysis”.

A further challenge is presented by the distinction between legislative capacity and legislative performance – what legislatures *can* do versus what legislatures *actually* do. Scholars need to choose whether to focus on capacity or performance. Once this choice is made, further challenges arise, as *measurement* is very difficult, especially of performance. Great care must be taken, even with ostensibly objective measures such as votes in the legislature assembly, to ensure that one appreciates the context in which the votes were held.

Furthermore, the necessarily descriptive endeavour of focusing on how members of legislatures vote on given matters is potentially reductive and unhelpful. What is going on outside the walls of the chamber might be more important than the votes held within the walls of the chamber. Hence the emphasis some scholars place on the “anticipated reactions” of members of legislatures to government proposals.[[8]](#footnote-8) These are, of course, much harder to measure than votes; there is no obvious objective measure and, accordingly, interviews are “often the only source of data on the activity of parliamentary clerks, civil servants and parliamentary lawyers”. A “significant development in the field”, therefore, has been to meld quantitative measures, such as votes, with qualitative inputs in the form of interview data. Readily visible data points, such as votes, are used alongside qualitative analysis to enhance contemporary understandings of what legislatures do.

Another political scientist, Emmett Macfarlane, tackles the judiciary. Whereas lawyers have typically studied judicial decision-making by reading the texts of judicial decisions, political scientists have used “observational methods to identify political trends and patterns in decisions over time”. These social sciences methods have led to the development of a number of competing approaches, which are the subject of Macfarlane’s contribution.

The first is the modern attitudinal model. This model is based fundamentally on the proposition that judges are “primarily interested in effecting their personal policy preferences” and use their judicial decisions to achieve their ideological goals. Proponents of this model are relatively uninterested in the reasons judges give for their decisions, which they see as designed to cloak the real reasons judges act in the way they do, which is to further their ideological commitments. The second is the strategic model. On this model, ideology remains relevant but judges modulate their decision-making behaviour “to secure the support of their colleagues” and are also mindful of the likely “reaction of the other branches of government” to their decisions. The third is the historical institutionalist model. This model builds on the preceding models by presenting a “role-conception” account of judging in which judicial decision-making is “constrained and informed by institutional norms about the judicial role”. Historical institutionalists are much more interested than their attitudinal and strategic counterparts in the reasons given for judicial decisions, which are inseparable from “the sense of obligation or duty that comes with perceiving one’s role as inherently meaningful”.

Proponents of these models are faced by various challenges. To begin with, on the attitudinal model, is difficult to disentangle the perceived influence of ideology from judges’ approaches to interpretation: maybe judges vote the way they do because of their particular approach to the law and the role of courts. Measuring ideology is also difficult. Even where scholars can draw upon neat categorizations, as in the United States, where ‘Democrat’ and ‘Republican’ appointees can be easily distinguished, more work needs to be done, as judges in these categories are not homogenous and need to be sorted into further sub-categories. These measurement challenges mean, Macfarlane warns, that the attitudinal model frequently ends up generating measurement criteria from the analysis of the judicial votes it purports to measure.

The strategic approach suffers also from these difficulties. But in addition, it is difficult to isolate “specific factors” which might influence judicial decisions, amongst the multitude of considerations capable of influencing a judge’s strategic behaviour, especially when access to data about judicial deliberations is withheld (as it generally is).

As for the historical institutionalist model, it is most often criticized for being insufficiently systematic and leading to outcomes which are not generalizable. This is a result of the requirement for “thick description and a deeply contextualist understanding of a particular country, institution, or even case”. Lurking in the background here are debates over the merits of quantitative versus qualitative approaches to research.

Contemporary scholars have attempted to meet the challenges posed to each of these approaches by blending quantitative and qualitative approaches and integrating components from the other models. Notably, scholars outside the United States – in Canada, Israel and the United Kingdom, for example – have engaged in sophisticated studies of judicial decision-making. Taken together, contemporary scholarship has led to “increased pluralism and comparative insight”, as the literature has grown progressively more interdisciplinary, with economists, historians and psychologists joining the fray. Macfarlane goes so far as to suggest that only “methodological pluralism” will lead to an “accurate depiction” of how courts make decisions.

