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Rethinking research methods curriculum in law schools: Lessons from investigating contracting practices of burial societies in Cape Town

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1 Introduction

Black letter law is the default legal research method which is also referred to as the doctrinal method. The doctrinal research method entails the use of primary and secondary sources of law, such as statutes, case law, books and legal periodicals, to determine the rules governing a specific legal issue.[1] The analysis of the sources of law is an enigma and a perplexing concept to describe. One might rely on academic texts or build one's logical interpretation. Therefore, the analysis is often deductive when the researcher finds the specific rule in the sources of law and proceeds to determine whether the scenario meets the rule. Another approach is to use case law to find common principles in cases and deduce a general idea. The approach to legal reasoning does not often involve empirical means, making it necessary for one to rely on legal propositions already posited. An additional technique is reasoning by analogy. The problem with this narrow approach lies in its assumption that the 'law' is easily accessible, which is inadequate for addressing certain legal issues, especially those

1 T Hutchinson & N Duncan 'Defining and describing what we do: Doctrinal legal research' (2012) *Deakin law review* 83, 85; M Van Hoecke 'Legal doctrine: Which method(s) for what kind of discipline?' in M Van Hoecke & F Ost (ed) *Methodologies of legal research: What kind of method for what kind of discipline?* (2011) 4; C McCrudden 'Legal research and the social sciences' in M Del Mar & M Giudice (eds) *Legal theory and the social sciences* (2017) 150.

concerning those on the periphery of society. This narrow perspective is further reinforced in law schools, where students are primarily trained in 'desktop research'.[2] Moreover, the research method is inadequately taught such that scholars and students lack the theoretical grounding to enable them to critically engage with the methodology. This pedagogy, to a certain extent trains proficient lawyers but falls short of cultivating proficient researchers, which are necessary in a legal system. As such, the chapter is premised on the argument that incorporating other research methods in the legal curriculum will better equip the students. Consequently, the first section of the chapter thoroughly discusses the doctrinal method with the overarching aim of teasing out the inadequacies of the approach. The second section of the chapter moves to argue that, given the inefficiencies of the doctrinal approach, there is a need to also incorporate socio-legal methods in the curriculum. Thereby providing an explanation and theoretical foundations of the socio-legal methods. To provide practical solutions on the socio-legal methods, the chapter draws lessons from a study that incorporated socio-legal methods to supplement the doctrinal methods.[3] Providing solutions grounded in reflections from one of the author's experiences bridges the gap between theory and real-world application, thus allowing evidence-based solutions.

2 Doctrinal method

The doctrinal method is the core research method in law that is premised on the notion that the law must be studied as a normative system that is heavily influenced by legal positivism.[4] Law as a normative system is founded on the philosophical underpinning that law is the answer to what should be done.[5] Therefore, the researcher must establish what

2 'Desktop research' is a term that is colloquially used to refer to 'doctrinal research' by undergraduate students or early-stage researchers to refer to not conducting field work. While commonly understood as a perusal of law sources, its usage often reflects a limited grasp of research methodology.

3 S Mzezewa 'uBuntu and certainty in commercial contracting: A study of burial societies in Cape Town' PhD Thesis, University of Cape Town, 2023 6.

4 R Banakar & M Travers 'Law, sociology and method' in *Theory and method in socio-legal research* (2005) 1 Van Hoecke 'Legal doctrine: What kind of method for what kind of discipline?' in Van Hoecke & Ost (n 1) 2.

5 P Chynoweth 'Legal research' (2008) 1 *Advanced research methods in the built environment* 29; J Hage 'The method of a truly normative sicence' in M Van

the law is.[6] As such, legal documents are the main subject of study.[7] In essence, it involves reliance on established legal texts, case law, legislation and scholarly legal writings.[8] Therefore, the doctrinal approach seeks to describe the existing law, provide practical solutions that fit within the legal system and justify the existing laws.[9] The description of the law provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty, and, perhaps, predicts future developments.[10] The prescriptive process aims to find solutions by taking into account other external factors, provided it fits the existing legal system.[11] The justification reemphasises the validity of the norms by reference to the existing system.[12]

Fundamentally, the doctrinal method operates on the assumption that the law is an autonomous system emanating from the state.[13] The doctrinal method is challenging to describe from a practical perspective because it is primarily theoretical. Nonetheless, from the on-set, the researcher is confronted with a problem that requires a solution. This challenge necessitates not only identifying the issue but also determining an approach that effectively addresses it. Identifying the research question is often based on pre-conceived notions, as such, the legal texts will be consciously selected based on the pre-conceived notions.[14] In other words, the researcher is guided by pre-conceived theories and the outcome of the research question then confirms or refines

Hoecke and F Ost (eds) *Methodologies of legal research: Which kind of method for what kind of discipline?* (2011) 27-28.

