UNIVERSITAS BHAYANGKARA JAKARTA RAYA
FAKULTAS HUKUM

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Kampus II : Jl. Perjuangan Raya Marga Mulya Bekasi Utara Telp: 021. 88955882

SURAT TUGAS

Nomor : ST/0974-C/VI/2023/FH-UBJ

Tentang

PENUNJUKAN PESERTA SEMINAR NASIONAL

DEKAN FAKULTAS HUKUM UNIVERSITAS BHAYANGKARA JAYA

Menimbang : Bahwa dalam rangka pelaksanaan Kegiatan Seminar Nasional dengan tema "Perkembangan Teori, Metode dan Filsafat Hukum dalam Penulisan Disertasi", yang diselenggarakan oleh Program Doktor Ilmu Hukum Fakultas Hukum Universitas Indonesia maka dipandang perlu mengeluarkan surat tugas sebagai Peserta untuk melaksanakan kegiatan tersebut.

Mengingat :
1. Undang-Undang No. 14 Tahun 2005 Tentang Guru dan Dosen.
2. Undang-Undang No. 12 Tahun 2012 Tentang Pendidikan Tinggi.
3. Undang-Undang No. 49 Tahun 2014 Tentang Standar Nasional Pendidikan Tinggi.

MENUGASKAN :

Kepada : **SRI WAHYUNI, S.H., M.H.**
DOSEN TETAP FAKULTAS HUKUM UBJ

Untuk :
1. Melaksanakan tugas sebagai Peserta dalam Kegiatan Seminar Nasional dengan tema "Perkembangan Teori, Metode dan Filsafat Hukum dalam Penulisan Disertasi", yang dilaksanakan pada :
   - Hari : Sabtu
   - Tanggal : 24 Juni 2023
   - Pukul : 09.00 – 13.00 WIB
   - Tempat : Balai Sidang FH Universitas Indonesia.
2. Melaporkan hasil pelaksanaan kegiatan tersebut secara tertulis kepada Dekan Fakultas Hukum Universitas Bhayangkara Jakarta Raya.
3. Melaksanakan tugas ini dengan penuh tanggung jawab.

Selesai.

Ditetapkan di : Jakarta
Pada tanggal : 24 Juni 2023
Dekan Fakultas Hukum,

Dr. Rr. Dijan Widijowati, S.H., M.H.
NIP. 2207565

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HUKUM

SERTIFIKAT

Sertifikat ini diberikan kepada :

Sri Wahyuni, S.H.,M.H.

Sebagai **Peserta**
Seminar Nasional: Perkembangan Teori, Metode dan Filsafat Hukum dalam Penulisan Disertasi
yang diselenggarakan oleh Program Doktor Ilmu Hukum Fakultas Hukum Universitas Indonesia di Balai Sidang FH UI

Depok, 24 Juni 2023

Dr. Parulian Paidi Aritonang, S.H., LL.M., MPP.
Dekan Fakultas Hukum Universitas Indonesia

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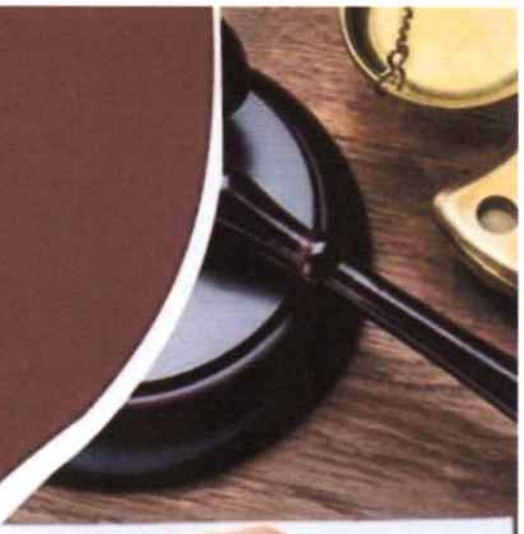
SEMINAR NASIONAL

PERKEMBANGAN TEORI, METODE DAN FILSAFAT HUKUM DALAM PENULISAN DISERTASI



Narasumber

Prof. Dr. Yusril Ihza Mahendra, S.H., M.Sc.

Prof. Hikmahanto Juwana, S.H., LL.M., Ph.D.

Prof. Dr. Topo Santoso, S.H., M.H.

Prof. M. R. Andri G Wibisana, S.H., LL.M., Ph.D.

Pembahasan

- Prof Topo Santoso: Metode Perbandingan dalam Riset Hukum
- Prof Andri Gunawan Wibisana: Penggunaan Teori dalam penulisan Disertasi: Contoh Kasus Analisa Ekonomi atas Hukum
- Prof Yusril Ihza Mahendra: Perkembangan Teori dan Filsafat Hukum
- Prof. Hikmahanto: Pendekatan Normative dan Doktrinal dalam Penelitian

FREE E-CERTIFICATE

bit.ly/SeminarNasionalS3

SABTU
24 Juni 2023
09:00 - 13:00 WIB
Balai Sidang FHUI

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PESERTA
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FAKULTAS HUKUM

Penelitian hukum dan Analisa Ekonomi

Andri G. Wibisana

"the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics"—Oliver Wendell Holmes

Pertanyaan (Penelitian) Hukum [Mathias Siems, 2008)

