EU Asia Inter-University Network
for Teaching and Research in Public Procurement Regulation

Legal Research Methods and Public Procurement Regulation

General introduction

These materials provide an introduction to some of the key research methods and techniques which form part of the diverse spectrum of legal scholarship and which are relevant to research in public procurement. They are derived from a set of materials originally produced by the Legal Research Methods Teaching Team – Dr Ezra Hasson, Professor Tamara Hervey and Professor Peter Bartlett – at the School of Law, University of Nottingham, with input in identifying relevant articles on public procurement for discussion provided by Professor Sue Arrowsmith of the School of Law, University of Nottingham. The materials were developed in part, and further discussed, in two workshops on Legal Research Methods in Public Procurement held at the University of Malaya (2008) and University of Nottingham (2009) as part of the European Community-funded Asia Link project on public procurement regulation (see below), with participation also from universities in Africa as part of a British Academy-funded project on public procurement in Africa. These materials are freely available for use by other institutions of higher education, provided that the source is acknowledged and this General introduction section is reproduced in full in any reproduction of the materials or part thereof.

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Introduction to the materials

Although regarded as essential by most disciplines within the social sciences, there is often a tendency within law to not devote time to any significant study of research methods. Yet despite this relative lack of explicit attention, methodology is of fundamental importance to the task of legal research. For example, it relates directly to both the formulation of research projects, and thereafter to the practicalities of actually carrying out that research – in essence it shapes the research questions that we initially ask, the data that we then use, how we conduct our research and, ultimately, how we explain what we actually did.

The terms 'research method' and 'methodology' are used throughout the materials to mean the system of methods which apply to research in a particular field – in this instance public procurement. This means that method is closely related to what we understand our field of enquiry to be. In addition, however, it is also closely related to questions of theory. This is because every legal research project will begin from a theoretical basis or bases, whether or not the researcher chooses to make them explicit. The theoretical basis of a project will operate, firstly, to inform how law is conceptualised within that project. That conceptualisation will then determine both the kinds of research questions that are meaningful or useful, and also the selection and analysis of data. To take a very simple example, if we believe that law is the written product of deliberations and negotiations between specific institutions (such as WTO members), then our research method for researching law in that sense will involve the analysis of texts produced through those deliberations and negotiations. It will not be concerned with, for example, the effects that law has on commercial life. If, however, we believe law to be the means for promoting the most efficient regime of public purchasing, then our research method for researching law in that sense will include an analysis of what is meant by 'efficient' in this particular context.

The theoretical bases of a project are often arrived at unconsciously, frequently in light of the way in which a subject was initially introduced to someone. However, these materials reflect the view that it is preferable to be open (and indeed critical) about the basis of one's research. In the materials we introduce a selection of research methods which we have identified as having been used in public procurement research. We obviously do not expect that those using these materials will be using all (or even most) of these research methods in your current research projects. However, the questions which interest you in the future may be appropriately addressed through methodologies other then those that you have used

thus far. We also believe that it is valuable to be able to understand one's own work in some sort of broader context. What exactly is your research question, and what methods or techniques are appropriate to answer it? Understanding one's own research methods is a reflective process, and it becomes much easer to articulate when you are able to compare your approach to that of others.

The materials are underpinned by a fundamental belief that the discipline of law is enhanced by having a variety of approaches available to researchers and scholars. It is also better for us, as individual researchers and scholars, to be as aware as possible about the choices that we make, and to understand how to go about choosing between different research methods and approaches. Inevitably a brief set of materials such as these can only provide a small introductory 'taste' of the various different research methods. The materials should thus be seen as a starting point for inquiry. However, a sense of what the various research methods and approaches entail will enable those using these materials to be better equipped to find the approach that they are most comfortable with, and which will best suit their particular research interests and goals.

I: 'Black letter' or Doctrinal Legal Methods

We all talk about 'black letter' law as if we know what it means. Here we will interrogate that concept further. What exactly do we think we are doing when we do black letter work? Consideration of a variety of doctrinal articles suggests that their emphasis and theoretical underpinnings differ considerably, that they rely on different sources, and that they result in markedly different claims about what on its face may be a single substantive topic (such as public procurement). Given these differences, should we actually be talking about black letter methodolog**ies**?

Readings

Please read the articles listed below. A reminder – you are reading the articles as an exercise in considering *methodology*, rather than the substantive law. The key questions for our purposes are: 'what questions can the paper's approach answer, and how does this differ from the questions the other papers address?' In other

words, what are the research questions of the papers, and are they successfully addressed?