Under the **technical** heading are grouped three further chapters: Theunis Roux on comparative methodology; Martin Loughlin and Samuel Tschorne on theoretical approaches to public law; and Sarah Nason on empirical research.

The burgeoning field of comparative public law is the subject of Theunis Roux’s contribution. His starting point is the difficulty of defining public law. As he notes, the term can cover constitutional and administrative law in common law systems, but can equally be used to refer to any regulation of the “exercise of public power”. In civilian systems, public law is another thing entirely, a “separate branch of law”. Some political scientists, moreover, use public law to denote research on the role of law and courts in the political system. Beyond terminological difficulties, there is a spectrum with those who see comparative public law “primary as a legal-research discipline” at one extreme and those at the other extreme who see it is a “multidisciplinary enterprise” with social science paradigms and methods playing a distinct role. But researchers may locate themselves on the spectrum between these two poles:

[I]t is probably best to think of comparative public law, not as a coherent research field, but as a convenient label for a range of different research agendas that are loosely connected to each other. For some people, the emphasis falls on legal doctrine, either from the perspective of a single jurisdiction looking outwards or from a more neutral perspective – looking down across several bodies of law. For others, the emphasis falls on the social and political context in which public law norms in different countries have evolved and their impact in turn on society. For yet another group, doctrine falls away altogether, with the focus falling instead on the social dynamics of the political system in which public power is exercised.

This, then, is the field of comparative public law, such as it is. Within the field, there are three main traditions: doctrinal, socio-legal and political science.

Researchers in the doctrinal tradition face, at first glance, imposing obstacles. Public law, perhaps uniquely amongst fields of comparative legal inquiry, is widely thought to represent (in whole or in part) underlying power relations in a particular society. Nonetheless, doctrinal researchers outside the United States have, by focusing on the search for “principled coherence” internal to public law in particular jurisdictions, engaged in comparative public law research without significant worries about whether law and politics are separable. Furthermore, public law is shaped by political, social and other factors which vary tremendously from jurisdiction to jurisdiction. This “cultural difference” obstacle has been surmounted or circumvented in two ways, “either by reducing the number of legal systems compared to a few closely related systems”, as by studying concepts such as legitimate expectation in select common law jurisdictions only “or, conversely, by making the culturally determined nature of public law the focus of the inquiry”, as by using a general concept such as proportionality and analyzing its reception by different legal cultures. A final difficulty is that in common law systems, public law is arguably not a distinct area of law at all, and certainly was not until recently. But taking a functional approach, focusing on the regulation of public law, allows the researcher to avoid hard questions about whether public law is a meaningful doctrinal category. With these obstacles avoided, there is a typology of doctrinal approaches to comparative public law research:

The first adopts the perspective of a single jurisdiction and looks to foreign law for guidance and instruction on the best interpretation of legal norms in that jurisdiction (Type 1). The second takes as its object of study a small number of closely connected legal systems and compares and contrasts the meaning of a given norm in each jurisdiction, either so as to contribute to enhanced understanding of the meaning of that norm in each of those jurisdictions (Type 2a) or to explain the reason behind the variation (Type 2b). The third type consists of legal harmonization work in which the researcher uses their understanding of the meaning of a norm in two or more jurisdictions to suggest ways in which the two meanings might be reconciled, with least violence to each (Type 3).

At the other end of the spectrum, socio-legal studies is a multidisciplinary field of inquiry “in its own right” featuring, accordingly, a wide variety of research approaches. This research tends to focus less on testing hypotheses as on illuminating complex social processes. Moreover, it tends to be “genuinely interdisciplinary in the sense that it treats law as a relatively autonomous social system with its own conceptual logic and immanent values, and not just as an empirically measurable phenomenon…”. There are two distinct types of qualitative socio-legal research in comparative law. First, combining a lawyer’s insider perspective on legal norms with the external perspective of one or more social-science disciplines. The goal is to understand the “operation and effect of legal norms” but – a clear point of distinction with doctrinal researchers – “the ambition is usually not to improve the legal regulation of a given social problem, but rather to contribute to an autonomous body of social science knowledge”. Second, engaging in area studies, whereby “common experience, such as a shared history of colonisation, say, serves to reduce the relevance of some of the harder-to-operationalise cultural variables that can hamper comparative work in public law”. This tends to involve focusing on countries in similar geographic regions. With geographic proximity reducing the salience of background context and geo-politics as explanatory variables, it becomes possible to ascribe differences in constitutional outcomes to “political and institutional choices”.