- Tipe pertanyaan/topik penelitian:
  - Micro: The term 'micro-legal questions' describes research that analyses a specific legal problem, such as a specific provision of a statute or code, or a specific case or line of cases.
  - Cara membuat micro legal research menarik (orisinal):
    1. mencari koherensi dan integritas dari aturan hukum yang sedang dibahas
    2. pendekatan sejarah hukum
    3. menambahkan topik makro ('*macro-legal topics*') ke dalam '*micro-legal analysis*'
    4. perbandingan hukum
    5. *Law and...*
    6. *Law in action*
    - 1 s.d. 4: internal; 5 dan 6: external point of views

Pertanyaan (Penelitian) Hukum

- Macro: A macro-legal analysis is concerned with general concepts, problems and principles of the law.
  1. Buku tentang keseluruhan isu dari bidang hukum tertentu
  2. Penelitian yang fokus pada "justice", "law", "rights"
  3. Penelitian tentang metode
  4. *Transnational law*
  5. *Law and politics*
  6. *Law and reality*

Pertanyaan (Penelitian) Hukum

- *Scientific legal research*
  - *Law and economics*
  - *Experimental legal research*
  - *Quantifiable effects of rules and enforcement*
  - *Case studies (qualitative research)*
- *Non legal topics*
  - Misalnya: topik tentang *corporate governance,* yang mencari tahu bagaimana perusahaan bekerja dan dikelola, di mana hukum adalah salah satu saja dari beberapa faktor lainnya

Pertanyaan (Penelitian) Hukum

- Pendekatan:
  - Internal point of view
  - External point of view

Pertanyaan (Penelitian) Hukum

- *Kedua*, pendekatan sejarah hukum
  - Mengkaji bagaimana sejarah hukum menjelaskan hal dari masa lalu yang masih bisa diterapkan pada hukum sekarang
  - Sejarah hukum dapat menjadi cara untuk memahami, mengkritisi, dan menilai aspek hukum tertentu saat ini
- *Ketiga*, menambahkan topik makro ('*macro-legal topics*') ke dalam '*micro-legal analysis*'
  - Menambahkan konsep, masalah, atau asas hukum tertentu yang biasanya dibahas di dalam filsafat hukum atau teori hukum
  - Misalnya pembahasan mengenai *nullum crimen sine lege*.
- *Keempat*, perbandingan hukum
  - Melakukan perbadingan antara dua atau lebih sistem hukum dibandingkan
    - » Mengapa sistem hukum tersebut berbeda, dan apakah dibutuhkan konvergensi hukum
    - » Membantu untuk mengetahui jawaban atas pertanyaan tertentu terkait aturan di dalam sistem hukum setempat

	Approaches that keep disciplines separate	Approaches that integrate 'scientific' methods into legal thinking
Legal questions	Basic interdisciplinary research	Advanced interdisciplinary research: Type 2
Non-legal questions	Advanced interdisciplinary research: Type 1	Advanced interdisciplinary research: Type 3

Contoh Soal

- Penjelasan Pasal 88 UU Nomor 32 Tahun 2009:
  - Yang dimaksud dengan "bertanggung jawab mutlak" atau strict liability adalah unsur kesalahan tidak perlu dibuktikan oleh pihak penggugat sebagai dasar pembayaran ganti rugi. Ketentuan ayat ini merupakan lex specialis dalam gugatan tentang perbuatan melanggar hukum pada umumnya. Besarnya nilai ganti rugi yang dapat dibebankan terhadap pencemar atau perusak lingkungan hidup menurut Pasal ini dapat ditetapkan sampai batas tertentu.
    - *Liability cap*

Tipe Penelitian

1. Internal:
   - Micro: perbandingan dengan ketentuan sejenis (statutory vs common law-based strict liability), trade-off antara cap dengan jenis liability
   - Macro: asas pencemar membayar, hak korban atas kompensasi

2. External

A. Basic Research: pengantar law and economics tentang tort

- Negligence vs Strict Liability
- Definisi unilateral cases
- x adalah level of precaution
- w adalah biaya utk tiap level of precaution (konstan)
- *p(x)* adalah probabilitas munculnya kerugian yang tergantung dari tingkat *precaution* (*endogenous*)→kehati-hatian akan menurunkan probabilitas
- *D* adalah kerugian

Level of Care

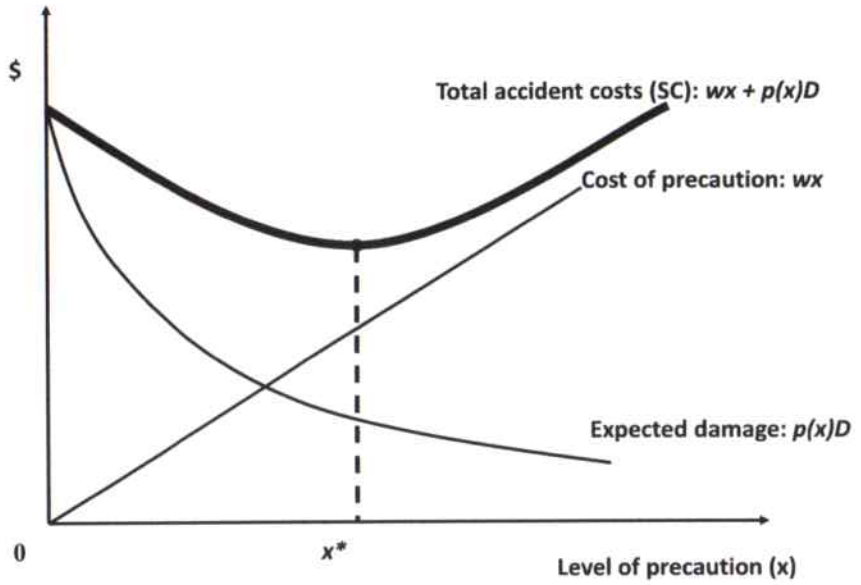
- MinSC = Min $[wx + p(x)D]$

  →titik maksimum jika $f'(x) = 0$;

