

## **Take (what they say) with a pinch of salt: Engaging in Empirical Research to Understand the Parameters of the ‘Quality’ in ‘Poor-Quality Defence Lawyering’**

*Ashlee Beazley\**

**Keywords: Empirical legal research; legal advice; qualitative research**

### **Abstract**

The criminal defence lawyer is an essential component to the equality of arms, due process, the enforcement of the prosecution’s burden of proof, and to the right to a fair trial. Despite this, little attention has yet to be paid to what the different qualities of legal defence assistance—whether adequate, effective, sufficient, etc.—actually amount to. This article presents the methodology and results from a comparative empirical legal study on the quality of criminal defence advocates in England & Wales and Belgium. The study presented, and the wider PhD research to which it forms a part, seeks to construct a theoretical framework by which poor-quality (insufficient) defence representation may be identified, understood, contextualised, addressed and remedied. To this end, the empirical research undertaken and outlined in the article which follows focuses on a particular source of information: the data acquired from semi-structured interviews held with defence practitioners about their (own) perceptions, opinions and experiences of the quality of defence representation.

The article discusses the extent to which lawyers are a reliable source of data and the usefulness of empirical research as a means by which legal theory may be developed, articulated and tested. If, for example, quality lawyering is to be defined in the hope of demarcating “sufficient” quality from “insufficient”, then it is both natural and necessary to involve the subjects of this research, the lawyers. A qualitative empirical study which utilises constructivist grounded theory and critical realism is, this article suggests, one means by which this delineation may be ascertained, one which also seeks to contextualise the data obtained whilst acknowledging the role and effect of the researcher in question.

## 1. Introduction

As Lord Levenson once astutely noted, it is a ‘critical test of the freedom inherent in our democratic society’ that those accused of committing criminal offences can and should be represented by ‘capable criminal advocates, independent in spirit’ who, subject to the rules of law and procedure and to the ‘dictates of professional propriety’, are prepared to put the interests of their clients at the forefront, irrespective of personal disadvantage.<sup>1</sup> The criminal defence advocate, it can be said, is of fundamental importance to the modern criminal justice system. An obvious statement, perhaps, but this does not detract from the fact they are an essential component to the equality of arms, due process, the enforcement of the prosecution’s burden of proof, and the right to a fair trial. The assistance of legal counsel in the preparation of one’s defence serves to promote individual dignity—it recognises and upholds the right of the accused to exercise individual participation in their defence,<sup>2</sup> while also protecting the legitimacy and integrity of the proceedings’ due process.<sup>3</sup> The presence and assistance of legal counsel, furthermore, help to alleviate the stress of facing charges, aid in ensuring defendants are treated properly during criminal proceedings and, fundamentally, give expression to

---

\* PhD Candidate, KU Leuven. The author would like to thank the two peer reviewers of this article for their useful and insightful comments and suggestions. Any errors or omissions are the author’s.

<sup>1</sup> *R. (On the application of Lumsdon & Ors.) v. Legal Services Board & Ors.*, [2014] EWHC 28 (Admin), para. 1, per Lord Levenson. The full quotation is: ‘It is a critical test of the freedom inherent in our democratic society that those accused (usually by the State) of committing criminal offences can and should be represented by capable criminal advocates, independent in spirit who, subject to the rules of law and procedure which operate in our courts and to the dictates of professional propriety, are prepared to put the interests of their clients at the forefront and irrespective of personal disadvantage. Similarly, advocates instructed to prosecute crime must be impartial, balanced and fair. These are the values, to the great advantage of the rule of law in this country, that have long been embedded in the practice of advocates before our criminal courts. Those who have the responsibility for the regulation of advocates (whether barristers or solicitors) are imbued with the same sense of the centrality of independence and mindful both of the need to maintain standards and the critical importance of supporting professional independence.’

<sup>2</sup> John D Jackson and Sarah J Summers, *Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Forms* (Hart Publishing 2018) 18.