The last major approach to comparative public law is the comparative approach taken by American political scientists. Although at the beginning this approach was applied to domestic institutions, researchers in this tradition have, since the end of the Cold War in 1989, used their techniques to study jurisdictions other than the United States. So, for example, the collapse of the Soviet Union and the resultant formation of new legal systems led to particular interest in institutions such as constitutional courts. The spread of American-style constitutionalism allowed behaviouralists, rational choice theorists and historical institutionalists to test their hypotheses and “generalise their insights”. This work does not focus simply on courts but also on public decision-making institutions generally and, recently, has brought empirical methods to bear on matters such as the content of constitutions.

Roux concludes by making some suggestions about the future evolution of the field. Whilst acknowledging the benefits of a “big-tent, multidisciplinary conception of the field”, he notes a major downside risk: “that scholars working in each paradigm would run the risk of ignoring findings emanating from the other paradigms that might assist them in their work or, indeed, challenge some of their settled assumptions”. Interdisciplinary work, by contrast, ensures that the dangers of tunnel vision are avoided. Yet, so far, there has been a lot of “easy talk” about interdisciplinary work but “very little serious consideration” about feasibility. For Roux – and here there is a message for the aspiring researcher in comparative public law – the chances of comparative public lawyers making “a practical contribution to fair and effective governance” would be greatly enhanced by interdisciplinary engagement.

Martin Loughlin and Samuel Tschorne tackle theoretical approaches to public law. They begin with the arresting proposition that there is widespread belief that “traditional constitutional practices are coming to the end of their useful life”. Loughlin and Tschorne’s focus is the constitutional arrangements of the United Kingdom (but we would add that their account of the recent theoretical turn in public law scholarship carries force overseas as well). A “sustained exercise in conceptual and methodological diversification” over recent decades has led to a reconfiguration of the subject of public law. Given the vastness of the field of inquiry, Loughlin and Tschorne identify three clusters of theoretical analysis in public law, choosing exemplars of each as a means of describing different theoretical approaches to public law. These are constructivism, deconstructivism and reconstructivism.

Constructivism involves “an inquiry into the normative foundations or justificatory principles of constitutional and administrative law” and, ultimately, painting the law in its best possible light given “certain higher principles of political morality extant in our community life”. Constructivists seek to answer pressing questions in public law by reference to these higher principles. There are three main varieties of constructivist thought which are distinguishable based on the higher principles – social, moral and political – upon which they rely. A constructivist theory of public law based on critical social theory (like Ian Harden and Norman Lewis’s *The Noble Lie: The British Constitution and the Rule of Law*[[9]](#footnote-9)) seeks to interrogate whether political institutions are remaining true to the underlying principles which animate them. Whereas a constructivist critical social theorist sees public law as a “power map”, a constructivist moral theorist sees it as “a set of [normative] principles”. For example, Professor TRS Allan’s approach[[10]](#footnote-10) is moral rather than political as his prescriptions are not based on a fully worked-out theory of justice but derived, rather, from “the way in which a constitutional government should treat each individual citizen”. Constructivist political theorists emerged in reaction, or as a counterweight to, their moralistic counterparts, seeking “to vindicate both the essentially political character of the British constitution and the place of Parliament within it” by elaborating a theory that is “capable of explicitly positing the normative underpinnings, the values, that ground the political constitution”.

Deconstructivism takes issue with the key assumption of constructivism, that there is “one best interpretation that makes public law normatively compelling”. Indeed, deconstructivists consider that theorizing about the British Constitution “overestimates the role of principles and tends to become estranged from constitutional practice”. Deconstructivists seek, accordingly, to “expose the realities of public law”, focusing what actually happens in constitutional practice, an approach which is avowedly descriptive. In the British tradition, deconstructivists are skeptical of Parliament and the judiciary as meaningful constraints on executive power – both Westminster and the courts are creatures of politics. The descriptive approach of deconstructivists is not necessarily normatively barren, however, as it may highlight the need for “political mechanisms” capable of meeting the challenges of a particular period, whatever they may happen to be.