  $SC' = w + p'(x)D = 0$

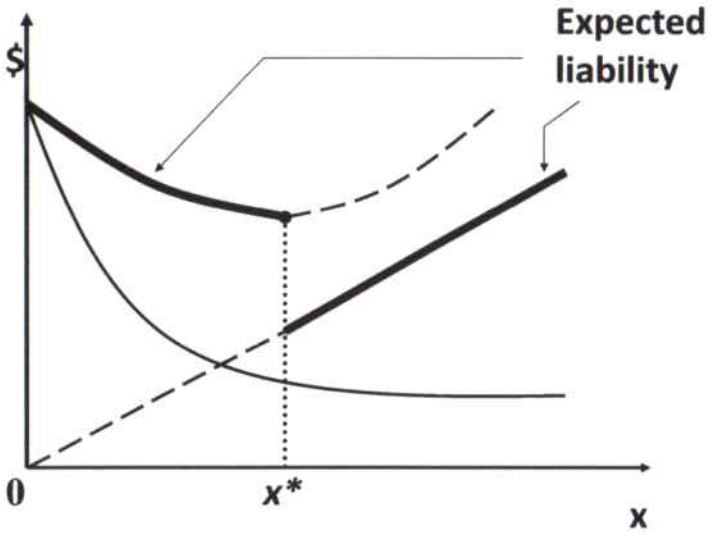
  $w = - p'(x)D$

- x^* (level of precaution yg optimal) terjadi ketika biaya per unit precaution sama dengan perubahan probabilitas munculnya kerugian dari tiap peningkatan precaution, dikalikan dengan kerugian yg diperkirakan
- w = biaya marjinal pencegahan
- $- p'(x)D$ = manfaat marjinal dari pencegahan

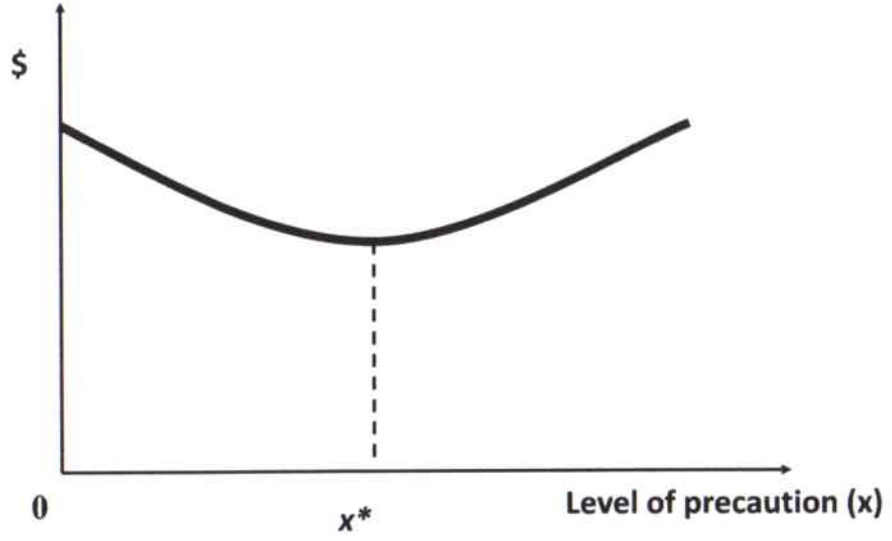


- Baik negligence maupun strict liability akan mendorong orang berhati-hati (mengambil x*)

- Negligence rule



Strict Liability



Level of Activity

- the level of activity = z, yaitu jumlah waktu di mana seseorang terlibat dalam satu kegiatan (yg beresiko)
- $b(z)$ adalah fungsi dari keuntungan dari kegiatan tersebut,
- social benefit (SB) adalah:

  $SB = b(z) - z\,[wx + p(x)D]$ ...1

- Artinya, SB adalah manfaat dari keterlibatan di dalam kegiatan dikurangi total biaya kerugian yang ditimbulkan dari kegiatan tersebut
- Karena benefit akan maksimum ketika biaya adalah minimum, x^*, persamaan di atas dapat ditulis:

  $SB = b(z) - z\,[wx^* + p(x^*)D]$ 2
- SB maksimum didapat ketika SB' = 0, sehingga:

