The Methodology of Dutch Private Law from the Nineteenth Century Onwards

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I. Introduction

"Method" means "about the way" or "the way itself" (from the Greek *meta hodos*). In legal terms, a method represents the way in which a legal researcher finds an answer to his research question; the way in which he attempts to systematically acquire a pool of knowledge. According to the Amsterdam professor Martijn Hesselink (b. 1968) and Holger Fleischer (b. 1965), one of the directors of the Max Planck Institute in Hamburg, the study of "legal" methods has become a national discipline since the emergence of nation states. The derivation of meaning from Roman law, which is enshrined in the *Corpus Iuris Civilis* and for centuries was the universally studied subject of legal scholarship, is no longer the method used in legal science.[1]

[1] *Martijn Hesselink*, The Common Frame of Reference as a Source of European Private Law, Tulane Law Review 83 (2009) 919, 936; *Holger Fleischer*, Europäische Methodenlehre: Stand und Perspektiven, RabelsZ 75 (2011) 700, 704.

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In the German-language discourse on this topic, the view of the legal philosopher Gustav Radbruch (1878–1949) is regularly cited. Radbruch argued that a science which is preoccupied with its own methodology is a sick science.[2] However, systematic knowledge is inconceivable without method, as this systematic knowledge can only be acquired in an ordered fashion. This knowledge must be open to scrutiny by others.[3] Writing in what he himself describes as a rather "highbrow" manner, Fleischer notes:

> "Rechtswissenschaft ist methodisch oder sie ist nicht."[4]

Hesselink is more down to earth in his description of the need for the study of method:

> "The aim of legal methods is to make [legal analysis] less messy, eg by developing standards of interpretation, by trying to demarcate the application of existing law and the creation of new law by the courts, and by telling the courts what to do when the law 'runs out'. […] The aim of a scientific method is to make scientific results objective."[5]

In the recent past, Germany served as an example to the Netherlands as regards methodology. By the beginning of the twentieth century, the former had a talented body of legal scholars whose studies focused on method.[6] Hans-Peter Haferkamp recently went as far as to say that Germany is the country of legal methodology.[7] This situation stood, and still stands, in stark contrast to that of the Netherlands. It appears that Radbruch's argument, as untenable as it may be, has gained a following in the Netherlands. There is an astonishingly scant body of literature on legal methods in private law theory. In this article, I will discuss the two salient methods in private law research in the Netherlands from the nineteenth century onwards: the dogmatic and the empirical. I will also discuss – very briefly – the two main theories on judicial decision-making (*Rechtsfindungstheorien*). Strikingly, the twentieth century saw a considerable overlap between the study of methods

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[2] *Gustav Radbruch*, Einführung in die Rechtswissenschaft[12] (1969) 253.

[3] *Govaert van den Bergh / Corjo Jansen*, Geleerd recht – Een geschiedenis van de Europese rechtswetenschap in vogelvlucht[7] (2018) 7; *Jan Smits*, Omstreden rechtswetenschap – Over aard, methode en organisatie van de juridische discipline (2009) 154 f.; *idem*, The Mind and Method of the Legal Academic (2012).

[4] *Fleischer*, RabelsZ 75 (2011) 700, 702 with further references. A variant on Gierke's assertion: "Unser Privatrecht wird sozialer sein, oder es wird nicht sein." – *Otto von Gierke*, Die soziale Aufgabe des Privatrechts (1948) 34.

[5] *Martijn Hesselink*, A European Legal Method? – On European Private Law and Scientific Method, European Law Journal 15 (2009) 20, 33 f.

[6] See *Corjo Jansen*, De wetenschappelijke beoefening van het burgerlijke recht in de lange 19e eeuw (2015); *idem*, De wetenschappelijke beoefening van het burgerlijke recht tussen 1940 en 1992 (2016).

[7] *Hans-Peter Haferkamp*, On the German History of Method in Civil Law in Five Systems, German Law Journal 17 (2016) 543–578.

of legal science and that of methods of judicial decision-making. Books regarding the methods of judicial decision-making were therefore the most important literature on legal methods. I will give several examples of these. At the end, prior to my conclusion, I will reflect on several publications about legal methods and on the academic teaching of legal methodology.

