Writing a thesis or a research paper in law at university

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Introduction

This document aims at providing students with a basic, but sufficient, understanding of what writing their thesis in a legal domain entails. More specifically, this paper was written for students writing a paper or their thesis in European Union law. However, its main underpinnings are valid also for anyone writing a paper or thesis on topics such as the relationship between EU and national law or the relation between EU and international law. This document is structured in four main parts. The first part deals with the definition of a legal research question whereas the second deals with the identification of a legal research question; the third section provides a short typology of legal research questions. Fourthly, this text discusses very shortly the methods and approaches used by legal scholars to answer legal research questions. Lastly, the document contains a couple of ideas in relation to the structure of a research paper or thesis in law.

Like for any scientific discipline, the writing of a thesis or paper in law is scope-oriented since it aims at answering a specific research question. Moreover, like any other type of scientific research, also legal research starts from assumptions. However, whilst a research question in the broad sense could pertain anything, not

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any question is a legal research question. Indeed, in order to have a research question that can be answered from a legal perspective one needs to formulate a legal research question.

**What is a legal research question?**

From the outset, a legal research question is simply a question to which a legal answer can be given; far from being a tautology, the phrase that precedes allows us to focus on the nature of the research question and on the instruments (broadly speaking) that must be used to answer it. In relation to the *nature* of the research question, it tells us that the researcher or the jurist must be able to identify and describe the question from a legal perspective, i.e. using references to normative texts, legal principles and/or legal doctrines and theories. In relation to the *instruments*, it tells us that the answer to the question must be sought by analysing normative texts, legal principles and/or legal doctrines and theories.

Therefore, one can simply affirm that a *legal (research) question is a question that pertains the interpretation and application of norms*; and legal scholars answer such questions using existing norms legal principles and/or legal doctrines and theories. Usually, legal scholars focus with the interpretation of norms within a given legal context, i.e. against the backdrop of a specific legal order, but this is not always the case.

**Identification of a research question**

Before turning to the presentation of a short typology of legal research questions that legal scholars tackle, it is important to briefly consider how a legal research question is identified *in concreto*. Indeed, since we have defined what a legal research question is in the previous paragraph, we must now consider how one identifies, or comes up with, a legal research question for the purpose of writing a paper, an article in a scientific journal or a thesis.

Bearing in mind the limited scope of this document, we can affirm that very often the identification of a legal research question is a passive rather than proactive activity: legal scholars identify legal research questions on the basis of the adoption of norms by institutions and bodies and/or on the basis of the interpretation and application of norms by judges and other adjudicating authorities. Alternatively, a legal research question may be identified on the basis of a particular legal doctrine, theory or principle. Whilst the source of inspiration to do research on a given topic may initially come from a simple societal phenomenon (such as the inflow of asylum seekers in the EU), the fundamental first step to identify a legal research question is about the legal qualification of the source of inspiration – in our case, the inflow of

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3 This does not exclude the fact that numerous schools and scientific approaches have been developed departing from the traditional one mentioned above. Examples of schools that have departed from a purely legal approach are the following: economic analysis of the law and legal sociology.

4 The notion of ‘legal order’ used in this document is a broad one, therefore it includes any set of rules governing a given community such as legal order of the Students Union of the University of Twente or the legal order of the Kingdom of the Netherlands.

5 Whilst it is true that traditionally lawyers work within the context of specific legal orders such as the Dutch legal system, or the law of corporations, other branches of legal disciplines focus on other aspects and transcend traditional, national, ‘borders’. For instance, comparative lawyers do not use a specific legal orders as backdrop, but use a specific legal topic as the cornerstone of their work: for instance, the norms on consumers’ protection in European countries.

6 But it can also come from other scientific disciplines (the rules on the use of drones) or natural events (consider for instance the eruption of a volcano that creates a new island in the Mediterranean).
asylum seekers to the EU. In other words: after the source of inspiration comes to mind, it is necessary to identify the relevant legal framework connected to it; this can be a single provision, a law, a set of norms, a legal principle or doctrine. The two schemes that follow provide the reader with two graphic representations of how a legal research question is identified.