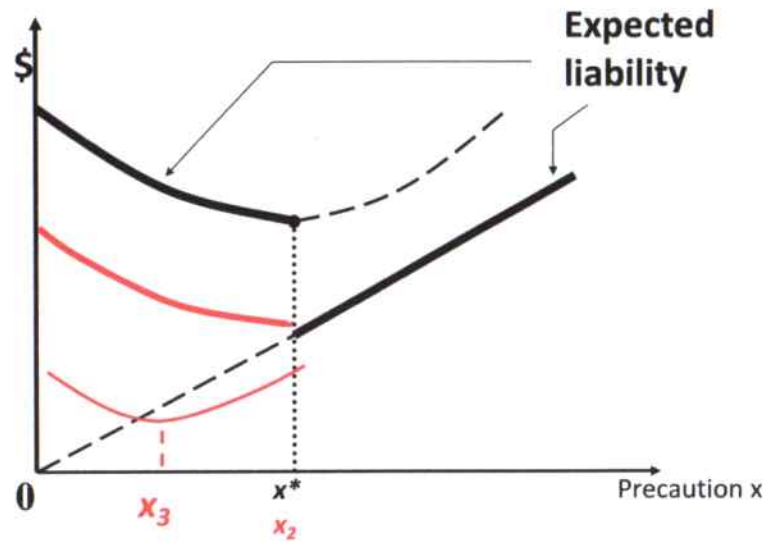
  $SB' = b'(z) - [wx^* + p(x^*)D] = 0$ ...3
- Jika tingkat aktivitas optimal adalah z^*, maka:

  $b'(z^*) = [wx^* + p(x^*)D]$ ...4

Error dalam Penentuan D

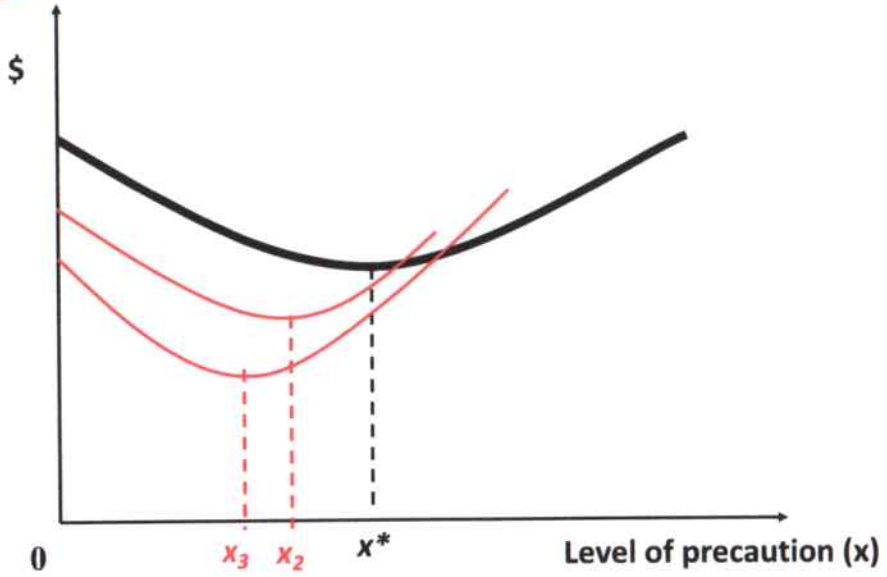
- Apa efeknya bagi kehati-hatian?

- Negligence



- Selama $D_{error} > wx^*$, maka x^* akan diambil

- Strict Liability



- Setiap $D_{error} < D_{actual}$, maka $x < x^*$

b. Advance Research tipe 1: Judgment Proof dan Asuransi

- Bagaimana asuransi bekerja?
- Apa saja cara yang biasa dilakukan oleh asuransi untuk mengatasi kemungkinan liability yang tinggi?

c. Advance Research tipe 2: Judgment Proof dan Asuransi

- Judgment Proof = Error dalam penentuan damage = financial cap
- Third Party Insurance

d. Advance Research tipe 3

- Mengapa terdapat trade-off?
- Apa peran lobby dari asuransi?

Kesimpulan

- So what can the scenario of a world without law professors tell us about the current system of legal education and research? First, it is possible to delegate the training of prospective lawyers, and to some extent legal education more generally, to legal practitioners. Second, doctrinal research can also be well done by legal practitioners. Third, in return, law professors should favour deep legal research since we already observe an oversupply of descriptive legal writings. Fourth, since such deep research is often interdisciplinary, there is a need to foster collaboration across disciplines. Fifth and finally, the relationship between teaching and research can be handled in a flexible way. Universities should not prescribe a fixed allocation of time but, if appropriate, let academics specialise in either teaching or research. [Mathias Siems]

MENGGUNAKAN PENDEKATAN PERBANDINGAN DALAM STUDI DOKTOR ILMU HUKUM

TOPO SANTOSO
FAKULTAS HUKUM UNIVERSITAS INDONESIA

24 JUNI 2023

"Thinking without comparison is unthinkable. And, in the absence of comparison, so is all scientific thought and scientific research."
--G. Swanson

Contoh judul disertasi dengan pendekatan perbandingan

- A comparative study of the environmental laws of India and the UK with special reference to their enforcement □ Sinha, Govind Narayan (2003), University of Birmingham.