<sup>3</sup> Herbert L. Packer, ‘Two models of the criminal process’ *University of Pennsylvania Law Review* 113 (1964) 1, 60. Packer notes that the criminal defence advocate is a “crucial figure” to the Due Process Model of criminal justice, for on their presence depends the viability of the Model’s prescriptions (ibid.).

defendants' participation more effectively than defendants themselves may otherwise be able to do so.<sup>4</sup>

Defence counsel not only act as the defendant's voice, they are also tasked with ensuring the most effective case is mounted against the prosecution—their presence is thus also vital in upholding the institutional need for the prosecution case to be challenged.<sup>5</sup> There can be little doubt, then, that the right of the accused to be assisted by a lawyer<sup>6</sup> is of crucial importance to ensuring the legitimacy and integrity of criminal proceedings: the fairness of the criminal justice system, the European Court of Human Rights (ECtHR) has stated, depends on an accused being adequately defended, both at first instance and on appeal.<sup>7</sup> This idea, that an accused should be adequately defended, is reflected in the right and requirement that the legal assistance provided by counsel be effective.<sup>8</sup> Despite this, and notwithstanding the continued focus on increasing the presence and assistance of advocates during all stages of proceedings, little attention has yet to be paid to what the different “virtues” of legal defence assistance—adequate, effective, sufficient—actually amount to.<sup>9</sup>

---

<sup>4</sup> Jackson and Summers, 18.

<sup>5</sup> Sarah Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart Publishing 2007) 110.

<sup>6</sup> The right of access to a lawyer is an essential procedural right of suspect and accused persons in criminal proceedings, as art. 6(3)(c) of the European Convention of Human Rights. The right of access to a lawyer plays a significant role in facilitating other procedural rights, such as the right to the accused not to incriminate themselves, the right to competent and effective legal advice and the right to have adequate facilities for the preparation of a defence. Despite this, there is no “uniform understanding” of the role and function of defence counsel. As Wohlers observes, there is an interesting distinction between counsel required to assist the accused person, and counsel expected to act as the accused's representative; these activities, he argues, are not one and the same: Wolfgang Wohlers, ‘The Role of Counsel in Criminal Proceedings’, in Jackson and Summers (n 2) 127. For a discussion of this idea, in the context of the right to defend oneself, see Ashlee Beazley, ‘*Sans l’avocat*: The Right to Represent Oneself and EU Fair Trial Rights’ in S. Allegrezza and V. Covolo (eds.), *EU Fair Trial Rights in Criminal Proceedings* (Hart Publishing, 2021, forthcoming).

<sup>7</sup> *Aleksandr Dementyev v. Russia*, App. No. 43095/05 (ECtHR, 28 November 2013), para. 40. In fact, the ECtHR has gone a step further, and held that art. 6 guarantees that proceedings against an accused should not take place without adequate defence representation: *Correia de Matos v. Portugal*, App. No. 54602/12, (ECtHR, 4 April 2018), paras. 122–123.

<sup>8</sup> The right to an effective defence is a part of the right to defend oneself through legal assistance of their choosing under art. 6(3)(c) of the European Convention of Human Rights. See Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press 2006) 286–290 and Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (OUP, 2020) 354–360.

<sup>9</sup> This observation has been by many commentators. Cf., for example, Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press 2005) 145. There has also been very little empirical research on the quality of criminal advocacy, despite concerns expressed in jurisdictions like that of England and Wales:

This is surprising: it should be self-evident that the protection of the interests and rights of the accused requires not just the mere presence of a qualified representative, but one who is sufficiently active, vigilant, skilled and competent. If the right to defence oneself through legal assistance is to be effectual, this assistance must be of ample competency to ensure one's rights—not least to a fair trial—are appropriately represented and protected. What distinguishes, in other words, those who provide a suitably effective defence and those who do not? The answer to this, as this article argues, may depend on how these varying descriptions of quality are defined.

The problem with using quality as a qualifying descriptor is that it is a nebulous one—perhaps even an ‘essentially contested concept.’<sup>10</sup> Rare is the agreement on how to define it; rarer still is the agreement on how to measure it. Quality is a concept often used and yet it remains ill-determined: it is a word many of us instinctively understand, yet few can precisely explain: how can one define a concept as intangible and variable as that of quality? The *Oxford English Dictionary*, with its explanation of ‘a standard or nature of something as measured against other things of a similar kind’ suggests a method: that of the comparison. Yet this overlooks a basic, foundational step: in order to have a comparative standard, one must first *determine* the standard.