Scheme 1

FACT/EVENT: the inflow of asylum seekers to the EU

Dublin Regulation 604/2013 determining the EU State responsible to examining an asylum application amending Regulation 343/2003

New rules of the Council on the relocation of refugees within the EU (22/09/2015)

Possible legal research questions:
Does the new Regulation respect the Geneva Convention on the Rights of Refugees?
Does the new Regulation respect the EU Treaties?
Which rules of the older Regulation are still valid?
What is the relationship of the two legal texts?
Are the new rules strengthening the protection of the rights of asylum seekers in the EU?

Scheme 1 above provides a few examples of simple legal research questions that emerge as a result of the adoption of a new legislative act that integrates an antecedent set of rules on asylum within the context of the current inflow of asylum seekers coming from (mostly) Syria. In this case the data is produced by the EU legislative authorities (the two pieces of legislation mentioned in the scheme) and the Geneva convention on Refugees which is an international act. Legal research usually does not require the creation, manipulation or selection of “data”, because the data used by legal scholars is already produced by the competent authorities: legislative authorities and judicial authorities. In addition, on top of the use of data such as laws, treaties and judicial decisions, legal doctrines and theories can also be used. Once a plurality of legal research questions has been identified, how does one choose? In this respect the only objective criterion to bear in mind is relevance: which is the most relevant research question? The researcher can answer this question by checking whether any of the given questions is to some extent answered by the legislative texts or not: the more the questions are already answered by the legislative texts the less relevant is the research questions. Secondly, to determine the extent to which a research question is relevant it is necessary to check the extent to which the existing
body of knowledge in the field already answers the given question.\(^7\) Personal interest should only follow these two first steps.

Scheme 2

Arrival of minors within the flow of asylum seekers

A plurality of EU norms refer to the "best interest of the child" principle ex UNCRC (United Nations Convention on the Rights of the Child)

Dublin Regulation 604/2013 determining the EU State responsible to examining an asylum application amending Regulation 343/2003 explicitly says that in dealing with minors the allocation needs to respect "the best interest of the child" principle.

In the case C-648/11 on the criteria to allocate asylum seekers within the EU, the CJEU used the "best interest of the child" principle.

To what extent is the Dublin system and its application consistent with the principle of "best interest of the child"?

Scheme 2 above deals with a different type of legal research question. In this case the researcher is investigating the reference to the principle of the “best interest of the child” in EU legislation on asylum seekers. More precisely, in this example the legal scholar has two objectives. The immediate one is to analyse the extent to which the Dublin system and its application are consistent with the principle of “best interest of the child”; the mediate, but preliminary and necessary objective is to actually clarify what the fuzzy expression “best interest for the child” means from a legal perspective. Also in this case the role of the researcher is rather passive: the data

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\(^7\) The relevance of a given research question in legal studies is tested on a case-by-case basis, depending on the purpose for which one is writing. An academic paper will have to deal with a relevant question that is left open in the scientific debate or will have to propose an innovative approach to analyse or solve a legal question. A university textbook, on the other hand, will deal with any question concerning the legal significance of a determined set of rules.
exists (judgements, legislation and theories) and does not need to be elaborated or manipulated.

Conclusion

- Writing a thesis or paper in a legal discipline means answering a question that pertains the interpretation and application of norms.
- The identification of a legal research question for the writing of a thesis or paper takes its cue from a certain pre-determined element (or data) such as existing legislation, decisions of courts, (societal and/or natural) events, and legal theories and doctrines.
- The identification of a legal research question is a passive, desk-research type of activity: it primarily, but not exclusively, involves analysing legislative developments, the application of norms and/or the validity and relevance of legal theories and doctrines.
- Once a legal research question has been identified, one can assess the scientific relevance of that question. To do so one must look at extent to which the existing body of knowledge already answers that question. Other factors such as the societal relevance of a question also play a great role in the selection of the final research question.

In the next section, the focus will turn to the different types of legal research questions.