Reconstructivism also takes issue with the key assumption of constructivism and, in addition, rejects the thesis of deconstructivism “that the logic of public law is to be found by unveiling power relationships and the clash of conflicting of interests”. Rather, it accepts that “reason plays a constitutive role”. But to “reason” for a reconstructivist does not mean reasoning from higher-order social, moral or political principles in the constructivist mode. Instead, reason must be grounded in practice, “to offer a theory in public law that is empirical but not empiricist and normative but not normativist”. The fundamental premise is that social practices are meaningful to the participants, and the fundamental task, then, “to render explicit and expand on an already existing know-how”. In setting out an empirical and normative theory, the goal is “to make sense of the plurality of competing rationalities that have historically shaped the field” of public law. For Loughlin – himself the exemplar of reconstructivist theories – the current dissatisfaction with Britain’s constitutional arrangements can only be understood through a “historically-oriented reconstruction” of constitutional change over time.

These three theoretical approaches – constructivist, deconstructivist and reconstructivist – are prevalent in public law theory (and, again, we would observe that such approaches are evident in scholarship in other jurisdictions too). For Loughlin and Tschorne, however, only deconstructivist or reconstructivist approaches are “purely scholarly” approaches, whereas constructivists invariably invoke theory to promote the author’s “own ideological dispositions”. For constructivists, this is a significant challenge (though, as some-time constructivists ourselves, we would retort that deconstructivists and reconstructivists may sometimes struggle to respond convincingly when asked “what’s the point?”).

Sarah Nason lays out the quantitative, qualitative and computer-science methods which have been used in empirical research in public law. In general, empirical research is a species of socio-legal research, which is concerned with the “nature and role of law in society”, motivated by a desire to introduce “scientific methodological rigour” to the study of phenomena in public law. Empirical approaches have grown in popularity in recent decades, especially in the United States and, more recently, in the United Kingdom and other common-law jurisdictions. This is unsurprising, Nason notes, as there has been no shortage of constitutional and administrative change to study.

There are several “stages of activities” for the budding empirical public law researcher. First, the researcher must “identify a researchable problem” (which might be accomplished by reference to work done by more traditional methods). Then, the researcher must conduct a literature and data review to gather existing evidence and design a research project. After that, it is necessary “to consider how the relevant problems or issues can be expressed as concepts that can then be concretised or operationalised as measurable phenomena”. This step is sometimes “left unarticulated” but is nonetheless centrally important. For in order to observe concepts, the researcher must first clarify the concepts. Here, reliance on previous research done from a theoretical perspective is particularly helpful, underscoring how different methodologies in public law research can be complementary. This process of reflection leads to the formulation of a research question setting out the “overall aims and objectives of the research”. This should be done by reference to considerations of epistemology: broadly speaking, the researcher has to determine whether to proceed deductively (an approach often associated with quantitative methods) or inductively (more commonly thought to involve qualitative research). Lastly, the researcher must identify the evidence they wish to rely upon, which can be generated by observation of different groups who have been randomly selected, quasi-experimental development with carefully chosen groups, or longitudinal studies of the same group over tie.

The primary methods are quantitative and qualitative. Quantitative methods involve “observing phenomena through, for example, statistical, mathematical, or computational techniques”, whereby the phenomena can be reduced to numerical form. Of course, in any data set there will be multiple variables which might account for the characteristics of the phenomena. The researcher must make choices about how and what to measure. These choices are assessed by reference to criteria of reliability – the extent to which the study can be replicated – and validity – the extent to which a measure reflects the underlying concept (for example, its alignment with prior evidence). Once the key variables have been identified, the researcher must then translate them “into a form that can be systematically analyzed”. This process is “coding”. Statistical methods must then be brought to bear in analyzing the data, drawing descriptive or causal inferences, and ensuring that any inferences drawn are statistically significant.

By contrast, qualitative methods are interpretive, as they aim to “capture the meanings participants ascribe to issues, situations and occurrences and … explain these in a meaningful way”. Here the data sets are usually smaller, though researchers must be as cautious as they are with quantitative methods to ensure that samples are appropriate. A significant difference is that researchers using qualitative methods “interpose themselves” between the raw data and conclusions, as they may “fluidly redesign their research to meet changing conditions, perceptions and findings”. (In this they are not unlike the interpreters of doctrinal materials described by Ahmed and Perry, and Varuhas.) Furthermore, scholars employing qualitative methods tend to stress dependability and integrity as criteria rather than the reliability and validity which are the touchstones for quantitative researchers. Their approach to coding will also differ, with classical content analysis, discourse analysis and grounded theory method all plausible approaches.