---

see Gillian Hunter, Jessica Jacobson and Amy Kirby, ‘Judicial Perceptions of the Quality of Criminal Advocacy: Report of research commission by the Solicitors Regulation Authority and the Bar Standards Board’ (Institute for Criminal Policy Research, Birbeck, University of London, 2018), at < <http://eprints.bbk.ac.uk/22949> > accessed 3 June 2022, who note concerns ‘about declining standards of advocacy’ have been highlighted in reports by the BSB (‘Perceptions of Criminal Advocacy’, ORC International, 26 March 2012) and the Crown Prosecution Service (CPS) (‘Follow-up report of the thematic review of the quality of prosecution advocacy and case presentation’, HM Crown Prosecution Service Inspectorate (HPCPSI), March 2012) 1.

<sup>10</sup> First proposed in 1956 by W.B. Gallie, essentially contested concepts are ‘concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users.’ See W.B. Gallie, ‘Essentially Contested Concepts’ (1956) 56 *Proceedings of the Aristotelian Society* 167. Applying this idea to the law itself, van der Burg suggests that ‘essentially contestable concepts are concepts that refer to ideals or to concepts and phenomena that can only be fully understood in the light of ideals, and that are, as a consequence, open to pervasive contestation.’ This may well be the concept of quality. See Wibren van der Burg, ‘Law as a Second-Order Essentially Contested Concept’ (2017) 8 *Jurisprudence* 230, 245.

And it is here we reach the crux of the definitional problem of quality: exactly whose standard should be taken as determinative of quality? With personal standards of quality, the answer is easy: that of the respective individual. But with common standards, such as those applied or imposed upon one's defence counsel, the answer is much more difficult. Quality is a useful indicator of the "degree of excellence" demonstrated or possessed by the thing or person in question, so long as it is satisfactorily—and consistently—defined. Its usefulness is rendered futile if conflicts of definition or inconsistencies in application are allowed to remain. Such is the problem of the (presently) inexplicable "quality defence practitioner". While many commentators have sought to define quality,<sup>11</sup> no definition—as it is applicable to criminal defence practitioners—has been agreed upon: the courts and regulatory bodies, for example, each apply different attributes.<sup>12</sup>

The research from whence this article is drawn is a PhD thesis which discusses the quality of defence legal assistance in England & Wales and Belgium<sup>13</sup> and which attempts, at least in part, to proffer a common definition or standard of "quality". A comparative analysis, using England & Wales and Belgium as jurisdictional case studies, the thesis is concerned with assessing whether the quality of a defence lawyer's performance can be quantitatively

---

<sup>11</sup> See for example: M Travers, 'Measurement and Reality: Quality Assurance and the Work of a Firm of Criminal Defence Lawyers in Northern England' (1994) 1 *International Journal of the Legal Profession* 173; Hilary Sommerlad, 'The Implementation of Quality Initiatives and the New Public Management in the Legal Aid Sector in England and Wales: Bureaucratisation, Stratification and Surveillance' (1999) 6 *International Journal of the Legal Profession* 311; Alan Paterson, 'Peer Review and Quality Assurance Papers Presented at the UCLA/IALS Conference on Enriching Clinical Education' (2006) 13 *Clinical Law Review* 757; Richard Moorhead, Avrom Sherr and Alan Paterson, 'Judging on Results? Outcome Measures: Quality, Strategy and the Search for Objectivity' (1994) 1 *International Journal of the Legal Profession* 191; Richard Moorhead, Avrom Sherr and Alan Paterson, 'What Clients Know: Client Perspectives and Legal Competence' (2003) 10 *International Journal of the Legal Profession* 5.

<sup>12</sup> Although this article will not discuss the standards of lawyering used by the courts and regulatory bodies, it is worth mentioning them in brief for context: in England & Wales, the courts refer to "adequate" defence representation, while the professional codes—the Bar Standards Board and Solicitors Regulation Authority in England; the *Ordre des Barreaux francophones et germanophone* and *Orde van Vlaamse Balies* in Belgium—speak of "competence" and "diligence".

<sup>13</sup> England & Wales was selected as the first jurisdiction as it is both common law and a jurisdiction in which discussion around the quality of defence legal assistance has been ongoing for some time, both in the courts and wider scholarship. Belgium was selected as the comparative jurisdiction as it is a mixed legal system of inquisitorial tradition on which very little has said on this subject. It is also the jurisdiction in which the author is based.

measured, with the objective being to facilitate a defendant's right to access competent and effective legal representation and, in turn, to assist practitioners in more clearly defining the limits of the expectations placed upon them. As a part of the thesis's research, semi-structured interviews with current practitioners on their experiences and perceptions of "quality lawyering" have been conducted. The PhD research is therefore a combined empirical-legal one.