An essential typology of legal research

In the previous section it was explained that a legal research question is a question that pertains the interpretation and application of norms. In that section, the process through which a legal research question is identified was explained and in this section the attention will turn to illustrate an essential typology of legal questions. In general, legal doctrine recognises the existence of a plurality of types of legal research and the following excerpt from the book by Van Hoecke gives a good overview and succinct explanation of the main types of legal research:

- Explanatory (explaining the law);
- Empirical (identification of the valid law; determining the best legal means for reaching a certain goal – the 'best solution' in comparative law);
- Hermeneutic (interpretation, argumentation);
- Exploring (looking for new, possibly fruitful paths in legal research);
- Logical (coherence, structuring concepts, rules, principles);
- Instrumental (concept-building);
- Evaluative (testing whether rules work in practice, or whether

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8 Body of knowledge must be interpreted in its broad sense: covering academic literature, judicial decisions, official interpretative legislation, and existing legal principles, doctrines and theories applicable to the issue at hand.
they are in accordance with desirable moral, political, economical aims, or, in comparative law, whether a certain harmonisation proposal could work, taking into account other important divergences in the legal systems concerned)⁹

With this list in mind, it should be emphasised that most of the time legal research questions will combine one or more of the afore-mentioned types. To clarify this point, it could be helpful to go back to the examples mentioned above in the two schemes (Scheme 1 and Scheme 2 above) concerning the identification of a legal research question.

In the first example (Scheme 1 above) the pre-existing condition was the adoption of a new legislative instrument to complement and integrate the existing legislative framework of EU asylum law. In that respect, a number of legal research questions were identified and the Textbox below couples some of those questions with the types of legal research as presented in the list above.

Textbox 1

- Does the new Regulation respect the Geneva Convention on the Rights of Refugees?
  - This question mostly comprises characteristics of the explanatory, hermeneutic, evaluative and interpretative types mentioned above.
- Does the new Regulation respect the EU Treaties?
  - This question mostly comprises characteristics of the logical and explanatory types mentioned above.
- Which rules of the older Regulation are still valid?
  - This question mostly comprises characteristics of the empirical and explanatory types.
- What is the relationship of the two legal texts?
  - This question mostly comprises characteristics from the logical and explanatory types.

⁹ M van Hoecke (ed), supranote 3, p. i
Also in the second example (Scheme 2) the pre-existing condition was the massive inflow of asylum seekers to the EU, but with a focus on the fact that there are numerous minors arriving in the EU. The technical assumption in this case is that the EU and the international community have adopted a number of conventions and other legislative texts to protect children, also in relation to asylum cases. As a consequence, the legal research question identified pertains to the relationship between the standards and principles on the protection of the rights of children within the evolving legislative context of EU asylum law. Textbox 2 below couples the legal research question with the typology of legal questions mentioned above.

Textbox 2

- To what extent is the Dublin system and its application consistent with the principle of "best interest of the child?"
  - This question mostly comprises the following types of research patterns: empirical, explanatory, hermeneutic, exploring, logical.

From this short analysis of the different types of legal research it can be argued that depending on the topic of the legal research question, a plurality of categories may coexist. Yet, one or two characters often become predominant: this happens as the researcher divides the research question into sub-questions and gets more acquainted with the relevant legal framework and the existing body of knowledge.

Let’s consider the research question “To what extent is the Dublin Regulation and its application consistent with the principle of "best interest of the child?"”. As it was observed above, this question can be linked to a plurality of legal research types. However, the different types do emerge more clearly if one divides the research question into sub-questions. The next page presents three related schemes: in the far left the reader will find the identification of the legal research question. In the scheme at the center of the page the main research question has been divided in a number of sub-questions and in the scheme at the far right the different questions have been labelled following the Van Hoecke typology used above.
A plurality of EU and international norms refer to the best interest of the child

From the identification of the question (left) to the classification of the research questions according to the Van Hoecke typology (right)

Dublin regulation 6014/2013 determining the State responsible to examine an asylum request

Case C-648/11 and the decision of the Court also relate to the application of the Dublin regulation in relation to the position of minors

To what extent is the Dublin system and its application consistent with the principle of "best interest of the child"?

RQ: To what extent is the Dublin Regulation and its application consistent with the principle of "best interest of the child"?

Sub-question 1: What is the existing legal framework concerning the protection of the rights of children within the global and EU contexts?