Perbandingan Hukum dalam Kajian Akademik

- Method?
- Approach?
- Bidang hukum? □ Hukum Perbandingan
- Perbandingan Hukum vs Hukum Perbandingan

Types of Comparative Studies (Hug, 1922)

- (a) Comparison of foreign systems with the domestic system in order to ascertain similarities and differences;
- (b) Studies which analyse objectively and systimatically solutions which various systems offer for a given legal problem;
- (c) Studies which investigate the causal relationship between different systems of law;
- (d) Studies which compare the several stages of various legal systems;
- (e) Studies which attempt to discover or examine legal evolution generally according to periods and systems.

(de Cruz, 1993: 5)

The Comparative Method (Rheinstein)

- Macro-Comparison the study of two or more entire legal systems
- Micro-Comparison the study of topics or aspects of two or more legal systems

mis.

(i) the institutions or concepts peculiar to the system

(ii) the sources of law, judicial systems and judiciary, legal profession or even the structure of the legal system

(iii) the various branches of national or domestic law

(iv) the historical development of legal system;

(v) the ideological, socio-legal and economic bases of that system

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THE PURPOSE OF THE COMPARISON will often determine the suitability of selection !!!
(de Cruz 1993: 37)

The test of Functionality (Zweigert and Kotz)

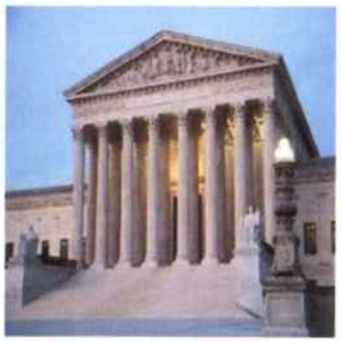
- The basic methodological principle of all comparative law is that of functionality
- The legal system of every society faces essentially the same problems and solves these problems by quite different means though very often with similar result
- Although different societies have different specific problems, all societies have the same basic problems
- They need to resolve their particular domestic / local problems and to consider how best 'the law' may deal with these problems.
- (de Cruz 1993: 37)

Tertium Comparationis

- Dari bahasa Latin yang artinya:
- "the third [part] of the comparison")
- = the quality that two things which are being compared have in common.
- It is the point of comparison which prompted the author of the comparison in question to liken someone or something to someone or something else in the first place.

- If a comparison visualizes an action, state, quality, object, or a person by means of a parallel which is drawn to a different entity, the two things which are being compared do not necessarily have to be identical. However, they must possess at least one quality in common. This common quality has traditionally been referred to as *tertium comparationis*.

- Jika perbandingan memvisualisasikan suatu tindakan, keadaan, kualitas, objek, atau seseorang dengan cara paralel yang ditarik ke entitas yang berbeda, dua hal yang sedang dibandingkan tidak harus harus identik. Namun, mereka harus memiliki setidaknya satu kualitas yang sama. Kualitas umum ini secara tradisional telah disebut sebagai tertium comparationis.



Stages in the Process of Comparison
(Kamba, 1974)

- (a) the descriptive phase
- (b) the identification phase
- (c) the explanatory phase

The Method of Comparison : A Blueprint (Peter de Cruz)

Step 1. identify the problem and state it as precisely as possible

Step 2. Assuming that the 'home jurisdiction' is one of the jurisdictions being compared, identify the foreign jurisdiction, and if possible , its legal family

Step 3. decide which primary sources are going to be needed

Step 4. gather and assemble the material relevant to the jurisdiction being examined

Step 5. organise material . (i) list the main sources of law (ii) list the hierarchy of sources (iii) socio cultural material

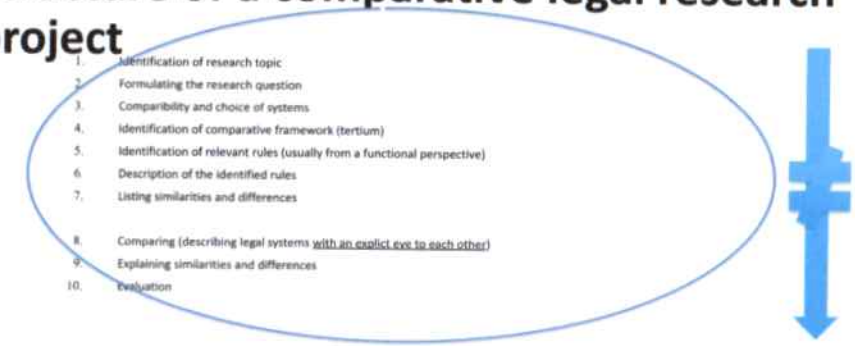
Step 6. map out the possible answers to the problem, comparing the different approaches, noting possible cultural differences, different legal interpretation, socio-economic factors and any non-legal factors

Step 7. Criticaly analyse the legal principles

Step 8. Set out your conclusions in a balance manner

(de Cruz 1993: 38-39)

Structure of a comparative legal research project



The scheme deals with comparative research as if it is linear, although in reality it is circular

Comparative law is not a cook book with recipes to be followed strictly!

Maurice Adams, 2020

Key Concepts in the Comparative Law Method (de Cruz 1993: 22-24)

- The Parent Legal Family and Legal Traditions : a set of 'deeply rooted historically conditioned attitudes about the nature of law, the role of law in the society and the political ideology, the organisation and operation of a legal system' (Merryman,1977) a legal tradition ≠ a legal system
- Sources of Law this can mean different things in different countries and, even in the same country ; the popular meaning (1) historical sources , (2) place where the law can be found, and (3) legal sources (Wu Min Aun, 1975), p. 17.