While the broader research looks at a wide variety of source material in pursuit of the aforementioned research objectives, including the jurisprudence of the courts, legal commentary and the regulatory standards of their respective professional bodies, this article will focus on a particular, empirical source of information: the data acquired from semi-structured interviews held with (defence) practitioners about their perceptions, opinions and experiences of the quality of defence representation. First, the empirical research methodology will be presented, followed by a general discussion of (some of) the results acquired so far, before moving on to consider the reliability of lawyers as source of information, particular in the context of qualitative research.

## **2. Empirical research methodology**

The empirical research was initially carried out as an 'exploratory case study',<sup>14</sup> with the intention of testing initial hypotheses regarding the "lexicon" of quality (in the context of defence representation). A case study is an 'empirical study that investigates a contemporary phenomenon within its real-life context', especially when the boundaries between the phenomenon (poor-quality lawyering) and context (wider defence representation) are not

---

<sup>14</sup> Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M. Kritzer, *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 934.

‘evidently clear’.<sup>15</sup> It was intended to be exploratory, i.e. a tentative probing of whether defence practitioners are, and could be, a useful source of data regarding the definitions and descriptions that might be given to the different attributes of quality, especially when triangulated against the other sources of data within the research.<sup>16</sup> Accordingly, checking for the availability of, and access to, relevant data (the defence practitioners as sources of data), ascertaining the relevant variables for the research (e.g. the parameters of the “lexicon of quality”) and assessing the suitability of the empirical as a study in of itself were additional drivers of the initial research. The empirical research, like that of the wider PhD research of which this forms a part, is comparative in design: it allows improvement of theory building (what is the “quality” in “poor-quality lawyering”?) by comparing the case studies of England & Wales and Belgium.<sup>17</sup> Over time, it became apparent that the defence lawyers were an invaluable source of information and insight, even if what they said—and how they said it—had to be taken with “a pinch of salt.”

Between April 2020 and April 2022 16 legal practitioners in England & Wales were interviewed, composed of six barristers, eight solicitors and two practitioners involved in (post-)appellate organisations, one of whom works for the Criminal Cases Review Commission (and who spoke to me in this capacity). In Belgium, 11 practising defence lawyers were spoken to. These interviews sought, through a qualitative research lens,<sup>18</sup> to “capture and categorise social

---

<sup>15</sup> *Ibid.*, 939.

<sup>16</sup> The use of different data sources collected using a range of research methods assists in ‘reducing the possibility that the research will lead to misleading findings based on an incomplete picture’. The process of using multiple data sources to reach ‘well rounded conclusions’ is known as triangulation: Webley, *ibid.*, 940. The other sources of data within the wider research of the thesis include case law, the professional regulatory bodies’ codes of conduct, and secondary scholarship.

<sup>17</sup> Alan Bryman, *Social Research Methods* (5th ed., Oxford University Press 2016) 67. On this point, Bryman goes on to note that the main argument in favour of the ‘multiple-case study’ is that by comparing two or many cases, a researcher is ‘in a better position to establish the circumstances in which a theory will or will not hold.’ (*ibid.*)

<sup>18</sup> The qualitative research methodology is not concerned with whether people or situations are statistically representative. The focus is not on seeking to reach findings that are “generalizable to an entire population”, but rather, to utilise the in-depth study to “go beyond description to find meaning.” Cf. Webley (n 14) 940.

phenomena and their meanings”,<sup>19</sup> namely the views, perceptions and descriptions of the defence lawyer’s role, purpose and (quality of) performance, as drawn from the professional experiences of those who were interviewed. While different forms of probability sampling were used to find the respondents, the study itself deployed purposive sampling overall: only criminal defence practitioners were sought in the first instance.<sup>20</sup>

Six barristers were first spoken with, who were contacted via a means of personal connection and referral (known as the “snowballing effect” of participant selection<sup>21</sup>). More barristers were attempted to be reached through criterion sampling<sup>22</sup>: the clerks of those chambers outside of London listed on the Legal500 and similar lists or databases were contacted; of the 51 chambers contacted, none replied. The difficulties faced in finding additional barristers with whom to speak also illustrates the barriers faced when conducting research of this kind: those with personal contacts from which they can benefit will often have greater advantage: less time and effort needs to be put into arranging interviews. Although more success was had when contacting the solicitors (see *infra*), the number of cold contacts

---

<sup>19</sup> *ibid.*, 928.