Sub-question 2: How is the principle of "best interest of the child" translated into EU normative acts?

Sub-question 3: How does the Dublin Regulation address the issue of minors and their transfer between Member States for the purpose of establishing which EU State is responsible to examine asylum requests?

Sub-question 4: How has the EU Court interpreted and applied the Dublin regulation in relation to the "best interest of the child" principle?

Evaluative, hermeneutic, logical, exploring, instrumental

Empirical and explanatory

Empirical, explanatory, hermeneutic

Logical, hermeneutic

Logical, hermeneutic
From the analysis above, it clearly emerges that a legal research question may reflect more than one type of research questions. It also emerges that, depending on the objective of the legal research question on the one hand, and on the normative framework considered by it on the other hand, different types of legal research questions may be used to answer sub-questions and, ultimately, the main legal research question. Lastly, it can be added that most research in law is about consistency and coherence: of norms within a specific policy (asylum law), of norms within a legal system (a Regulation adopted by the Council of ministers of the EU and the European Parliament against the backdrop of the EU Treaties), of rulings of courts against the literal or teleological meaning of a norm and of national norms and court rulings against the backdrop of EU law. The list, of course, could be developed with other examples.

Conclusion

- Legal doctrine has identified seven types of legal research, but the list is not exhaustive;
- The different types of legal research are not mutually exclusive; rather, they are complementary;
- Once a legal research question is broken down into more specific sub-questions each research sub-question may reflect one of the different types of legal research more prominently, but there is no doctrine or uniformed approach on how a research question must be divided and subsequently answered;
- The legal research question chosen and the specific field of law at hand determine -to a large extent- the type of legal research that needs to be used;

Developing legal argumentations: some reflections on methods.

No matter what type of question one needs to tackle, legal science has a certain number of techniques and approaches to address research questions. First, it must be borne in mind that in the legal domain researchers do not need to develop and/or create their field of enquiry: this is already developed by a number of identified sources such as legislators and courts. With this in mind, when discussing the methods of legal research, the following statement acquires a distinctive meaning:

“legal scholars collect empirical data (statutes, cases, etc), word hypotheses on their meaning and scope, which they test, using the classic canons of interpretation. In a next stage, they build theories (eg the direct binding force of European Union (EU) law), which they test and from which they derive new hypotheses (eg on the validity, meaning or scope of a domestic rule which conflicts with EU law)”.

From the excerpt above it emerges that in legal research a legal system itself

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10 M van Hoecke, Legal Doctrine: Which method?, in M van Hoecke, supranote 3, p.11
provides scholars with the necessary data to study a certain legal or societal development. Moreover, not only the relevant legislative texts and decisions of courts are pre-determined by the legal system, but also constitutional principles and other *canons (rules) of interpretation* are often pre-determined by the law or by practice.

Therefore, as Westerman has argued, “law is not only the object of the research, but also the theoretical perspective from which that object is studied. Its concepts and categories are not only concepts used by the officials who make, interpret and apply the law, but are at the same time the conceptual tools to be used by the legal scholar”.¹¹ It can be concluded that in legal research the approach and the methods used to analyse and answer research questions *stem from and are conditioned by the legal system (lato sensu) and culture in which the researcher works.*

These reflections make us conclude that in legal science, research approaches and methods are fragmented: each system of law (Dutch law, EU law, international law etc.) impacts the way in which academic legal research is conducted.¹² At the same time, it is possible to identify a core group of *techniques* and *principles* that can be considered “canons of interpretation”. In the following sub-sections, a number of fundamental principles and techniques that characterise research methods in law will be presented.

**Techniques of legal research**

In relation to techniques the following universal techniques can be mentioned. Also in this case, the list should not be considered exhaustive.

- **Systematic approaches**: here the researcher looks at the consistency and coherence of rules, or looks at the consistency and coherence between judicial decisions and the law. These can be labelled systematic approaches because these stem from the fact that in a legal system there is a hierarchy between norms and that valid norms must form a coherent, consistent system.

- **Comparative approaches**: the study of different legal systems or of different ways to regulate a similar phenomenon

- **Argumentation via analogy**: it involves reasoning from a specific case to another for the purpose of identifying the norms applicable to similar situations.