6 Chynoweth (n 5) 32.

7 As above 29; Van Hoecke 'Legal doctrine: What kind of method for what kind of discipline?' in Van Hoecke & Ost (n 1) 4; Hutchinson and Duncan (n above)84; T Hutchinson 'Doctrinal research: researching the jury' in D Watkins & M Burton *Research methods in law* (2013) 9.

8 Van Hoecke 'Legal doctrine: What kind of method for what kind of discipline?' in Van Hoecke & Ost (n 1) 11.

9 JM Smits 'What is legal doctrine? On the aims and methods of legal-dogmatic research' (2017) in R van Gestel, H Micklitz, & EL Rubin (eds) *Rethinking legal scholarship: A transatlantic dialogue, New York* (2017) 8-11.

10 Smits (n 9) 9- 0.

11 Smits (n 9) 10.

12 Smits (n 9) 11.

13 D O'donovan 'Socio-Legal methodology: Conceptual underpinnings, justifications and practical pitfalls' (2016) 1 *Legal Research Methods: Principles and Practicalities* 31.

14 Chynoweth (n 5) 29; Van Hoecke 'Legal doctrine: What kind of method for what kind of discipline?' in Van Hoecke & Ost (n 1) 13.

one's assumptions.[15] For instance, if one seeks to determine whether a contract is valid, they are guided by established rules of contract law. The evaluation process requires checking whether the contract meets the necessary legal criteria, demonstrating how legal analysis is shaped by existing conceptual frameworks.

Within this framework, the researcher then categorises the sources according to the degree of relevancy and authority.[16] The relevancy and degree of authority depend on the legal system, particularly insofar as case law is concerned. For instance, in South Africa, the Supreme Court of Appeal has more relevance and authority compared to a High Court judgement. However, in the legal scholarship, it is subjective to the researcher, because one might accord importance to an established scholar as opposed to a junior scholar.[17] Consequently, legal research is rarely an objective exercise.

Having identified the possible sources, the researcher then undertakes the process of organising the sources, which then leads to a description of the law.[18] Description of the law then leads the researcher to the interpretation process. The ultimate goal is to support a hypothesis. In most cases, the interpretation thereof is not an issue because it is settled; researchers rarely require new methods of interpretation.[19] Irrespective of a settled interpretation, researchers are often at liberty to formulate new ways of interpretation.

Having described and interpreted the law, the researcher performs reasoning or argumentative writing. As such, deductive logic involves drawing conclusions from precepts that are known to be true.[20] On the other hand, inductive reasoning typically formulates new theories or rules by analysing case patterns.[21] Analogical reasoning involves relying on cases with similar legal issues, although the facts are often different.[22]

15 Van Hoecke 'Legal doctrine: What kind of method for what kind of discipline?' in Van Hoecke & Ost (n 1) 13.
16 Van Hoecke(n 15) 11.
17 Van Hoecke(n 15) 11-12.
18 Hutchinson 'Doctrinal research: researching the jury' in Watkins & Burton (n 7) 13.
19 Van Hoecke 'Legal doctrine: What kind of method for what kind of discipline?' in Van Hoecke & Ost (n 1) 14.
20 Chynoweth (n 5) 32.
21 Chynoweth (n 5) 32.
22 Chynoweth (n 5) 33.

Interestingly, Chynoweth argues that it is incorrect to label the process of collecting legal materials and utilising different approaches of reasoning as a 'methodology'.[23] The argument is centred around the observation that the 'methods' in legal research are not 'learned' but instead are instinctive because of exposure to the process.[24] Moreover, the credibility of the work is dependent on the researcher showing adherence to accepted dogma.[25] In essence, researchers in this context are merely performing the objects of doctrinal research, namely, description, prescription and justification.