	Civil Law	Common Law
The influence of the *Corpus Juris Civilis*	significant and abiding	modest
The codification process, derived from the *Corpus Juris Civilis*	Have comprehensive codes, often developed from a single drafting event. The codes cover an abundance of legal topics, sometimes treating separately private law, criminal law, and commercial law.	Have statutes in those areas, sometimes collected into codes, they have been derived more from an ad hoc process over many years. Codes of common-law countries very often reflect the rules of law enunciated in judicial decisions (i.e., they are the statutory embodiment of rules developed through the judicial decision-making process).
the existence and growth of equity law	There is no comparable equity law in civil-law countries; the system orientation of the codes would not permit the growth of another branch of law outside the framework of the system. Equity would disrupt the certainty required in the interests of legal science. Equitable principles and remedies, to the extent they exist in the civil-law tradition, would be built into the structure of the codes as part of the overall system.	Equity law developed in England as a legal method to soften the often harsh effects of judicial precedent or legislation; to establish different procedures that might be required for a particular issue in the interests of fairness when common-law remedies were not available or could not ensure a just result in a particular case; and to deal with new problems that called for different remedies than the common law provided.

	Civil Law	Common Law
the role of judicial decisions in the making of law	1. the role and influence of judicial precedent, at least until more recent times, has been negligible 2. Civil-law judges or their scholar-advisers initially look to code provisions to resolve a case	1. precedent has been elevated to a position of supreme prominence 2. common-law judges instinctively reach for casebooks to find the solution to an issue in a case.
methods of legal reasoning	the reasoning process is deductive, proceeding from stated general principles or rules of law contained in the legal codes to a specific solution.	the process is inductive, the judges apply inductive reasoning, deriving general principles or rules of law from precedent or a series of specific decisions and extracting an applicable rule, which is then applied to a particular case.

Restorative Justice & Legal Culture

- "A country seeking to expand RJ should look at countries or systems which have had success in implementation and which have similarities with its own legal and socio-political culture in general, and with its RJ tradition, in particular, in order to learn from it/ them."
- "RJ developments in a given country will be a reflection of said country's legal, social and political culture."

- (Diaz Gude & Navarro Papic, 2020)

- Contoh Perbandingan tentang Restorative Justice

□ RJ dari dua keluarga hukum (Common Law & Civil Law),memahami Karakteristik Umumnya, dan kemudian melihat beberapa aspek nya(legal framework, scope, dan implementation) dari beberapa negara

Faget, 2000 dalam Diaz Gude & Navarro Papic, 2020

COMMON LAW

- The ide of individuals or group autonomy over the power of the monarch or government.
- Justice and judges are seen as emanating from society
- Citizens participation is considered a crucial element of democracy

CIVIL LAW

- The state distributes law
- Justice is a bureaucratic appendix of the central power
- Judges are agents of the sovereign authority
- The delegation of power to the community is much more limited

Dunkel et al, 2015 dalam Diaz Gude & Navarro Papic, 2020

COMMON LAW

- The Victim Offender Reconciliation Programmes (VORP)
- Mediators are usually volunteers form the community and are seen as representatives of community in the process
- Deliberative Justice
- Stresses the importance of a mutual checking of powers between the state and the community
- The community as the most important site of social regulation and crime control in society
- Restorative community justice

CIVIL LAW

- Weak community participation
- Reflected in The Victim – Offender Mediation (VOM)/ Penal Mediation (in Spain and France)
- Involves bilateral processes of conflict-resolution between the victim and offender, where the community has little or no participation
- Mediators tend to be mostly professionals
- Professional justice of lawyers

RJ di Austria

Legal Framework	Scope	Implementation
- Sampai 1 Januari 2000 - VOM for juvenile, Article 7,8 of the Juvenile Justice Act 1988 ; for adults, article 42 of the Penal Code ; - Saat ini □ Juvenile and adults, Article 90 of the Criminal Procedure Law, amended Act 1999	- The provision for both adults and juveniles is diversionary in nature and discretionary in its application,; this determined in any case by the public prosecutors - The court may, of its own motion or at the application of either the victim or the offender, propose an out of court resolution	The regular VOM implemented as a form of case dismissal by the public prosecutor The public prosecutor is the gatekeeper to mediation Mediators must possess a professional qualification such as one in social work, law or psychology

RJ di Belgia

Legal Framework	Scope	Implementation
- Untuk Mediation between victim and young offender□ Juvenile Justice Act 1965, Act tahun 1995 - Penal mediation for adults □ Article 216 the Code of Criminal Procedure - Departement circulars by ministry of justice in 1994, 1999	Juveniles □ diversionary measures , victim orientation, mediation, court's disposal, mediation at police stage Adults □ penal mediation, mediation at the police stage, diversionary in nature penal mediation by public prosecutor as a condition of the formal dismissal of the case--> it includes reimbursement of, or reparation to, the victim , referral to training or medical treatment, and community service. Restorative and negotiated justice model □ objective : the reparation of the material and moral damages to the victim and the community. Mediation for redress □ more serious offences Mediation at the police stage □ minor offences	Mediation service managed by private (mediation for redress and juveniles) Mediation service managed by public (mediation at the police stage and penal mediation) Mediation in all cases carried out by professional mediators, background in social work An NGO is an umbrella organization for all forms of VOM In 1999, 43 victim offender service in Belgium, 27 of these were penal mediation In 1998 □ juvenile mediation 461 Mediation for redress 41 Mediation as the police stage 256 50 percent --> property offences