Quantitative and qualitative methods can be blended, of course. Advances in technology have also made it possible to assemble large data sets and code them. And technological advances have allowed empirical researchers to open new frontiers by using methods such as corpus linguistics and automated content analysis. These methods set machines to work on large data sets with a view to uncovering the meaning or architecture of legal texts by making links to other texts which are relevant. This relevancy is not obvious on the face of the texts, but is immanent in the larger body of materials combed by the machine. Human researchers are not irrelevant, however, as they must set the machine to work and use their critical faculties to assess the machines’ output. Again, the lesson is that empirical legal research in public law does not exist in a hermetically sealed compartment. Rather, other methodological approaches can contribute to informed empirical analysis.

Lastly, in the **critical** category are grouped the contributions of Paul O’Connell on Marxism and Helen Carr and Edward Kirton-Darling on socio-legal studies. It is worth acknowledging at the outset that there are many more critical approaches than are catered for in this collection. The exigencies of assembling an edited collection during the COVID-19 pandemic meant that, unfortunately, this collection lacks chapters on feminist or critical race theory. Nonetheless, Carr and Kirton-Darling provide a roadmap for such research and, in his deconstructive approach to legal doctrine – albeit from a Marxist rather than feminist or critical race perspective – O’Connell demonstrates the methodological tools which may be used by feminist or critical race researchers.

The Marxist approach to public law is one possible critical approach. On the Marxist approach, the emergence of the capitalist mode of production as the dominant mode of production produces a formal separation of economic power and political power. The role of public law is to constitute and constrain this political power – by doing so in an ostensibly neutral fashion, public law lends legitimacy to the state or political order in capitalist societies. Whereas, however, a conventional view of public law sees a “sharp division” between politics and law, critical theorists recognize the “systemic, deep interpenetration” of law and political power. For Marxists, analysis of public law involves highlighting the “material, social and historical relationships of power that condition the doctrines and institutions of public law, and how these in turn sustain and legitimate the extant capitalist system”.

Marxism has two central methodological elements: historical materialism and class antagonism. Historical materialism “seeks out the material basis of ideas and institutions in a given historical period [and] further stresses the historicity of ideas and institutions”. Our “juridical relationships and institutional forms” are products of this material basis and historicity and must be situated “in a broader historical and materialist context”. Class antagonism explains the “motor force of historical change”, namely, divisions and struggles between different social classes. In the capitalist system, the division and struggle between workers and capitalists creates a “fundamental tension”, as “the existence and prosperity of one of these classes [the capitalists] is structurally dependent on the exploitation and degradation of the other [the workers]”. This leads to inequality which “law and state power play a crucial role in sanctioning, legitimating and reproducing…” Ultimately, the Marxist view is that law serves to “uphold the interests of the dominant class in capitalist society” (and one can appreciate how a feminist or critical race theorist could come to a similar conclusion, though identifying the dominant class differently).

From this position, Marxists can deconstruct legal phenomena, drawing attention to the “obscured relations” which are hidden beneath the façade of public law. O’Connell uses Brexit as an example, situating “the Brexit conjuncture in a broader historical context [that] looks to the competing class interests and forces that shaped the conjuncture, to explain how this in turn impacted on public law”. Debates about neat points of constitutional law – the role of referendums, the relationship between domestic and EU law, the use of the prerogative – miss the bigger point that Brexit is a product of an “ongoing structural crisis in the capitalist system”. And the debates are also naïve, in that they fail to notice that judicial intervention grew out of the longer process of “neoliberal reconstitution” of Britain’s constitutional arrangements.