II. Methods in private law

Private law theory in the Netherlands is characterised by the themes of interpretation, analysis of case law, systematisation and a practical orientation. The task of a scholar in civil law is to interpret the applicable legal framework; to gather judge-made law; to align and systematise private law definitions, principles and rules; and to inform legal practitioners (legislators and the judiciary).[8] This method is known as the dogmatic method, and is the prevailing method in Dutch civil law. In the first half of the twentieth century, Dutch legal scholars who were keen on systematising were initially greatly assisted in their endeavours by the *Lehrbücher* of German pandectists such as Bernhard Windscheid (1817–1892) and Heinrich Dernburg (1829–1907), and later by the books of other German civil law professors. Nowadays, there is an overwhelming consensus that private law theory, in its dogmatic operations, must also inform legal practice in general and the courts in particular.[9] The functions of the dogmatic method extend beyond the adaptation of existing positive law for application by the court: "Ordnung und Systematisierung, Stabilisierung und Konservierung, […] Bindung und Innovation, sowie Kritik und Rechtsfortbildung." As a result, the dogmatic method is often referred to as the centrepiece, *Herzstück*, of legal scholarship, "als die Form rechtswissenschaftlicher Tätigkeit, die sich mit Erkenntnis, Anwendung und Fortbildung des geltenden Rechts befasst."[10]

The empirical study of law gained influence in private law theory in the Netherlands beginning at the end of the nineteenth century. Scholars of labour law in particular considered socio-economic reality in their research.

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[8] See *Jansen*, Het burgerlijke recht tussen 1940 en 1992 (Fn. 6) 157; *Wissenschaftsrat*, Perspektiven der Rechtswissenschaft in Deutschland – Situation, Analysen, Empfehlungen (2012) 31; *Jan Smits*, What is Legal Doctrine? – On the Aims and Methods of Legal-Dogmatic Research, Maastricht European Private Law Institute Working Paper No. 2015-06, 5 ff.; *Jan Vranken*, Mr. C. Assers handleiding tot de beoefening van het Nederlands burgerlijk recht – Algemeen deel ****: Een synthese (2014) 6 f. (no. 8).

[9] See *Wissenschaftsrat*, Perspektiven (Fn. 8) 27: "Es kennzeichnet die deutsche Rechtswissenschaft, dass universitäre Wissenschaft und Rechtspraxis, insbesondere die Gerichtsbarkeit, eng miteinander verknüpft sind."

[10] *Reinhard Zimmermann / Gerhard Wagner*, Vorwort: Perspektiven des Privatrechts, AcP 216 (2016) 1, 3 f. (quotes); *Corjo Jansen*, Dogmatiek en codificatie, in: Liber Amicorum S.C.J.J. Kortmann (2017) 247 ff.

The Dutch Member of Parliament Arnold Kerdijk (1846–1905), Groningen professor Hendrik Drucker (1857–1917) and Leiden professor Eduard Maurits Meijers (1880–1954) were the best-known empiricists. "Dogmatism" became a pejorative term, as the dogmatic method was criticised for its inability to provide solutions to the social problems caused by industrialisation, mass production enabled by electricity, and the rural exodus. Surveys, many of them commissioned by the Parliament, provided evidence for legislators to defend the economically vulnerable with mandatory norms. More and more civil lawyers started applying methods and techniques derived from the social sciences, such as statistics, field research, interviews, surveys and experiments, as well as building on the data derived from empirical studies.[11]

Meijers, the *auctor intellectualis* of the Dutch Civil Code (1992), remained loyal to the empirical method throughout his life. As part of the preparatory work for the new Dutch Civil Code, he conducted a survey among the major chambers of commerce, De Nederlandsche Bank (The Dutch Central Bank) and other bodies to establish the desirability of introducing a registered right of pledge to replace the *fiducia cum creditore*. In the same way, he explored experts' opinions, asking them whether they considered a deed a necessary formality for the transfer of immoveable property.[12] As the inherent private law method *par excellence*, the dogmatic method began to wane towards the end of the twentieth century. Given the decline of dogmatic legal research, the Dutch Supreme Court came to embody doctrinal authority in the Netherlands, with legal scholarship following at some distance. Whether a proposed solution would gain a following was not determined by the law itself, but by the results of all sorts of auxiliary empirical sciences.[13]

III. Theories on judicial decision-making

Private law methodology and theories on judicial decision-making were intertwined in the nineteenth and twentieth centuries. The freedom of the

[11] My discussion will not comment on evaluation studies or other studies on legislation or the enforcement of legislation. On the principles of relevant empirical legal research: *Gijs van Dijck*, Naar een succesformule voor empirisch-juridisch onderzoek, Justitiële Verkenningen 2016, 29, 30 f.

