Call for abstracts

“Access to sources and results of legal research”

Conference held by the Centre de Théorie et Analyse du Droit (CTAD UMR 7074)

Organising Committee:
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Paris Nanterre University, 1-2 June 2023

In 2023, the Centre de Théorie et Analyse du Droit is addressing the issue of access to the sources and results of legal research. A conference at the University Paris Nanterre on 1 and 2 June 2023 will open the discussion on this theme from various theoretical, disciplinary, national and international perspectives. All interested parties are invited to send proposals to the conference organising committee, particularly, but not exclusively, in the three areas listed below.

Proposals for contributions must be submitted by 15 December 2022 to the following address acces-aux-sources@sciencesconf.org. They may be written in French or English. They should not exceed 4000 characters including spaces, and should include 5 keywords.

1/- Identifying the sources of legal research

The question of access to the sources of legal research is not just a question of more or less open access to the norms produced by the State, but also invites us to consider what sources we need to have access to. Clearly, legislative and regulatory production and decisions rendered by the courts are essential material for research on the law. Are administrative practices, sources that are sometimes described as "grey", recommendations and internal guides of administrations and courts all necessary materials for research? How can we also take into consideration the practices of private actors? Are companies not also at the origin of guidelines, performance contracts, charters of ethics (dissemination of a compliance culture)? What use can be made of the products of associations, NGOs and other militant structures that construct and argue for a certain vision of the law? And what about interviews with people involved in the life of the law: legal professionals, litigants, holders of elected office, etc.? Or non-textual but still discursive sources such as experimental calculations, graphs, drawings, photographs, videos, etc., which have evidential value in legal reasoning? How is one to access foreign language sources - especially in minority languages - and oral sources?

In other words, are the sources of legal research restricted to the sources of law? Our conception of the sources of research controls the kind of research we can do. This has long been the case. Pluralistic and “non-official” perspectives have suggested a broadening of sources beyond the law produced by modern forms of the State in some countries. In the same
vein, some of the sociology and anthropology of law approaches legal normativity not from the perspective of a third party empowered to say what the law is, but from the ordinary representations that individuals make of it, which calls for a profound renewal of the sources on which to build research. Other research takes into account the fact that the sources of law generally recognised as such are also sometimes marked by power relations linked to political and linguistic domination. Thus, in colonial and post-colonial contexts, access to sources of law that are not formulated in the language of the coloniser and take into account dominated representations of the sources of law can be a means of combating the epistemic injustice linked to colonial phenomena and their long-term effects. Finally, other authors ask us to consider research on law without first having to reduce its perimeter to “sources of law”, however broadly understood.

The organisers therefore invite contributions that may raise the question of access to sources of legal research by questioning what constitutes a "source" and considering the whole spectrum of legal research. Which sources are needed for which research? What are the issues (legal, linguistic, political, and epistemic) related to the designation of a material as a “source of law” that should be accessed? How does a policy of access to sources of legal research support a policy of law?

2/- Accessing the sources of legal research

The inaccessibility of some French legal decisions may come as a surprise. Justice is indeed rendered in the name of the French people, and is in principle "public", which means that those subject to the law can attend a hearing. As regards the decisions themselves, the fundamental principle is also that of their publicity. Since the French Revolution, this has been a way of protecting individuals against arbitrary judgments. However, the principle of publicity is not absolute and may be subject to conditions, exceptions and restrictions laid down by "provisions specific to certain matters". However, although the principle of publicity seems to be the rule and the restriction the exception, it is in fact the communicability of the judgment that is the rule and its non-communicability the exception. This is a point of particular interest for legal research. Court decisions - in principle communicable to the parties and third parties - are far from being all available to researchers on Légifrance. In other words, their dissemination is only partial. This inaccessibility can be a major obstacle to research work. In their daily practice, judges use databases to which access is restricted (intranet). Which databases are freely accessible to researchers and for what reasons? How can we analyse the agreements that research teams sign with the supreme courts of the jurisdictional orders concerned in order to gain access to the material they need for their investigations? What conditions do/can the courts impose to authorise access to these documents? In other words, what are the conditions and obstacles to the accessibility of court decisions? Will the recently adopted provisions for open-data access to court decisions really remove these obstacles?

1 Article 451 of the Code of Civil Procedure stipulates that "contentious decisions are pronounced in public hearing [...] subject to the provisions specific to certain matters. Availability at the registry is subject to the same rules of publicity". In criminal matters, see Articles 306, 400 and R 156 of the Code of Criminal Procedure. For the administrative court, see Article L10 of the Code of Administrative Justice.

2 The 2018-2022 programming and reform law for justice modified the availability of court decisions to the public in electronic form. This modification was specified by a decree of 29 June 2020 and then by an order of 28 April 2021.
These questions are more broadly part of the debate on the publicity of case law, the status of which is still being debated in countries such as France, as opposed (actually?) to common law countries. Our judicial system operates largely on a vertical model, insofar as the law produced by the supreme courts largely determines the solutions adopted by the lower courts. The latter, while not legally bound to follow precedents, regularly follow them. The courts’ internal databases are also the tools for this alignment of case law. What might observation of these freely accessible databases reveal to researchers? What is the resistance to the dissemination of all case law data? This conference will be an opportunity to compare the plans for openness set out in these recent texts with the explicit and implicit resistance to the opening of databases.