Marxist public lawyers need not necessarily engage in deconstruction. There is also a reconstructive aspect to their work. Notably, the development of “socialist constitutionalism” lends a “productive element” to the Marxist public law project. This involves the development of “institutional arrangements that expand democracy and increase working class self-activity and confidence”, inspired by rejection of “the public/private, state/civil society binary which is central to liberal legalism”. Socialist constitutionalism thereby seeks to reform existing institutions and form new ones as “alternative sites of working class power”. Examples are provided by proposals for Workers’ Councils and, more recently, community wealth-building initiatives. Similarly, feminist and critical race scholars can, having deconstructed existing institutions, propose concrete reforms or “new institutional forms” altogether, which are not beholden to prevailing power structures. Shared by advocates of all critical approaches is O’Connell’s aphorism that “[t]he fetishised character of legal rules and principles within liberal legalist, or bourgeois, frameworks conceal more than they reveal about the nature of law and processes of legal and social change”.

Helen Carr and Ed Kirton-Darling provide an analysis of possible methodological approaches for the socio-legal public lawyer. Eschewing the possibility of drawing up a “template” for a successful socio-legal research project, because research is inherently “unstable and uncertain” and socio-legal research quite “catholic”, they offer a series of helpful “pointers” and consider some “practical and pragmatic issues”.

At the outset, they note the general orientation of their work as socio-legal public lawyers interested in problematizing the state, the public/private divide, individuals who are “excluded” or “marginally included” in legal structures and “all the ways in which power and the relationship between the (broadly understood) state and citizen is mediated…” This calls for a rejection of conventional thinking, where theory is helpful, both in highlighting connections which doctrinal legal categories obscure and in simply thinking differently. One useful theoretical approach is Foucault’s scholarship on governmentality, which focuses attention on the “myriad” relationships between the various actors who administer the law and the relationship between law and norms. Another theoretical approach is Cowan’s legal consciousness approach, based on the insight that “law is experienced in everyday life outwith the terrain marked by formal legality”.[[11]](#footnote-11) A still further possibility, especially for those concerned that theory will become a “metanarrative of oppression”, is utopian studies, whose adherents seek to draw on the “innovative and the radical” to imagine “more progressive futures”.

Carr and Kirton-Darling offer some caveats to the use of theory, however. To begin with, the researcher should be clear about why they are using a particular theory and the contribution it is designed to make to the researcher’s work. Use of the theory should also be sustained through the researcher’s work. But the theory should not drive the research: adhering too close to a theory “such that all of your conceptual effort goes into trying to make the theory work in a particular context, runs the risk that the entire project becomes incoherent”.

With theory – appropriately caveated – in hand, the researcher must also be careful to have accurately identified their research problem, considering how others have approached it and not making undue assumptions about the past (for instance, that social divisions in the United Kingdom began during the Thatcher’s time as Prime Minister). In particular, “any claims to the uniqueness of contemporary social problems needs to be made with great care”. In fully appreciating the relevant perspectives on a given research problem, it is useful to reach across disciplinary divides – the social sciences and the humanities can each be helpful in contextualizing research problems – and to consult with practitioners outside academia. Here, again, however, there is an important caveat, as without “long-term immersion” in a field (such as history), the socio-legal researcher will be a ‘lawyer doing history’ rather than a legal historian or a historian proper. This requires some modesty on the researcher’s part, “as well as being respectful of the expertise of others and the ways in which their interventions might fit as responses in ongoing conversations in other disciplines”. Furthermore, the researcher must be alive to the risk of becoming too embedded in the research project, as getting too close to the legal details and intricacies of a research problem may cause a socio-legal project to collapse into a “law first account”. Moreover, the researcher may become “overly present” and fail to notice what is “missing” from the research problem. This leads Carr and Kirton-Darling to reflect on the utility of critical approaches, from a feminist or race perspective, in effective socio-legal studies:

It is all the more important then to consciously interrogate your research project from the outset. Ask who is missing from previous accounts you have read and what the implications are. If you can, refocus your work, extend your research questions and examine your empirical methods. Remember that gender and race may be relevant in more contexts than you might imagine. So for instance when considering street homelessness it is not only that the accounts of women are missing, but that the role of masculinity in shaping legal and policy responses to homelessness has been overlooked. As a first step one simple audit you can do is of your references: is there anyone other than white male academics. If not, this might suggest you have overlooked key perspectives. This is obviously not to suggest that race and gender are the sole ways in which exclusion occurs, or that background predetermines perspective, but is a way to provoke reflection on what is missing – which we would suggest should go on to include reflections on class and the ways accounts might privilege wealth and ability over poverty and disability.