[12] *Evert Florijn*, Ontstaan en ontwikkeling van het nieuwe Burgerlijk Wetboek (1994) 110, 159; *Corjo Jansen*, Die Beweggründe des Eduard Maurits Meijers (1880–1954) für den Entwurf des neuen niederländischen Bürgerlichen Gesetzbuches (1992), ZEuP 16 (2008) 59, 66; *idem*, Het burgerlijke recht tussen 1940 en 1992 (Fn. 6) 74 f. See also *Parl. Gesch. NBW*, Algemeen deel (1961) 117 f.

[13] *Jan Lokin / Corjo Jansen*, Tussen droom en daad – De Nederlandse Juristen-Vereniging 1870–1995 (1995) 231 f.; *Van den Bergh / Jansen*, Geleerd recht (Fn. 3) 167–170; *Jansen*, Het burgerlijke recht in de lange 19e eeuw (Fn. 6) 318; *idem*, Het burgerlijke recht tussen 1940 en 1992 (Fn. 6) 73–77, 157–163.

judge vis-à-vis the statute or code was an important theme that dominated the literature on judicial decision-making in this period. There were two main positions: what was known as legalism (*Legismus* or *Gesetzespositivismus*) and free judicial decision-making (*freie Rechtsfindung*). Legalism stated that the legislature had a monopoly on law-making (*Rechtsfortbildung*). In this view, neither case law nor customary law was acknowledged as a source of law. The core value was legal certainty (*Rechtssicherheit*). A citizen was supposed to be able to ascertain his legal position from the statutes. Legalists developed methods of interpretation (*Auslegungsmethoden*) enabling the judge (and the legal scholar) to clarify the meaning of the text of the law, which could be considered unclear by definition. The legalists realised very well that statutory law could show *lacunae*. Judges were compelled by necessity either to resort to legal doctrine or to deny the claim. Legalism, a judicial decision-making theory, was sometimes wrongfully identified with the dogmatic method. Many legalists, however, fostered sympathy for the dogmatic method, because both legalists and dogmatists sought to systematise civil law. The second position is known as *freie Rechtsfindung*. Its supporters regarded the judge as an independent lawmaker, who could even decide *contra legem*. They saw (steady) case law as a source of law. According to them, the judge had to find the law within society, in the public consciousness and in legal practice. They wanted to reconnect the judiciary to the people. Therefore, many supporters of free judicial decision-making had sympathy for the empirical method.[14]

IV. The overlap between the methodology of private law and the methodology of judicial decision-making

Dutch lawyers of the twentieth century stated that the task of the legal scholar was largely similar to that of the judge. The study of civil law and, consequentially, the methods to be applied by the civil lawyer were intimately linked to the question of the relationship between the judiciary and the legislature, especially the freedom of the courts to interpret statutes. As a result, methods in private law concentrated on how a court should arrive at its judgment and which legal sources were to be used. In 1988, the Leiden professor and later Justice of the Dutch Supreme Court Auke Bloembergen (1927–2016) arrived at the following conclusion:

[14] Detailed: *Jansen*, Het burgerlijke recht in de lange 19e eeuw (Fn. 6); *idem*, Het burgerlijke recht tussen 1940 en 1992 (Fn. 6).

> "There appears to be a certain unanimity that there is no essential difference between the method of a legal researcher and the method of the judiciary in terms of solving legal problems and finding an answer to questions of law."[15]

He added that he did not believe that he would argue differently or use another method as a member of the judiciary than he had previously as a legal researcher. However, he did see differences between the task of a researcher and that of the court. A researcher was not bound to the law in the same way as a judge, and could interpret the facts much more freely. The judiciary was focused specifically on the case and the particular question of law related to it, while a researcher should focus on the legal system. To build a system, a legal researcher would need to gather and describe legal matter; the court had much less to gather or describe.[16]

In his superb book "Methodenlehre der Rechtswissenschaft", Karl Larenz (1903–1993) also noted the intimate relationship between the tasks of a court and of a researcher:

> "[…] auch die Auslegung der Gesetze [bildet] die nächste Aufgabe einer der Rechtspraxis zugewandten dogmatischen Rechtswissenschaft […]."[17]

Even a comparative law researcher as contemporary as Holger Fleischer still notes the connection between judicial decision-making and private law theory:

> "Methodologische Selbstvergewisserung erschöpft sich keineswegs in krankhafter Nabelschau, sondern weist der richterlichen Rechtsfindung die Richtung und hilft, den subjektiv-persönlichen Rest judiziellen Entscheidens in engen Grenzen zu halten."[18]

In the Netherlands it is perhaps the Amsterdam professor Paul Scholten (1875–1946), in his influential work entitled "Algemeen deel" (1931), who most eloquently articulated the principle of the equal treatment of the methodology of the researcher and the court:

> "In my opinion, the student – and also the elder lawyer – must learn to become conscious of the method used in the discipline of private law and must make clear to himself why a decision is made one way and not another, what the factors are that determine that decision."[19]

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[15] *Auke Bloembergen*, Iets over object en methode van wetenschap en rechtspraak in het privaatrecht, in: Nederlandse rechtswetenschap – Tussen distantie en betrokkenheid: paradigma's in de twintigste eeuw, ed. by Otto Kamstra / Frank Kummemann / Cees Maris (1988) 61, 70 (in Dutch; transl. by Corjo Jansen).

[16] *Bloembergen*, Iets over object en methode (n. 15) 62, 70, 72, 74.

[17] *Karl Larenz*, Methodenlehre der Rechtswissenschaft (1960) 273.

[18] *Fleischer*, RabelsZ 75 (2011) 700, 701.

[19] *Paul Scholten*, Voorwoord (1931), in: *idem*, Mr. C. Assers handleiding tot de beoefening van het Nederlands burgerlijk recht – Algemeen deel ⋆ (1974) VII.

Scholten's view greatly influenced subsequent generations of civil law scholars and lawyers.[20] During the twentieth century, the scant distinction between the tasks of the legal researcher and of the court drew ever more criticism. The separation of legal method from the judicial decision-making model grew stronger in the 1970s. Although the dogmatic study of law was prominent and continued to be so, this period witnessed a certain shift towards the study of social reality.[21] As Bloembergen commented on the utility of empirical research for civil law:

> "It appears to me that research on these and other 'hard' facts is, for the moment, more beneficial than endless discussions on the 'sociology of law'. At this stage, empirical research should be favoured over theoretical speculations. […] This entails that there must be legal experts with an interest in and experience of the social sciences on the one side, and people from social sciences with an interest in law on the other."[22]

The Leiden professor Tim Koopmans (1929–2015) believed that a student of law must first and foremost be taught a method, a certain way of solving a problem and recognising legal terms of reference. He also advocated that law students should study aspects of social sciences in their legal education as a counterpart for their legal courses.[23] The Leiden professor Willem van Boom (b. 1969) observed a revived interest in the empirical approach of civil law, an interest which likely started in the mid-1990s and was influenced by the law and economics approach. This led to private law research that drew on the sociology and psychology of law. Furthermore, the early years of the new millennium saw the emergence of "civilology": an approach to civil law that is based on the social sciences and often blends several disciplines ("private law in perspective"). Van Boom's view was, ultimately, that the empirical and normative study of private law were not mutually exclusive, but mutually inclusive. In his opinion, private law theory required aspirations and knowledge of the empirical basis of civil law.[24] In arguing this,

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[20] See *Smits*, Omstreden rechtswetenschap (Fn. 3) 155 ("an opinion that is still influential today"). *Pieter Kamphuisen*, Beschouwingen over rechtswetenschap (1938) 3, had already noted that Scholten's study concentrated more on judicial decision-making than on legal scholarship. See *Hesselink*, European Law Journal 15 (2009) 20, 21–23 and *Vranken*, Algemeen deel ★★★★ (Fn. 8) 6 f. (no. 8).

[21] *Cees Schuyt*, Paradigmatische vernieuwingen in de rechtswetenschap: de jurist en de sociale werkelijkheid, Een beeld van recht, Ars Aequi 28 (1979/11) 237; *Jansen*, Het burgerlijke recht tussen 1940 en 1992 (Fn. 6) 132–138.