- **Argumentation via syllogisms** to develop the analysis of the norms applicable to a specific case or issue:
  - Major Premise: identification of a general rule and a specific consequence that follows the rule;
  - Minor Premise: a given situation;
  - Conclusion: states whether the rule applies to the facts in the minor premise

¹¹ P C Westermann, *Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law*, in M van Hoecke, supranote 3, pp. 87-110, at 90

¹² This is because often laws define the rules of interpretation.
Example

Let’s consider the research question identified in the previous section:

*To what extent is the Dublin system and its application consistent with the principle of "best interest of the child?*

To answer this question, the researcher will use a systematic approach and will refer to the analogy technique. It will use a systematic approach because, the “best principle of the child” principle is present in a plurality of norms and these norms have to abide by the same regulatory standard (the best interest of the child). Therefore, the notion and application of the said principle will have to be construed considering the position of the principle within the whole EU legal system.

Furthermore, it may be possible that, because of their distinctive function, the different sub-questions require different methods. Let’s consider those in turn.

Sub-question 1: *What is the existing legal framework concerning the protection of the rights of children within the EU and global context?* To answer this sub-question, the researcher will use systematic argumentation combined with analogical and comparative argumentations.

Sub-question 2: *How is the principle of "best interest of the child" translated into EU normative acts?* To answer this sub-question, the researcher will use almost exclusively a systematic approach.

Sub-question 3: *How does the Dublin Regulation address the issue of minors and their transfer between Member States for the purpose of establishing which EU State is responsible to examine asylum requests?* To answer this sub-question, the researcher will use almost exclusively a systematic approach.

Sub-question 4: *How has the EU court, and how have national courts interpreted and applied the Dublin regulation in relation to the "best interest of the child" principle?* Here the researcher will analyse case law and will probably use argumentations by analogy and by syllogism to analyse the decisions of the different court and place them within the given legal system.

Principles

In addition to the techniques mentioned above, legal scholars also rely on a number of principles to structure their research, their writing and, ultimately, answer their research questions. The following, non-exhaustive, list gives but a few examples of general principles (the first four, that can be used in any legal field) and of EU-related principles (the last four, specific to the EU legal system).

- Principle of *lex posterior*: a new law on a given domain implicitly replaces pre-existing rules covering the same field;
- Principle of *lex specialis derogat generali*: a law governing a specific matter overrides a law that has general application;
- Principle of *lex superior derogat inferiori*: the superior norm (e.g. a
constitutional provision) overrides the inferior norm (e.g. a Directive or a Regulation adopted by EU institutions). In constitutional systems, this is often regulated by the constitution itself in the part in which the sources of norms are identified and ordered in rank.

• Principle of proportionality: this principle serves as a criterion to test the fairness, and reasonableness of a norm and its application;

• Principle of proportionality within the EU legal system:
  • there must be a legitimate aim for a measure;
  • the measure must be suitable to achieve the aim (potentially with a requirement of evidence to show it will have that effect);
  • the measure must be necessary to achieve the aim, that there cannot be any less onerous way of doing it;
  • the measure must be reasonable, considering the competing interests of different groups at hand;

• Principle of supremacy and direct effect in EU law: the principle of supremacy is a rule of precedence that determines when EU law prevails over national law in case of a conflict whereas direct effect establishes when natural and legal person can rely on EU law to protect their interests and rights against another natural or legal person or a public authority;

• Principle of conferral: EU legislation must be based on the powers attributed by the Treaties to the EU and, more specifically, on a given provision of the Treaties; otherwise action is illegitimate.

• Purposive interpretation (or teleological interpretation): the competences of the EU and the legislation adopted must be interpreted in a manner that contributes to the attainment of the objectives of the Treaties.

Example

Also in this case it may be useful to consider where and how these principles may be applied in a concrete case such as the one pertaining to the relationship between the EU asylum system and the best interest of the child principle.

To what extent is the Dublin system and its application consistent with the principle of "best interest of the child?"