RJ Finland

Legal Framework	Scope	Implementation
- No specific legal authority for diverting a case to mediation - Section 15 of the Decree on the Enforcement of the Penal Code recognizes its value - Guidance notes on mediation practice by the Ministry of Social Affairs and Health	Complainant offences □ minor in nature and Non-complainant offences □ more serious Mediation may serve as a reason for dismissing a case If the case comes to trial, the court may take these factors into account when determining whether, and what sentence to impose - Finnish Mediation Association	Mediation is offered in 255 of the 452 municipalities in Finland There is no uniform model for its organization The usual practice locates mediation within social or youth welfare 34 municipalities maintain an office responsible for the conduct and implementation of mediation in any case Mediators, who are volunteers, are drawn from the general population and are required to undergo training - In 1997, 70 percent commenced mediation, 60 percent resulted in an agreement, overall success rate of 30 percent

RJ France

Legal Framework	Scope	Implementation
- Article 41 Code of Criminal Procedure - Decrees, departmental circulars - Practice statements issued by the National Institute of Victim Assistance and Mediation (INAVEM)	VOM applies both to adult and juveniles □ the intended outcomes is an agreement in which the offender acknowledges his wrongdoing and makes material amends The outcome is reported to the prosecutor, whose decision whether to prosecute or dismiss the case The diversionary effect of mediation under Article 41 applies at the pre-prosecution stage only Its potential application and impact on any case lies entirely at the prosecutor's discretion	- Victim assistance associations must be accredited by the local prosecutor, be approved by the state Office for the Protection of Victims, and have reached an agreement with the Ministry of Justice for delivery of mediation service

RJ Germany

Legal Framework	Scope	Implementation
- Article 46a the Code of Criminal Law - Article 153a the Code of Criminal Procedure - The Juvenile Justice Act 1953 as amended by the Youth Court Law Amendment Act 1990 - Authorise the use of mediation for a number of purposes, including diversion from prosecution, and the payment of compensation as sentencing option	Victim-oriented measures that can be taken without a trial and those which follow from the trial Dual structure of restorative measures available to public prosecution authorities 1. Mediation and compensation in the context of diversion, without the formal conviction of the offender; 2. The offender is formally sentenced.. • Juveniles □ • article 45 and 47 of the Juvenile Justice Act 1953 provide for VOM as a means of diversion • Article 10 □ the Judge may dispose of the case by ordering that mediation take place as part of an educational procedure • Adults □ • Article 153a of the Code of Criminal Procedure, permits discontinuance of criminal proceedings, applied to offenders over 21 years of age and in some cases to those aged over 18.	VOM located within the Juvenile Court assistance office (60 percent) or social service (15 percent), independent service (25 percent) 100 cases a year (VOM dll) In 1997 □ the primary form of mediation in the case of juveniles (60 percent) , adults (40 percent) □ The outcomes : apology, restitution, reparation or some other service for the victim □ 9000 mediations in 1997 □ The number of services has increased substantialy

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Pendekatan Normatif dan Doktrinal dalam Penelitan Hukum

FAKULTAS HUKUM

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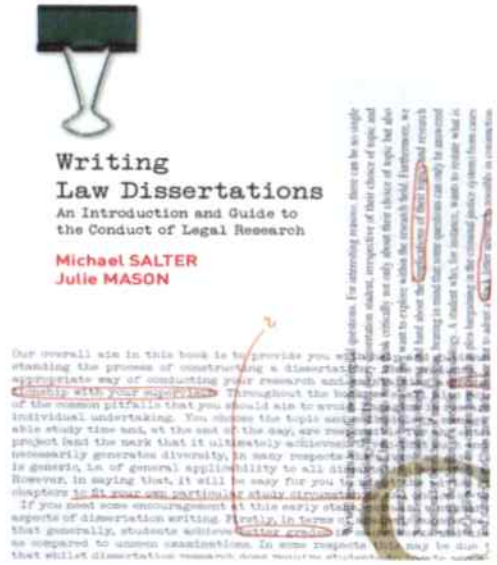
Buku yang Bisa Menjadi Panduan


Writing
Law Dissertations
An Introduction and Guide to the Conduct of Legal Research

Michael SALTER
Julie MASON

Beberapa Metode/ *Approach*

Brief Contents

Black Letter Approaches to Doctrinal Research

Pertentangan antar Para Ahli terkait dengan Metode dalam Penelitian Hukum

● Recognising the Implications of the Tension Between Different Research Methodologies

Writers have noted that legal researchers have to take into account 'the intellectual tension' and 'discernible friction' between 'black-letter academic lawyers using traditional

[5]See University of London external LLB programme, Chapter Two. Further details available at: www.londonexternal.ac.uk/current_students/programme_resources/laws/subject_guides/eng_legal_sys/com_law_ch2.pdf. [Accessed July 2005].

modes of legal analysis', and 'those who would classify themselves as interdisciplinary scholars using ideas and techniques borrowed from other disciplines.'[1] Within university law schools, this tension and friction between competing approaches to the conduct of research may well mean that different supervisors will have different suggestions and expectations with respect to what counts as 'suitable research'.