[22] *Auke Bloembergen*, Nieuwe geluiden over het nieuwe ongevallenrecht, II, Nederlands Juristenblad (NJB) 1968, 961, 967 (in Dutch; transl. by Corjo Jansen).

[23] *Tim Koopmans*, De juridische opleiding, in: Handelingen van de Nederlandse Juristen-Vereniging (HNJV) (1972-I) 127, 131 f., 172 f. Also: *Alfred Heijder*, De juridische opleiding, ibidem, 71, 98 f., 117 f.

[24] *Willem van Boom*, Empirisch privaatrecht – Enige beschouwingen over de rol van empirisch onderzoek in de hedendaagse privaatrechtswetenschap, Tijdschrift voor Privaatrecht

he became a modern-day proponent of the empirical tradition that had gained a steady, albeit at times precarious, foothold in civil law theory from the end of the nineteenth century onwards.[25]

Finally, I would like to mention the Tilburg professor Jan Vranken's (b. 1948) vision. In his "Algemeen deel" (2014), he opposed the "equal treatment" of the methods of a researcher and a judge: "the judge is *not* a role model for legal researchers". Researchers had to develop their own methodology, he argued, as their fundamental attitude, their forum and their source references, amongst other things, differed from those of the court.[26]

V. Textbooks on judicial decision-making

In the twentieth century, the most influential textbooks on the methodology of private law were those that dealt with judicial decision-making in private law. The methods used by the court to arrive at a judgment were, as previously mentioned, representative of the way in which a scholar of private law would conduct research. The Dutch textbook that dominated the twentieth century was Paul Scholten's "Algemeen deel".[27] The title of this textbook referred to the "Wet, houdende Algemeene Bepalingen der Wetgeving van het Koningrijk" (Law containing General Provisions for Legislation of the Kingdom) of 1829. This law targeted the essence of the relationship between the judiciary and the legislature. The court had to administer law (Section 13) in specific disputes (Section 12) in line with the statutes (Section 11) and not according to customary practice, unless referred to in the law (Section 3). In other words, the court could not substitute for the legislature. Scholten criticised this – legalistic – vision of the relationship between the judiciary and the legislature. Despite the fact that the law was the starting point of the court's reasoning, and the court first and foremost *considered* itself to be bound to the law, Scholten urged caution in establishing too sharp an antithesis between the judiciary and the legislature. In their application of the law, judges would always add something to the current body of statutory material:

2013/1, 7, 71–74 (nos. 77, 79). See: Gedrag en privaatrecht – Over gedragspresumpties en gedragseffecten bij privaatrechtelijke leerstukken, ed. by Willem van Boom / Ivo Giesen / Albert Verheij (2008); Civilologie: opstellen over empirie en privaatrecht, ed. by Willem van Boom / Ivo Giesen / M. Smit (2012).

[25] See *Jansen*, Het burgerlijke recht tussen 1940 en 1992 (Fn. 6) 4.

[26] *Vranken*, Algemeen deel **** (Fn. 8) 37 f. (nos. 30 f.), 47 f. (nos. 37 f.), 105 f. (no. 88: quote), 210–214 (nos. 184–187).

[27] *John Bruggink*, Wat zegt Scholten over recht – Een rechtsfilosofische studie rondom het "Algemeen deel" (1983) 112 f., 130 f., 134 f.; *Herman Schoordijk*, Realistische en pragmatische rechtsvinding – Taak en taakopvatting van de rechter in de westerse wereld (2014) 12 f.; *Jansen*, Het burgerlijke recht in de lange 19e eeuw (Fn. 6) 243–257.

> "*every* decision, including those that are, as it were, done according to the wording of the law, is at the same time application and creation; there is always the judgment of the person who decides, which co-determines the decision. […] The decision always involves a leap in the end."

Therefore the legislature and the court both had authority, although in the Dutch constitutional context the authority of the court was inferior to that of the legislature.[28]

According to Scholten, a legal decision is ultimately nestled in the judge's consciousness. As each decision is made in accordance with the judge's conscience, it is free of arbitrariness. Judicial decision-making has always been an intuitive, moral and intellectual exercise. A decision could be reached by using the methods of interpretation, such as the grammatical method (the interpretation of a definition in a section according to the meaning used in legal parlance; *grammatische Auslegung*), the historical method (the interpretation of a section with an appeal to the legislature's intention as evident from parliamentary history; *historische Auslegung*), or the systematic method (the interpretation of a section of a law, taking account of the legal system or the civil code; *systematische Auslegung*), or by using modes of reasoning, such as purposive reasoning (*teleologische Auslegung*), reasoning according to analogy, or reasoning from general to specific. The methods of interpretation and modes of reasoning that were influential in the forum of jurisprudence were also available to a researcher of private law.