Chynoweth's argument feeds into how pedagogy has largely informed the doctrinal method. From a historical perspective in so far as pedagogy is concerned, legal training stems from the rhetorical tradition that emphasised the use of language to persuade an audience.[26] As time progressed, particularly in the common law systems, focus shifted to teaching using the case method.[27] Most law schools, particularly in countries that rely on the common law, adopted the technocentric approach to teaching law, which dates back to the rhetorical tradition.[28] The technocentric approach also extends to the language and the writing style that is used in law schools. Despite a substantial body of work critiquing the technocentric approach to pedagogy, legal culture remains deeply entrenched, rendering these debates largely confined to academic circles with little impact on law school curriculum. This reluctance may also stem from law schools' narrow perception of their mandate, focusing solely on training lawyers rather than preparing students for a broader range of careers. This continues to be the dilemma of legal academia and law schools. Cownie explains that the predominant pedagogy trains students to 'think like lawyers' which largely involves separating the law from other external issues like culture, society, politics, etcetera.[29]

Simply put, while the doctrinal method has long been a cornerstone of legal research, its limitations are increasingly evident, especially when applied to complex legal issues rooted in social, cultural, and economic

23 Chynoweth (n 5) 34-35.
24 As above.
25 Chynoweth (n 5) 35.
26 Hutchinson 'Doctrinal research: researching the jury' in Watkins & Burton (n 7) 10.
27 As above 10.
28 F Cownie *Legal academics: Culture and identities* (2004) 35.
29 Cownie (n 28) 35.

contexts. The rigidity of the approach also ignores pluralistic societies. The narrow approach has led to the distortion of the law and the erasure of practices that the legal system should take into account. Furthermore, the approach is typically deductive in nature, with scholars beginning with accepted and conventional legal doctrines and applying them to particular situations.[30] Murungi notes that this deductive method could restrict the investigation of different viewpoints or fresh interpretations on certain issues.[31] Particularly, in the context of customary law, this assumption that the law is a self-contained system is a fallacy. The limitations of doctrinal legal research become apparent in that the sources are few and misconstrue African cultural practices. A notable example is *lobolo*. Scholars misguided under the shroud of the dogma classify *lobolo* as a contract.[32] The misconceived inclination among legal scholars to think that lobolo is a commercial contract arises because *lobolo* entails the exchange of property in the form of money and other assets of value, such as livestock.[33] Moreover, the classification as a contract is baffling because it lacks the theoretical grounding of the basics of contracts. Contract doctrines are premised on the neo-classical perspective that posits that contracts are voluntary exchanges that move resources from less to more valuable uses.[34] Descriptions of *lobolo* as a contract neglect the purpose of the cultural practice, which is to unite the two families.[35] The misconceived categorisation amounts to epistemic violence in an attempt to fit the cultural practice within accepted dogma.

Given the deficiencies of the doctrinal approach, scholars have consistently argued for socio-legal methods.[36] The following section will explore the socio-legal method, which offers a broader and more inclusive approach to understanding legal phenomena.

30 I Dobinson & F Johns 'Legal research as qualitative research' (2017) *Research methods for law* 18 21.
31 J Murungi *An introduction to African legal philosophy* (2013) 18.
32 Several texts leading scholars on customary law classify *lobolo* as a 'contract', see for example CN Himonga & RT Nhlapo *African customary law in South Africa: Post-apartheid and living law perspectives* (2014) .
33 Mzezewa 'uBuntu and certainty in commercial contracting: A study of burial societies in Cape Town' (above) 97-98.
34 RA Posner *Economic analysis of law* (2014).
35 Mzezewa (n 33).
36 For example, see R Banakar & M Travers *Theory and method in socio-legal research* (2005); F Cownie & A Bradney 'Socio-legal studies: A challenge to the doctrinal approach' in *Research methods in law* (2013) 42; R Cotterrell *Living law: Studies in legal and social theory* (2017) .

3 Socio-legal research

There is no coherent theory relating to 'socio-legal research' and often referred to as 'law in context' or 'law in action'.[37] Nonetheless, it is generally understood as a way of studying the law through empirical and systematic ways that characterise social field experiences and their processes.[38] The socio-legal approach is posited from the argument that the law is a social phenomenon that must be understood systematically and empirically.[39] In that sense, it enables one to observe laws outside the formal sphere.[40] It is important to note that the socio-legal approach does not introduce unique modes of law but rather broadens the understanding of the law by expanding the pre-existing and partially systematic characteristics of the law. In other words, it is interdisciplinary. At its core, the socio-legal approach advocates for legal pluralism where 'all law is not state law nor administered by the state'.[41] Consequently, socio-legal studies bridge the gap between 'law in action' and 'law in text'.[42] Overall, the socio-legal approach is used to provide statistical measurements of legal phenomena, descriptions of the use of law, dispute resolution, show how there are multiple normative systems in a society and how non-legal actors perceive or relate to the law.[43]