To answer this question, the researcher will use a systematic approach and will refer to the analogy technique. This means that the systematic approach will be characterised by the reference to principles such as lex specialis derogat generali. In this respect, the use of the latter principle could be used to set aside interpretations of the EU’s asylum system that run against the best interest of the child. Indeed, this substantive principle was specifically developed to protect children and in order to be effective it requires to have precedence over and influence on any norm that may hinder the attainment of that objective.

Moreover, and similarly to what was argued before, the different sub-questions will require different approaches, depending on the question at stake.

Sub-question 1: What is the existing legal framework concerning the protection of the rights of children within the EU and global context? To answer this sub-question, the
researcher will probably make reference to three key principles: *lex specialis derogat generali* and *lex superior derogat inferiori* and *lex posterior*.

**Sub-question 2:** How is the principle of "best interest of the child" translated into EU normative acts? To answer this sub-question, the researcher will use almost exclusively a systematic approach and no general principle emerges as characterising this sub-question with the exception of the principle of conferral.

**Sub-question 3:** How does the Dublin Regulation address the issue of minors and their transfer between Member States for the purpose of establishing which EU State is responsible to examine asylum requests? To answer this sub-question, the researcher will use almost exclusively a systematic approach. To answer this sub-question, the researcher will probably make reference to three key principles: *lex specialis derogat generali* and *lex superior derogat inferiori* and *lex posterior*. Moreover, the principle of proportionality may be useful to address this question.

**Sub-question 4:** How has the EU court, and how have national courts interpreted and applied the Dublin regulation in relation to the "best interest of the child" principle? Here the researcher will analyse case law and will probably use arguments by analogy and by syllogism to analyse the decisions of the different courts. In this case, reference may be made to any of the principles listed above in order to analyse the decisions of the court and assess their impact on asylum law first, and to assess their compatibility with the theoretical framework emerged from Sub-Question 1, second.

**Conclusion**

It becomes clear from this short section on the methods that even though there are some common techniques and general principles of law that are used by scholars, each legal framework in which a lawyer investigates has an influence on the techniques and on the principles that can be used. The short overview provided in this document aimed at introducing the reader with the most commonly used techniques and principles relevant for the purposes of writing a thesis or a paper linked to EU law.

**The structure of a thesis or a paper in law**

After having identified a research question and its sub-questions, a researcher chooses the principles and techniques to use in order to answer the different components of the questions. The structure of the text will reflect the typology of the research question as well as the method(s) that the researcher will use. Some follow US-developed structures called IRAC\(^{13}\) and CRAC\(^{14}\), but these seem preferable only if one discusses judicial cases.

As a rule of thumb, one should structure its legal analysis and text on the basis of the number and scope of the research sub-questions identified in order to answer the main one. For instance, going back to the example used above on the respect of the "best interest of the child" principle in EU asylum law, a paper or thesis on this topic could be structured in the following manner:

\(^{13}\) IRAC: Issue, rule, application, conclusion

\(^{14}\) CRAC: Conclusion, Rules, Analogous Case (if applicable), Application, Conclusion
Introduction: the massive inflow of migrants including minors and the “best interest of the child” principle

Chapter 1: identification of the research question and sub-questions; explanation of the type of research that was carried and the approach(es) or method(s) used

Chapter 2: answer to the first sub-question

Chapter 3: answer to the second sub-question

Chapter 4: answer to the third sub-question

Chapter 5: answer to the fourth sub-question

Conclusion: answer to the main research question

General Conclusion

Legal research is highly influenced by the legal framework in which it is embedded. Not only in relation to the identification of a research question, but also in relation to the techniques and principles relevant to answer a given question. Moreover, and depending on the question to answer, in legal research different types of questions and research methods are mostly complementary and the possibility to integrate different methods depends on the legal and theoretical context in which the researcher has to/wants to analyse to answer the research question.

This paper aimed at introducing the reader with an overview of fundamental issues pertaining to the writing of a thesis or paper in a legal discipline. In order to get an insight of how this actually is done, out it would be highly helpful to go to the library and search for a thesis (bachelor, master or even doctoral) written on a legal topic and read the first chapter on methods and the scientific approach—which is usually the introductory one. A good exercise would then be to cross check the basic notions and ideas of this paper with the work done by students before you.

References

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