In 1974, the Rotterdam professor Pieter Zonderland (1923–1978) published a book on methods in private law,[29] in which he revisited the discussion in Scholten's "Algemeen deel". I would like to briefly comment on the main thrust of the book, as this is the only Dutch-language book in the twentieth century that, according to its title, was explicitly dedicated to the study of the methodology of private law.

The book consists of three parts. The first part relates to the various movements in legal philosophy, which Zonderland refers to as schools of thought, such as German idealism, the evolutionary school, the analytical school, the *Pure Theory of Law* and American legal realism. The second part focuses on the "technique of law creation", and handles a rich variety of subjects. Zonderland distinguishes between the different legal traditions ("common law" and "civil law"), the study of the sources of law (the relationship between statutes, customary practice and case law), and the study of legal precedents and methods of interpretation. Finally, the third part is entitled "the method". In this "methodical" part, Zonderland emphasises that the existing statutes in society were the starting point for the scholarly meth-

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[28] *Scholten*, Algemeen deel ⋆ (Fn. 19) 76 (quotes), 77, 85 f. (no. 91). See also p. 10: "[…] the finding comprises the new."

[29] *Pieter Zonderland*, Methode van het privaatrecht (1974).

od of private law. The absence of law precluded the possibility of organising a social, medical, economic, or technical matter. Not only was a lawyer a technician, not to mention an armchair scholar, but he also had to assess and analyse positive law according to the general principles of law. The study of law was either practical or non-existent.[30] The method established the way in which a lawyer could find the best legal forms governing the freedom and constraints of a person, company or government (such as a contract or law).[31] Presumably, few readers took heed of this personal (and also very concise) third part about method. This was one of the reasons why Zonderland's book disappeared into the mists of history and failed to eclipse Scholten's "Algemeen deel".

1995 saw the publication of the volume entitled "Algemeen deel ⋆⋆" by Tilburg professor Jan Vranken. Like Scholten's "Algemeen deel", the book was primarily concerned with the relationship between the judiciary and the legislature. Vranken believed that the court, and in particular the Dutch Supreme Court, had a task in shaping and supplementing the law.[32] Judges had to avoid falling victim to their own energy; in other words, "getting under the legislature's feet".[33] Given that the court had a law-making task (*gesetzesübersteigende Rechtsfortbildung*), it had to provide a detailed justification of its judgment. Vranken indicated that a decision – according to what the Supreme Court itself had found in the *Vredo / Veenhuis* judgment[34] – had to be justified in a verifiable and acceptable manner. Law was always the provisional result of opinion-forming and conviction, the outcome of a choice.[35] To support its choice, the court had what Vranken referred to as a toolbox. This toolbox contained resources for the court: the methods of interpretation, the principles of law, internal comparative law (e.g. between administrative law and civil law), external comparative law, case law and literature. Although Vranken never explicitly stated it, his argument implied that researchers had the same arsenal of resources to support their arguments.

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[30] *Zonderland*, Methode (Fn. 29) 208, 219, 221.

[31] *Zonderland*, Methode (Fn. 29) 228 f., 234, 239.

[32] *Jan Vranken*, Mr. C. Assers handleiding tot de beoefening van het Nederlands burgerlijk recht – Algemeen deel ⋆⋆ (1995) 124 (no. 190), 157 f. (no. 241), 159 f. (no. 244).

[33] *Vranken*, Algemeen deel ⋆⋆ (Fn. 32) 146 (no. 223). The Groningen professor Brunner states that the Supreme Court acted as such in its judgment of 28 February 1992, Nederlandse Jurisprudentie (NJ) 1993, 566 (*IZA/Vrerink*), in which the Supreme Court formulated a rule regarding liability in traffic accidents involving minors, while the legislature was drafting a bill on this matter.

[34] HR 4 June 1993, NJ 1993, 659.