The dispute between black-letter and sociolegal approaches is often more than a purely academic controversy.[5] This dispute can become intense and heated precisely because sociolegal research is often interpreted as posing a radical challenge to the credibility, even the continued existence, of black-letter approaches. Hence, defenders of the black-letter tradition may well perceive this approach as one which needs to be resisted, not least for reasons of internal law-school politics. To many black-letter academics, sociolegal studies and other alternative approaches appear as Trojan horses threatening their type of scholarship aligned to the methods and techniques of the legal profession.[6] The interdisciplinary character and aspirations of sociolegal studies is sometimes seen as a threat. It may appear to break the boundaries of law as a distinct and self-contained academic discipline, one which possesses its own distinctive territory, methods and interpretative techniques. Worse still, sociolegal studies threatens to open up legal scholarship to colonisation by numerous rival disciplines, including the absorption of criminal law into criminology and the sociology of deviance, or contract law into the study of economic behaviour. Part of this perceived threat within law schools consists of sociolegal studies and other alternative approaches disrupting the unchallenged 'handing down' of this cultural tradition from one generation to the next.[7] As Vick notes:

Black Letter Approach

A central goal of black-letter analysis is to reveal the presence of a series of rules based upon a smaller number of general legal principles defining, for instance, the difference between valid, voidable and void marriages. The central assumption is that the detailed rules give effect to, and specify, certain underlying and more general legal principles, such that law can be interpreted as a more or less rational and coherent system of rules. For example, one principle is that a legally valid marriage has to be based upon valid consent (involving, for example, the absence of duress). This is elucidated by more detailed

and specific legal rules that spell out what, for instance, is to count as valid consent concerning the age, gender, soundness of mind and identity of the parties to the marriage. Black-letter analysis involves students *cross-referencing* these specific rules to more general underlying principles as if together they formed a single, mutually reinforcing and rational system of regulation. The presence within legal doctrine of various contradictions, gaps, ambiguities and irrationalities, including those stemming from 'external' policy and political factors, must be treated as deviant and exceptional. Legal categories, such as marriage, possess a stable meaning for which it is possible in principle to give a single correct definition that captures its essence.

Black Letter Approach sama dengan Lawyer ketika mencari aturan ada dimana

Like all methodologies, black-letter analysis reflects a certain standpoint, typically that of a lawyer advising clients as to the legal implications of their situation. Hence, a student dissertation is supposed to interpret disputes in a strictly legalistic manner, not from the perspective of lay persons but rather in terms of their significance for lawyers within the legal process. Hence, a dissertation addressing aspects of the legal regulation of family relationships must respect the idea that law is a separate and independent academic discipline. It follows that it is not necessary for dissertation students to have regard to the research sociologists who, for instance, study the changing role and functions of the family in modern society. Contrary to a social science approach, the black-letter methodology requires students to rigorously exclude supposedly 'external' factors, such as policy, ideological and moral issues regarding same-sex relationships, forced marriages and property ownership within cohabitation.

Classic forms of black-letter analysis deploy a distinctly *deductive* form of legal reasoning from legal principles. Hence, it is supposed to be possible for students to deduce by thought alone the necessity for specific rules as if these represented logical implications of a general principle. For example, the detailed legal rules regarding what is to count as consent to a valid marriage can be deduced by pure logic from the basic axioms of contract law that govern legally enforceable agreements in general.

Black Letter Approach = Strictly Legal

Student dissertations should recognise that a number of these alternative methodologies have superimposed upon the analysis of cases and statutes a series of moral, gender and political issues, which members of the black-letter tradition typically reject as entirely inappropriate to a 'strictly legal' mode of analysis. Legal academics, criminologists, feminists and others within the social sciences have produced critical studies of, for example, judicial rhetoric, metaphors, imagery, concealed gender and other ideological assumptions, which fall well outside the scope of black-letter analysis.[14] Although such research has included studies of legal doctrine in an intensive and rigorous fashion, the researchers have made no attempt to conform to the black-letter perspective. On the contrary, they have more often defined their objectives in sharp opposition to this perspective.[15]

Law students adopting the black-letter approach for their dissertations will seek to study the primary sources contained in the law library in order to answer the question: what is the meaning and scope of the relevant legal provisions? This approach to research aims to offer an authoritative exposition, fully supported by relevant citations, that describes how the specific rights and obligations of substantive legal doctrine have been assigned through judicial interpretations and reinterpretations of the meaning, scope and requirements of 'given' legal categories, general principles and specific rules. Black-letter analysis will describe, often in intricate technical detail, the technical meaning of the relevant rules and principles. This emphasis on providing a description and exposition, as distinct from an explanation or critique of the origins, policy values or social impact of the law in action, is considered a goal in itself.[21]

● The Focus on Law in Books

It is widely recognised that pure forms of the black-letter approach focus exclusively on substantive legal doctrine contained in primary written sources. Hence, this approach shares with theology the idea that true statements can be ascertained through a close and rigorous elucidation of the meaning and implications of primary texts, which are deemed to be authoritative for events and actions in the world beyond the law library, even where the legal interpretation differs markedly from their 'common-sense' meaning within everyday life.[167]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