The socio-legal approach does not have a fixed method, thus allowing researchers flexibility to adapt during the process of collecting data as well as data analysis. The various methods include observing court proceedings, ethnography, and numerical analysis, etcetera.[44] Legal scholars typically use the case method and rule-based approach.[45] The case method focuses on dispute resolution processes and procedures,

37 W Twining *General jurisprudence: understanding law from a global perspective* (2009) 637; Cownie & Bradney (n 36) 42 34.
38 Twining (n 37) .
39 R Banakar & M Travers 'Law, sociology and method' in Banakar & Travers (n 36) 1; Cotterrell (n 36) 17-18.
40 Cotterrell (n 36) 55.
41 J Griffiths 'What is legal pluralism?' (1986) *The Journal of Legal Pluralism and Unofficial Law* 1 5.
42 C Menkel-Meadow 'Uses and abuses of socio-legal studies' (2019) in N Creutzfeldt, M Mason & K McConnachie, in *Routledge handbook of socio-legal theory and methods* (2019) 39-40.
43 As above.
44 Banakar & Travers (n 39) 1; M McConville *Research methods for law* (2017) 4 -5.
45 JG Hund 'The roles of theory and method in investigating primitive law' (1974) 7 *Comparative and International Law Journal of Southern Africa* 208, 209.

thus taking into account the social context of a dispute, the sequence of the dispute, its background and the relationship between the parties.[46] The problem with the case method is that it assumes that all disputes result in finality through the dispute resolution process, whereas parties often manage the dispute as opposed to resorting to belligerence. On the other hand, the rule-based approach ascertains rules of law from an empirical perspective.[47] Obviously, it appeals to a researcher primarily trained in the doctrinal approach because it assumes that rules can be easily ascertained, which is further from the truth.[48] As such, Hund suggested that the rule-based approach be supplemented by hypothetical questions to uncover undeclared rules.[49]

Despite the flexibility that the socio-legal approach presents, it has been criticised by doctrinal scholars. Cownie and Bradney note that socio-legal scholars have been accused of producing research that is 'not intellectually sophisticated, atheoretical and descriptive in nature'.[50] More so, an unsophisticated methodology that results in poor results.[51] We believe that the core of the criticism here lies in the delusional thinking of doctrinal scholars, whose legal culture imposes rigid language and framing. This rigidity renders anything that deviates from dogma unintelligible and unsophisticated in their view.

Nevertheless, beyond these critiques, the experiences of one of the authors of the chapter with the socio-legal approach offer a more personal perspective on its application and challenges in practice.[52]

46 As above 210; JL Comaroff & SA Roberts *Rules and processes* (1981) 14.
47 Hund (n 45) 208, 209.
48 As above.
49 As above.
50 Cownie & Bradney (n 36) 36-37.
51 As above 37.
52 Although the chapter was a collaborative effort, Sinikiwe Mzezewa provides an insight into using the approach based on her PhD thesis.

4 Reflections on socio-legal research

4.1 Methodological insights into researching burial society contracts

As someone trained in the doctrinal method, I encountered challenges while researching the contracting practices of burial societies. Burial societies were started during the period of migration to the cities with the underlying purpose to assist one another with the exorbitant costs associated with traditional burial rites.[53] As such, they have remained popular in black communities, though modernised and with the influence of globalisation, black people have retained their cultural practices. Burial societies became saturated in the townships following labour migration to the cities in the 1920s.[54] It is well documented that townships are marred with poverty, unemployment and meagre wages as such a fertile environment of survival skills.[55] As such, the communities in these areas face unique challenges when it comes to saving and exchanging money. In fact, hyper-individualistic tendencies do not suffice in these spaces. In such areas, deep legal pluralism is rife as there is an interplay of different normative systems that are not administered by the State.[56] This is an environment that economists categorise as the 'popular economy' because these activities are beyond the reach of the State and capitalist enterprises.[57] On the background of this knowledge, the legal literature presented difficulties because of the categorisation of the contracts as 'funeral insurance' contracts.[58] Funeral insurance is defined as an agreement between the insurer and insured, whereby the insured undertakes to pay predetermined contributions at regular intervals in

53 H Kuper & S Kaplan, 'Voluntary associations in an urban township' (1944) 3 *African Studies* 178; AK Lukhele *Stokvels in South Africa: Informal savings schemes by blacks for the black community* (1990) 5; G Verhoef 'Informal financial service institutions for survival: African women and stokvels in urban South Africa, 1930-1988' (2001) *Enterprise & Society* 259 263.