S. Bailey, "Judicial Review of Contracting Decisions" (2007) *Public Law* 444.

S. Arrowsmith, "Transparency in Government Procurement: the Objectives of Regulation and the Boundaries of the World Trade Organisation" (2003) 37(2) *Journal of World Trade* 283.

Questions for Discussion

For each of the articles, consider the following questions:-

1. What is/are the research question(s)? Why should a reader or publisher be interested in the article?
2. What is the approach? What sources/data were used? How were they used? What are the article's theoretical underpinnings? What assumptions does the author make about law and legal research?
3. What type of research questions can this approach answer?
4. What are the benefits and drawbacks of applying this approach?

5. Consider the following definitions of doctrinal or black letter law. Are they consistent with your views of the method? Why/why not? What are the problems with each? To what extent does each map to your idea of your own research projects?

> "The traditional view of law (sometimes referred to as a 'black-letter' approach) is to regard law as a set of legal rules derived from cases and statutes, which are applied by a judge who acts as a neutral and impartial referee seeking to resolve a dispute. Although such a definition of law is necessarily limited and does not seem to accord with the reality of law, it has nevertheless been remarkably persuasive."
> M. Fox and C. Bell, *Learning Legal Skills* (London: Blackstone, 1999), p 9.

> "Doctrinal studies of law … use interpretive methods to examine cases, statutes and other sources of law in an attempt to seek out, discover, construct or reconstruct rules and principles. It then systematises and employs them to conduct descriptive analysis and normative evaluation of the process of decision-making. This reliance on legal rules and principles turns much of law, legal reasoning and legal studies into a *formal* activity.
> Many theories of law, in particular those rooted in legal positivism, are also influenced by this rule-based approach. These theories often hold that 'legal

> rules are constitutive of law and that the force of rules … derives in general from their having been enacted by institutions authorised to make rules'."
> R Banakar and M Travers, "Law, Sociology and Method", in R Banakar and M Travers, eds, *Theory and Method in Socio-Legal Research* (Oxford: Hart, 2005), p 7.

> "We think of rules as things which are to be found in books and which tell us what we may or may not do. Many lay people characterise the job of lawyers as one of applying rules, which they know, in order to determine legality and to ensure that actions conform to the rules. …
> The idea of law as a body of rules discoverable in books points to a further feature of our legal system, and that is the separation of law from everyday life or social situations. The rules, or the laws, exist separately from the social situations they are called upon to resolve. …
> We have then, a separation of law from society. While the law is in books, the problem is in the social world, and the law seems to exist already for disputes which appear in the social world. … [F]or a dispute to become legal, the social problem must be transformed into a legal problem."
> W. Mansell, B. Meteyard and A. Thomson, *A Critical Introduction to Law* (London: Cavendish, 2004), p 4.

How would *you* define doctrinal legal method?

II: Doctrinal Plus I: Interdisciplinary Legal Study

Some legal research draws on the literature and methods of other, related disciplines, in particular other social sciences such as political science, sociology or economics, or humanities such as history. Interdisciplinary legal research may take many different forms, and the 'legal' elements of the research may become so incidental that we might argue that the work has ceased to be a 'legal' research project at all!

An interdisciplinary approach may bring significant insights that are not available in the context of a purely doctrinal or 'black letter' approach. However, there may also be significant drawbacks in pursuing an interdisciplinary project – not least the need to be sufficiently expert in two distinct disciplinary fields, each with their own discourse and their own body of literature. Care must also be taken with regards to how effectively concepts from one discipline can be transferred to another. For example, the concept of 'citizenship' may have very different connotations in law, political science, and sociology.

Types of interdisciplinary legal research include:-

Law and Political Science / International Relations: Seeks to bring together understandings of the legal order as a *legal* system, and as a *political* system. There are many different approaches in the study of international relations and political science – including liberalism, realism, critical theory, postmodernism, constructivism, feminism, post-structuralism and Marxism. If using this type of interdisciplinary approach it is therefore essential to be aware of the particular insights from political science that you are bringing to your research project.

Law and Economics: A method of appraising (rather than finding) the law. It attempts to explain law as it is, or as it ought to be, by reference to economic analysis. There are two main strands to law and economics approaches: (1) research that seeks to explain current law on the basis that it reflects economic thinking; and (2) research that seeks to make proposals to improve the law, in order to make it more efficient in some way.

Law and Sociology: Law and sociology approaches are based on the assumption that law exists in, and is developed through society. Law is regarded as a social practice – to some extent it both reflects and seeks to shape society. I.e. it is almost impossible to understand law without understanding the society in which it operates. Law and sociology approaches are interested in discovering 'law in action' as opposed to just 'law in the books'.