In addition to the question of practical access to court decisions, the conference returns to the problematic question of the relationship between secrecy and conditional access to archives, particularly with regard to the obstacles that are raised to the communication of the public archives of colonisation and decolonisation, in Algeria and France for example, and also other former colonial powers such as Belgium. In the French context, the conference revisits the recent debates sparked by the political authorities’ desire to restrict access to the archives, even though those of the Algerian War were about to gradually fall into the public domain with the expiry of the fifty-year time limit set by the law on archives of 15 July 2008. These discussions continued with the adoption of the law of 30 July 2021, which was presented sometimes as a law to open up the archives and sometimes as a means of extending the time limits for access to public archives for certain categories of documents. The controversies and jurisprudential decisions of 2021 attest to the need to continue the debate by questioning recent attempts to restrict this constitutional freedom that structures access to public archives and, consequently, the independence of research in law and history.

3/- Disseminating the methods, data and results of legal research

Open science is a movement that aims to build an ecosystem in which science will be more cumulative, more strongly supported by data, more transparent, faster and universally accessible. While this movement was initially mainly concerned with earth and life sciences, it is now extending as open scholarship to the humanities and social sciences. Ethical principles have been discussed and established by the scientific community around several models, including the so-called FAIR model for Findable, Accessible, Interoperable and Reusable. Research results have become shareable sources.

The accessibility of research data is becoming an increasingly important demand today, as the concept of Open Science becomes established as a new requirement for scientific activity. Beyond the publications resulting from the research process, it is now the underlying data that are attracting increasing attention. The challenge of re-using research data is therefore becoming crucial and requires players to master the applicable legal framework. Since the end of 2015, this framework has undergone an in-depth overhaul in France with the adoption of two laws: the “Valter law” on the free use of public sector information and the conditions for its re-use and the “Lemaire law” for a digital Republic. The combined provisions of these two texts have led to the establishment of a principle of openness or Open Data “by default”, which greatly modifies the rules governing the re-use of public information in France.

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3 See e.g. the Resolution on the segregation of mixed-race people from Belgian colonisation in Africa of the Belgian House of Representatives, 29 March 2018, doc. 2952/007.

4 Office parlementaire d’évaluation des choix scientifiques et technologiques, Report on Open Science, Assemblée nationale n° 514 (15th legislature) and Sénat n° 573 (2021-2022).
Although these texts do not deal primarily with research data, they lay down sufficiently general principles to be applicable to teaching and research establishments, including data produced in the context of research activities as such. Data, like research archives, are now subject to a principle of openness by default, which requires spontaneous online access and free re-use. It is only in a series of exceptional cases that research data - like all public data - escape this general rule, notably to protect the rights of third parties (intellectual property, privacy, confidentiality and official secrets).

In the framework of this call for papers, four fields of analysis are suggested:

**a/ Data papers and their challenges for legal research.** Starting in the life and earth sciences, data papers are defined by the sharing of the method according to the fields and practices. More devoted to data than to research results, data papers are presented as a complement to traditional scientific publications. Above all, they allow research datasets to be described in order to disseminate them, promote their re-use or the reproducibility of the research. Sometimes they are accompanied by executable codes or modelling or even analysis. Data papers, which are closely linked to open science, therefore raise several issues for the HSS: they question the nature of the data, their openness, their documentation, their audiences and their possible reuses.

**b/ Access to the results of legal research and the economic context of legal publishing.** The French Law for a Digital Republic has established two principles: free access to scientific publications and the right for researchers to deposit their research in open archives, under certain conditions; and with regard to research data, the principle of openness and free re-use of public data by default. Scientific production is often carried out in an economic context where free access is contested. This is all the more true given that, in the legal field, the highly concentrated publishing market is mainly geared towards legal practitioners. This feature necessarily has consequences for the orientation of the research to be promoted. Do we not see legal publishers imposing on authors the obligation to cite comments on court decisions published in the journals they edit? How should researchers deal with these constraints? Should the economic model be changed to one of open access?

**c/ Copyright and intellectual property protection in legal research.** Intellectual property law and industrial property law have developed a *sui generis* right to protect databases, one of the fundamental sources of research. The default openness of public databases has given rise to many exceptions (intellectual property rights of third parties involved in the creation of databases; identifiable personal data; administrative and commercial secrets; precise attribution of sources without distortion; private copies that cannot be redistributed; short quotations for texts but not for images; authorisation for educational and research purposes but not online, nor published in a journal). The European Commission says that research data should be as open as possible, but as closed as necessary. The conference invites a critical analysis of this situation in the light of legal research.

**d/ Oral data from research confronted with ethics and law.** This rich field has given rise to a great deal of work by researchers, working groups and dedicated consortia. Often approached from the perspective of international law (host country/referent country), oral surveys need prior ethical approval at various levels (institution of the research initiator; authority of the field being worked on which borders on the dynamics of local authorities: informed consent forms; population prohibited from consenting; anonymisation of data and metadata; avoidance of harm to the interviewees) Some examples would be rich with
information on the respect of minority rights through socio-political recognition of a language. Ethnolinguistic conflicts involve local claims against colonial documentation, which is the only reference for ordinary courts.

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- Colloque et les ateliers « #dhnord2021 - Publier, partager, réutiliser les données de la recherche : les data papers et leurs enjeux » organisé par Clarisse Bardiot (Université Rennes 2) et Juliette De Maeyer (Université de Montréal) à la Maison européenne des sciences de l’homme et de la société, Lille, 8-19 novembre 2021.


- Gerry-Vernières Stéphane, « Considérer le droit par ses acteurs à l’aide d’une démarche empirique. La connaissance des pratiques des juges du fond », in Frédéric Rouvière et Clotilde Aubry de Maromont (dir.), La méthodologie de la recherche juridique pensée par ses acteurs, Les Cahiers de la méthodologie, n° 34, Revue de la recherche juridique. Droit prospectif, 2020-3, p. 1599-1618.


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**Calendar:**

- Circulation of call for papers (in French and English): **1 October 2022**
- Deadline for responses: **15 December 2022**
- Announcement of successful proposals: **31 January 2023**
- Programme finalisation: **February 2023**