54 C Bundy 'Poverty and inequality in South Africa: A history' in *Oxford Research Encyclopedia of African History* (2020) 40.

55 Bundy (n 54).

56 Griffiths (n 41) 1 1.

57 E Hull & D James 'Introduction: popular economies in South Africa' (2012) *Africa* 1 9.

58 WG Schulze '*Legal aspects of the insurance premium*' LLD Thesis, Universiteit van Suid-Afrika, 1996 6 153.

exchange for funeral assistance upon death.[59] This categorisation negated the actual nature of the contracts, which is that these contracts are *sui generis,* serving an economic, social and cultural purpose. Moreover, this categorisation omitted the dispute resolution processes that are ubuntu-based – in other words seeks to restore and maintain the equilibrium between the parties as opposed to the finalisation of the dispute. It goes without saying that this incorrect categorisation of the contracts stems from the private law obsession with dogma and categorisation of concepts within specific doctrine. The obsession with the legal culture of formalism blinds the researcher. The misinterpretation filtered into the legislature, which categorises burial society contracts as 'funeral insurance' and attempts to enforce a regulation that is not fit for purpose. Having this knowledge, I sought to investigate whether the burial society contracts are certain and enforceable, given their nature, which defies the orthodox contract rules.

As such, I premised the study on the notion that burial society contracts are governed by 'living customary law'. My understanding of living customary law at this point was the judicial definition, which is the system of law known to the community, practiced and passed on from generation to generation, that has evolved over time to meet the changes in society.[60] Based on this judicial definition that is supported by several scholars, I framed my research under the assumption that these cultural practices are 'ancient' and have suffered from the problem of epistemic violence that dates back to the scramble for Africa. It is well known that epistemic violence has led to distortion, erasure, and hegemonic knowledge production. In this light, I sought to conduct fieldwork to have the correct reflection of the contracting practices of burial societies.

The first major hurdle I encountered in this endeavour was the ethics application, which essentially served as a preliminary outline of the project's research design and methodology. After several rounds of trial and error, I eventually navigated the process successfully. The chosen location of the study was initially Masiphumelele, which was amended

59 PM Nienaber & J Preiss 'Funeral insurance: A perception from the office of the Ombudsman for Long-term Insurance' (2006) *SA Mercantile Law Journal* 291-292.

60 *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC) para 53; *Bhe v Magistrate, Khayelitsha; Shibi v Sithole: South African Human Rights Commission v President of the Republic of South Africa* 2004 (1) BCLR 27 (CC) para 81.

to also include Phillipi, Nyanga and Gugulethu because the point of saturation was quickly reached in Masiphumelele. A research assistant provided valuable support during my study. I opted for a case study because it allows one to focus on one phenomenon and conduct an in-depth inquiry.[61] Moreso, allows one to expand and develop new concepts.[62] Since I lacked prior knowledge of the study population, utilising a non-probability sampling method was the most practical approach. Snowball sampling proved effective, as it allowed us to identify additional participants through those we had already interviewed. I also opted for a qualitative method by using semi-structured interviews. Semi-structured interviews are suitable because they often reveal information from the participants that the researcher had not anticipated.[63] The participants gave diverse views and a broad understanding of the issues and topics in the questionnaire. The semi-structured individual interviews focused on understanding the functioning of burial societies and establishing the contracting practice of burial societies. The participants were selected based on their group dynamics. Participants who played dominant roles in burial societies were preferred for their knowledge. Interviews were conducted at the convenience of the participants. A point of saturation was reached earlier than anticipated when the data showed similar patterns in the practices of burial societies. The analysis of qualitative data involves passing judgment and making conclusions based on evidence.[64] In that light, this involved arranging the data into themes related to the chronological process of contract formation. The data were analysed within the social and cultural context of these contracts. Thus, the explanations are derived from living customary contract theory and supplemented with studies that contextualise unique economic practices in South African townships.