Law and History: Applies some of the insights that historians have to offer on the interpretation of events to law and legal processes. Historical approaches to the law can help to ground arguments in their historico-political context and cast new light on events that have been forgotten or misunderstood. Courts and their proceedings are particularly amenable to documentary research.

Reading

E. Abbott, "Rule-making in the WTO: Lessons from the Case of Bribery and Corruption" (2001) 4 *Journal of International Economic Law* 275.

Questions for Discussion

1. What is/are the research question(s)? Why should a reader or publisher be interested in the article?
2. What is the approach? What sources/data were used? How were they used? What are the article's theoretical underpinnings? What assumptions does the author make about law and legal research?
3. What type of research questions can this type of approach and method answer?
4. What does the interdisciplinary element bring to the research project that would be absent without it?
5. What are the benefits and drawbacks of interdisciplinary legal research?

III: 'Doctrinal Plus' II: Comparative Law

Some legal research seeks to use a comparative method, comparing norms across different legal systems. This may be simply for its intrinsic interest, or to understand one's own legal system better, by contrasting comparative systems (what we might term "descriptive comparative law"). Alternatively, it might be for a number of other reasons, for instance to search for a "unified law" (e.g. to identify a "natural law of contract" or for unification of areas of private law); to test legal theory (which, if robust, would apply in different legal systems); to seek to understand the forces that cause changes in legal systems and societies (here there are links to interdisciplinary work, such as law and history or law and political science); or to make normative claims (this law is better at achieving some desirable aim or policy outcome than that law) which may even lead to law reform proposals. Where such normative claims are made, of course, some sort of justification (theoretical, qualitative, or quantitative) for the claim is necessary.

Comparative legal research assumes a certain degree of "transferability" of legal norms, from one country/legal system/legal culture/time period to another. This assumption may be problematic.

Reading

P.E. Morris, "Legal Regulation of Contract Compliance: an Anglo-American Comparison" (1990) 19 *Anglo-American Law Review* 87.

J.I. Schwartz, "Learning from the United States' procurement law experience: on "law transfer" and its limitations" (2002) 11 *Public Procurement Law Review* 115.

IV: An Introduction to Qualitative and Quantitative Methods

Where the point or emphasis of a research project is not merely theoretical, but purports to describe how things are in the real world, some form of qualitative or quantitative methodology must be employed. Using the readings set out below, the object here is to identify some of the basic characteristics (and uses) of each method.

Readings

Qualitative Research

D. Pachnou, "Bidders' Use of Mechanisms to enforce EC Procurement Law" (2005) *Public Procurement Law Review* 256.

Quantitative Research

S. Martin and K. Hartley, "Public Procurement in the European Union: Issues and Policies" (1997) 6 *Public Procurement Law Review* 92.

Questions for Discussion

1. What types of research questions can be answered by using a qualitative approach?
2. What types of research questions can be answered by using a quantitative approach?
3. What are the benefits and drawbacks of a qualitative and quantitative approach respective

Public Procurement Law readings for Legal Research Methods

Qualitative and Quantitative research

- Pachnou, D (2005) "Bidders' Use of Mechanisms to enforce EC Procurement Law" **P.P.L.R.** 256

- Braun (2003) "Strict Compliance versus Commercial Reality: The Practical Application of EC Public Procurement Law to the UK's Private Finance Initiative" 9 **E.L.J.** 57

- Martin, S and Hartley, K (1997) "Public Procurement in the European Union: Issues and Policies" 6 **P.P.L.R.** 92

Doctrinal legal methods

- Arrowsmith, S (2002) "Electronic Reverse Auctions under the EC Public Procurement Rules" 11 **P.P.L.R.** 299

- Bailey, S (2007) "Judicial Review of Contracting Decisions" **Public Law** 444

- Treumer, S and Werlauff, E (2003) "The leverage principle: secondary Community law as a lever for the development of primary Community law" 28 **ELRev** 124

- Arrowsmith, S (2003) "Transparency in Government Procurement: the Objectives of Regulation and the Boundaries of World Trade Organization" 37 **Journal of World Trade** 283.

Comparative law

- Morris, PE (1990) "Legal Regulation of Contract Compliance: an Anglo-American Comparison" 19 **Anglo-American Law Review** 87.

- Schwartz, JI (2002) "Learning from the United States' procurement law experience: on "law transfer" and its limitations" 11 **Public Procurement Law Review** 115.

Interdisciplinarity

- Abbott, F (2001) "Rule-making in the WTO: Lessons from the Case of Bribery and Corruption" 4 **Journal of International Economic Law** 275

- Madsen (2002) "Re-opening the Debate on the Lack of Impact of EU-tenders on the Openness of Public Procurement" 11 **P.P.L.R.** 265