Lastly, Carr and Kirton-Darling address the institutional environment in which research takes place. Socio-legal scholars are not exempt from requirements of academic rigour. A research project requires “critical reflection and detailed planning”. This may require adjustment over the course of the project, but this adjustment should be conducted according to the norms of socio-legal inquiry.[[12]](#footnote-12)

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Having outlined the contributions this book makes in some detail, it is possible now to highlight some recurring themes, which are central to effective reflection on methodology in public law.

By far the most significant is the desirability of transparency. As the contributions to this collection amply demonstrate, there is a plurality of approaches to methodology in public law. It is incumbent upon the public law researcher to describe, in a transparent way, the approach that they are choosing to take to their research. Whatever approach one takes, there are methodological choices to make, which come freighted with commitments, assumptions and methods. If these are visible, they can be discussed and reflected upon, with colleagues, doctoral supervisors, journal referees, editors and so on. But if they are not visible, the researcher runs the risk – heightened by greater attention to methodology in the legal community – of being accused of promoting a hidden agenda, relying on fallacious or outmoded assumptions or using defective methods.

Another important theme relates to the difference between an internal and external perspective. Traditional approaches invariably adopt an internal perspective, seeking to make sense of the law from the inside out. Critical approaches, by contrast, bring external perspectives to bear on the law, demonstrating how participant’s self-understandings neglect important details or are based on unexpressed assumptions. Sometimes, a methodological approach to public law might include both internal and external perspectives, as with the social constructivist approach described by Loughlin and Tschorne, the socio-legal strand of comparative public law identified by Roux and some of Nason’s empirical scholarship. As with methodological choices in general, it is usually helpful that a researcher’s stance relative to the internal and external perspective is made clear.

We would also highlight something implicit in the contributions, which is the need for epistemic humility. There is no unified field theory of law or legal systems. These living phenomena can be observed, studied and criticized from a variety of methodological perspectives. No one methodological approach reigns supreme over the others. Accordingly, each can only be assessed on its own merits. The ‘goodness’ or ‘success’ of a socio-legal or empirical project falls to be judged by reference to its compliance with the criteria for a ‘good’ or ‘successful’ socio-legal or empirical project. It cannot be ‘bad’ or a ‘failure’ because its results differ from those preferred by a comparative or doctrinal public lawyer.

Lastly, we note the desirability of discussion between adherents to different methodological approaches. Nason observes, for instance, that empirical public law scholarship is often based on hypotheses or thoughts prompted by doctrinal or theoretical thinking about public law. Similarly, empirical work may make doctrinal lawyers rethink their subject. Indeed, public lawyers can learn a great deal from those following other methodological approaches. Without necessarily adopting the approaches themselves, public lawyers can enhance their own research by rigorously assessing their commitments, assumptions, and methods in the light of work done by others.

1. Varuhas Taxonomy chapter. [↑](#footnote-ref-1)
2. (2013) 72 *Cambridge Law Journal* 526. [↑](#footnote-ref-2)
3. See, in particular, his description of Coke’s celebration of Magna Carta:

The basic reconstructive features of his celebration of Magna Carta were, first, the abstraction of a causa or purpose from a complexity of facts, secondly, the ex post facto imputation of the causa as the prima causa or principal purpose from the perspective of the present rather than that of the past and, thirdly, the actionality of the causa as a motive, or reason of principle or policy, for acting. [↑](#footnote-ref-3)
4. See further Varuhas, Daly. [↑](#footnote-ref-4)
5. [↑](#footnote-ref-5)
6. On this, as members of the “values-based” camp, we demur, and retort that “narrative” approaches might well feature high levels of normative capture. [↑](#footnote-ref-6)
7. Xanthaki. [↑](#footnote-ref-7)
8. Russell and Gover. [↑](#footnote-ref-8)
9. Hutchinson, 1986. [↑](#footnote-ref-9)
10. See e.g. *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford University Press, Oxford, 2013). [↑](#footnote-ref-10)
11. “Legal Consciousness: Some Observations” (2004) 67 Modern Law Review 928, at 929. [↑](#footnote-ref-11)
12. S Halliday and P Schmidt, *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge, 2009), at 2. [↑](#footnote-ref-12)