4.2 Practical challenges

Having taken the position that burial society practices constitute living customary law, I was inclined to romanticise them as being

61 B Somekh & C Lewin *Research methods in the social sciences* (2005) 3343; ER Babbie *The practice of social research* (2020) 309.
62 As above.
63 LM Given *The Sage encyclopedia of qualitative research methods* (2008) 422.
64 As above.

rooted in ubuntu only. In other words, the contracts are shaped by communitarianism, solidarity, humaneness, compassion and trust. More so that the practices would, to a certain extent, reveal 'culture' as ancient practices that have remained in place, passed on from generation to generation for the purposes of upkeeping burial rites. The romanticised theoretical framework stemmed from my ideological stance, shaped by the recognition that the literature I reviewed perpetuated epistemic violence. However, my hypothesis was only partly correct. A major insight was that ubuntu ought to be invoked with caution, particularly in the context of contracts, courts and scholars have a tendency to elicit the term without contextualisation. For instance, the burial society contracts depict most descriptors of ubuntu except for communitarianism. This is because absolute communitarianism does not ring true. As it turns out, there is moderate communitarianism, which is a balance of two competing interests, namely individualism and communitarianism.[65] In reality, the contractors in this environment are inclined to act in favour of the common good if their interests are protected. Therefore, to maximise the status *quo* of personal interest, one would be willing to be in solidarity with the group, something which implies co-operation. Hence, the contracts of burial societies show moderate communitarianism. In addition, some of the norms do not depict an idealised version of ubuntu. For example, a participant revealed that in order to enforce reciprocity, they make a participant sign an affidavit undertaking that they will not leave the society. Ignoring the doctrines of contract law rooted in the principle of voluntary exchange, where individuals have the freedom to enter into and terminate contracts at will, this norm does not reflect an idealised interpretation of ubuntu. An idealised version of ubuntu envisions compassion, humanness, trust, etcetera.

Another core observation is that living customary law is a broad concept that is not stuck in 'ancient' practices; in fact, it adapts and incorporates practices from other normative systems. In other words, culture is not immune to external forces. As a matter of fact, though certain elements of the 'core' culture that researchers often seek out are visible, one is often confronted with other norms. For instance, the burial society contracting practices showed elements of state laws, living

65 K Gyekye 'Person and community in African thought' (1992) *Person and community: Ghanaian philosophical studies* 101 113-115.

customary law, religion and self-made norms. Self-made norms in this case refer to rules that cannot easily be categorised but rather are made out of necessity to reflect the needs of the burial societies. The different normative systems are not in competition- there is no system that is superior to the other – they instead complement one another.

Acknowledging my own blind spot, the romanticised version of customary law that I, as a researcher, initially sought, does not negate the fact that living customary law serves as the normative system governing burial societies. Rather, it highlights that living customary law operates as a broader, more nuanced concept. The same applies to ubuntu, it is not confined to its idealised version but instead functions as a dynamic and subjective concept.

Although I initially dismissed customary contracts in the literature as lacking serious consideration due to epistemic violence. It is worth noting that some of the epistemic violence is perpetuated by African scholars who utilise the problematic anthropological research to frame their research. However, in my efforts to counter the marginalisation of the customary contracts, the lingering influence of my doctrinal training shaped the way I framed my research questions. I took the approach that contracting is a universal concept, as such, the contract has a life cycle that is familiar to all – the beginning and the end, in contracting language, this is generally understood as 'concluding and terminating'. The parties often have rules to regulate the life cycle of the contract. Due to the fact that I took this approach, I framed the questions using similar doctrinal rules relating to the formation of the contract. As noted earlier, I adopted the suggestion by Hund that the rule-based approach be supplemented by hypothetical questions to uncover undeclared rules. While this makes sense in theory, in practice, formulating effective hypothetical rules often depends on prior knowledge. This creates a methodological limitation if the rules are not already known to some extent. In essence, by formulating my questions in this way, I possibly missed some norms that are important in building a body of knowledge in this regard.

In essence, the challenges in the practical application of socio-legal research largely stem from an inability to detach from the doctrinal approach. Be that as it may, it is worth considering in the pedagogy of law schools, taking into account some of these practical challenges. The following section will offer insights into how law schools can better

equip future legal scholars and practitioners to address the complexities of modern legal issues through diverse research methods.