[35] *Vranken*, Algemeen deel ⋆⋆ (Fn. 32) 141 f. (no. 217).

VI. Textbooks on legal methodology

In the first decade of the twenty-first century, Dutch lawyers held heated discussions about the academic character of legal scholarship.[36] One of the criticisms directed at Dutch scholars, including experts in private law, is that their arguments often lack a methodological explanation of their working method. One Dutch book that does address methodology, however, is Vranken's "Algemeen deel ★★★★" (2014), in which he argues that a methodology of legal research is purposeful and useful, even if some scholars believe that dogmatic, and even empirical, research leaves no room for a methodology other than the one used by the court.[37] According to Vranken, legal researchers must explain, justify, debate and argue. To enable this, the forum of legal researchers establishes rules of play, demands and informal practices (methodology) that differ according to the nature of the research (dogmatic, empirical, comparative, etc.). In any case, these methods are very different from the ones used by the court.[38] In his book Vranken explores several aspects of scholarly methodology in legal research, such as the requirement to correctly formulate a research question; the way in which a researcher explains the research question, accounts for his use of sources in a scholarly publication, and accounts for the selection of legal systems in the case of comparative research; and the role of digital methods and the particularities of performing empirical research.

The Maastricht professor Gijs van Dijck (b. 1980) writes: "In order to perform empirical legal research, a researcher requires a certain expertise as regards the methods and methodology of empirical research."[39] Recently, there has been some more concrete discussion of this topic.[40] In his new textbook, "Privaatrecht in context" (2018), Tilburg professor Marc Loth (b. 1956) has written an interesting chapter on the methodology of civil law,

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[36] See e.g. *Carel Stolker*, "Ja, geléérd zijn jullie wel!" – Over de status van de rechtswetenschap, NJB 2003, 766 f.; *Remco van Rhee*, Geen rechtsgeleerdheid, maar rechtswetenschap!, RM Themis 2004/4, 196 f.; *Maurits Barendrecht*, Rechtswetenschap: stoffig of inventief?, NJB 2006, 705–714; *Pauline Westerman / Mark Wissink*, Rechtsgeleerdheid als rechtswetenschap, NJB 2008, 503–507; *Jan Lokin*, Regtskunde, rechtsgeleerdheid, rechtswetenschap, RM Themis 2008/2, 49–51; *Rob van Gestel / Hans Micklitz*, Revitalising Doctrinal Legal Research in Europe: What about Methodology?, in: European Legal Method – Paradoxes and Revitalisation, ed. by Ulla Neergard / Ruth Nielsen / Lynn Roseberry (2011) 25–73; *Willem van Boom*, Door meten tot weten (2015).

[37] *Vranken*, Algemeen deel ★★★★ (Fn. 8) 3 (no. 5), 10 f. (no. 10), 31 (no. 26).

[38] *Vranken*, Algemeen deel ★★★★ (Fn. 8) 34 (no. 29).

[39] *Van Dijck*, Justitiële Verkenningen 2016, 29, 37 f. (quote in Dutch; transl. by Corjo Jansen).

[40] The Oxford Handbook on Empirical Legal Research, ed. by Peter Cane / Herbert Kritzer (2010); Empirical Methods in Law, ed. by Robert Lawless / Jennifer K. Robbennolt / Thomas S. Ulen (2010). See also *van Boom*, Tijdschrift voor Privaatrecht 2013/1, 7, 10 f. (nos. 20 f.).

the differences between a judge making a decision and a legal scholar conducting research, and the core values of private law research.[41]

As a last point, I would like to mention the book entitled "Juridische methoden" by Harm Kloosterhuis (b. 1958), who is affiliated with the Erasmus School of Law. A popular reference work in legal education, this book touches only briefly on the conduct of research, instead concentrating on the other basic skills of a lawyer: how to solve a case, how to analyse case law and how to apply methods of interpretation and argument.[42] While the book does allude to legal methodology, its primary aim is to teach a number of essential academic and legal skills. For that reason, I will not consider this book in greater detail.

VII. Teaching of legal methodology

The focus on legal methods in the literature of law has not led to the widespread teaching, whether compulsory or elective, of legal methodology in the Netherlands. Most law faculties do not offer courses on legal methodology to bachelor's students. The exception to this is the Erasmus School of Law in Rotterdam, which teaches legal methodology as early as the third year. Other faculties, such as the law school at Leiden University, occasionally offer legal methodology as an elective in the last phase of the master's programme. The master's programme at Tilburg University teaches the methodology of private law.

Legal methodology is a compulsory component in the curriculum of Dutch research master's programmes, including the programme in business and law at Radboud University in Nijmegen (Research Methodology), the research LLM at Tilburg University (Methods of Legal Research and Empirical Legal Research), the programme in legal research at the University of Groningen (Introduction to Legal Empirical Research), and the programme in public international law at the University of Amsterdam (Methods of Legal Research). The master's programme in legal research at Utrecht University uses a "round table" method for discussions about issues of methodology and academic integrity. Most research master's programmes also focus on subjects that are comparable with legal methodology, such as comparative

[41] *Marc Loth*, De methode van privaatrecht, in: *idem*, Privaatrecht in context (2018) 193 f. Also recently: *Gijs van Dijck / Marnix Snel / Thomas van Golen*, Methoden van rechtswetenschappelijk onderzoek (2018).

[42] *Harm Kloosterhuis*, Juridische methoden[4] (2016). A comparable, albeit more theory-oriented book is the one by *Carel Smith*, Regels van rechtsvinding[2] (2007), which focuses on legal reasoning and argument. See also for the situation in Belgium: *Frederic Eggermont / Pieter Paepe et al.*, Praktijkboek rechtsmethodologie (2016).

law and the finding of law (Utrecht, for example, offers Comparative Law Methodology).

VIII. Conclusion

In the course of the twentieth century, legal methodology slowly but surely parted from the methods of judicial decision-making and the study of legal sources. For many years, the prevailing notion in the Netherlands was that the court's methods were the same as the legal researcher's. It is true that the study of methods in private law and the methods applied by the court in judicial decision-making overlap to a considerable extent. Both researchers and judges use methods of interpretation and modes of reasoning to derive from legal sources a meaning that would "solve" a problem or provide an answer to a question of law. The solution or answer in itself further develops the legal system, which is open. A difference is that a researcher is more system-focused than a judge. There are also larger differences between the working method of the court and that of the legal researcher. A researcher formulates his or her own research question; the court does not. The court establishes the facts for itself; a researcher usually does not. The court arrives at a decision; a researcher does not. However, both the researcher and the judge draw inspiration from the comparison of law. Although a researcher will make specific reference to this, the judge usually will not, etc.[43] The present-day judiciary in the Netherlands no longer bases its judgments on the letter of the law, but rather on its spirit and on consideration of what good faith, common decency and public order require (thanks to the *Generalklausel* in the Dutch Civil Code of 1992).

In contrast to social sciences in the Netherlands,[44] civil law still has too few methodology textbooks on performing dogmatic and empirical research on private law. The book that most closely resembles a textbook is Jan Vranken's "Algemeen deel ★★★★" (2014). Recent decades have also seen an increased interest in the methodological aspects of performing research, not only in literature on jurisprudence itself,[45] but also in teaching, especially in research master's programmes. The subjects covered mainly relate to the

[43] *Jansen*, Het burgerlijke recht tussen 1940 en 1992 (Fn. 6) 157 f.; *Vranken*, Algemeen deel ★★★★ (Fn. 8) 211.

[44] Cf. Onderzoeksmethoden[9], ed. by Peer Scheepers / Hilde Tobi / Hennie Boeije (2016). The book is a multidisciplinary introduction to the methods of foundational and practical research in the social sciences. It was written by research staff at Radboud University, Wageningen University, Utrecht University, Maastricht University and Tilburg University. See also Onderzoeksmethoden, ed. by Harm 't Hart / Hennie Boeije / Joop Hox (2009).

[45] See the journal Law and Method (since 2011). Also compare *Ewoud Hondius*, Privatrechtsdogmatik im Recht der Niederlande, in: FS Claus-Wilhelm Canaris (2017) 1125 ff.

formulation of a research question, proper use of literature, references in footnotes, citation and paraphrasing, the selection of a country's law for comparative research, data storage, some resources for performing empirical research (such as conducting interviews and using statistical information and digital tools), and issues of academic integrity, including copyright and conflicts of interest. This list is unable to disguise the fact that legal methodology in the Netherlands is still in its infancy.