5 Lessons for research methods curriculum

The doctrinal method undoubtedly serves its purpose, providing the necessary structure and coherence that underpin legal reasoning and doctrine. Our legal system is largely shaped by formalism; as such, it is deeply ingrained in legal education, practice, and interpretation. Law schools prioritise doctrinal research that provides students with a very narrow skill set. Furthermore, the doctrinal approach is inadequately taught, leaving students without a theoretical and practical application of the method. As such, it is not uncommon to come across a research thesis that merely refers to 'desktop' research. The lack of a thorough teaching of the theoretical foundations deprives the students of the skill to critically analyse the approach and its applicability in legal research. Doctrinal scholars need to move from the theoretical assumption that socio-legal research is not important, which is reflected in the absence of curriculum design in law schools. Socio-legal research is important for all forms of normative systems. A grasp of socio-legal research ensures that we have legal frameworks that respond to the needs of society. Moreover, this theoretical assumption is also reflected in the social attitude that scholars/lawyers have towards customary law that because it is 'flexible' therefore not possible to record. In most situations, there are no significant changes in the core practice but rather small changes to accommodate the change in circumstances of the parties. For instance, the research findings on burial societies revealed that some practices remained similar to studies done years ago in anthropological studies or popular economy studies, albeit with some changes to reflect the changes from external forces like inflation.

In order to bridge the gap, socio-legal research must be incorporated into the law curriculum with a particular focus on field research. Field research particularly focuses on a group of people in a particular setting.[66] Field research allows one to observe and interact with the participants in their natural settings – in other words, it allows one to be part of the lived

66 WL Neuman *Social research methods: Qualitative and quantitative approaches* (2014) 433.

experience.[67] Moreover, it can use various techniques, including asking the participants questions.[68] Although structured or semi-structured questions are ideal for ease of documentation, they also have limitations. As noted earlier, structured questions tend to introduce bias by framing inquiries around a predefined hypothesis, which can lead to the omission of important information.

Given that socio-legal research is concerned with 'law as is', students must be equipped with the analysis of the social context in which the law operates, particularly in the context of African societies. The continuation of epistemic violence can be averted by thinking like an 'African lawyer' as argued by Murungi.[69] Murungi argues that the way most lawyers think is an institutionalised way of thinking, which is typically called legal culture.[70] The legal culture was forced upon Africans because the colonisers were of the view that Africans were incapable of managing their own affairs.[71] In that light, thinking like an African lawyer involves not seeking approval of the set doctrines, in other words, must be decolonised and think in their socio-cultural context.[72]

Consequently, the data analysis requires the socio–cultural context within which the law operates. Importantly, socio-legal research derives explanations that are less abstract, instead generalisations that are close to concrete data and contexts.[73] By centering law within real-world social contexts, this approach provides concrete, context-specific insights that are essential for meaningful legal scholarship and reform.

Nonetheless, the rigidity of this approach underscores the need to incorporate other methods, particularly socio-legal methods, which offer a more contextualized and dynamic understanding of law as it operates in society - one that takes into account the interplay with the social, cultural, and economic forces that shape and influence its application in society.

67 As above 433.
68 As above 461.
69 Murungi (n 31) 100.
70 As above.
71 As above; KE Klare 'Legal culture and transformative constitutionalism' (1998) *South African Journal on Human Rights* 146 167-168; JP Langa 'Transformative constitutionalism' (2006) *Stellenbosch Law Review* 351.
72 Murungi (n 31) 109; 120.
73 Neuman (n 66) 478-9.

6 Conclusion

Our legal systems are largely shaped by legal positivism that operates under the assumption that the 'law is as is' and is an autonomous system that does not need to rely on external factors such as economics, culture and politics. The legal culture has also set the language, manner of writing and pedagogy. As such, the doctrinal method relies on legal texts. The researcher merely undertakes an exercise of describing the law with little to no interpretation. Interpretation is often settled. Though the doctrinal method serves its purpose of describing the law in a structured way, it ignores other normative systems of the law, particularly in plural societies. As such, the research is oversimplified and lacks depth, particularly the socio-cultural context. Taking into account the shortfalls of the doctrinal approach, there is a need to consider socio-legal methods. Essentially, the socio-legal methods bridge the gap between 'law in text' and 'law in action'. As such, it focuses on field work. It is a flexible approach, thus giving the researcher nuance and research grounded in the socio-cultural context. The need to consider the socio-legal approach should not be viewed as a disregard of the doctrinal approach. Instead, it should be recognised as a complementary method that enriches legal analysis.