<sup>20</sup> Purposive sampling is a strategic, non-probability form of sampling, whereby only those sampled are relevant to the research questions posed. Purposive sampling does not allow the researcher to general their findings to a population. See Bryman (n 17) 408. The deliberate selection of this group of professionals does lend weight to the suggestion the respondents were “elites”. In the context of the research presented in the article—that of the data obtained from interviews with defence lawyers—the concept of elite, however, holds less relevance here. The respondents came from a deliberate professional group (defence practitioners) and were chosen specifically because of their membership to this group. Their elite status, in their presumed education and professional prestige, was only relevant to the extent it had granted them membership to their profession. Further discussion on this is unfortunately outside the scope of this article.

<sup>21</sup> A ‘technique’ by which a researcher initially samples a small group of people relevant to the research question(s) (i.e. practising defence lawyers) and these sample participants thereafter ‘propose other participants who have [the same or similar] experience or characteristics relevant to the research’. These participants then suggest others and so on: Bryman (n 17) 411. Perhaps more than other of the other kinds of sampling, snowball sampling has been recognised, as a sampling method, to generate new interactional knowledge: the participants suggested are themselves “recommended” by the suggester, thus given the researcher additional information about these potential participants (the most significant of which may be in relation to the person who suggested them). For more, see Chaim Noy, ‘Sampling Knowledge: The Hermeneutics of Snowball Sampling in Qualitative Research’ (2008) 11 *International Journal of Social Research Methodology* 327.

<sup>22</sup> Criterion sample is described as ‘sampling all units (cases) or individuals that meet a particular criterion’: Bryman (n 17) 409.



made compared to the number of interviews actually arranged and conducted remained significantly disproportionate.

The 11 Belgian defence practitioners were contacted by a means of personal connection and referral as well as through criterion sampling. As the former gave predominantly male lawyers, all of whom work in Brussels and Flanders, the latter sampling technique was deployed to find—where possible—female lawyers, specifically (and particularly) those working in Wallonia.<sup>23</sup> Of the 37 Walloon lawyers contacted (of which approximately half were female), one (male) lawyer responded and was interviewed. The English and Welsh solicitors were sampled using maximum variation sampling.<sup>24</sup> Using online membership lists of organisations like the Criminal Law Solicitors' Association, 355 solicitors were contacted. Of these, 12 responded and of which nine were interviewed.

Each interview was recorded (audio-video) and thereafter manually transcribed.<sup>25</sup> The interviews themselves were semi-structured, with the sample questions being used a catalyst for discussion.<sup>26</sup> The transcript coding was done following the constructivist grounded theory<sup>27</sup> methodological approach to data coding, which suggests grouping interviewee responses by

---

<sup>23</sup> Belgium has two bar associations, the *Orde van Vlaamse balies* (Flemish Bar Association) who represents all Dutch-speaking lawyers in Flanders and Brussels and the *Ordre des Barreaux Francophones et Germanophone de Belgique* (the French- and German-speaking Bar of Belgium) who represents all Francophone (and Germanophone) lawyers in Wallonia and Brussels. To ensure as wide a variation as possible in the experiences, perceptions and background of my Belgian respondents, it was important I attempt to cover both bars (and so, all three regions in Belgium: Flanders, Wallonia and Brussels).

<sup>24</sup> 'Sampling to ensure as wide a variation as possible in terms of the dimension of interest': Bryman (n 17) 409.

<sup>25</sup> For reference, the lawyers and their responses have been anonymised according to the following code: [First letter of legal role, i.e. **B**arrister, **S**olicitor or general defence **L**awyer]-[Jurisdiction: **UK** or **BE**]-[Geographical location of work: **1** if in capital/main city, **2** if in small city or large town, **3** if practice is primarily rural]-[Order of interview, number]  
e.g. B-UK-1-2

<sup>26</sup> As described, in a semi-structured interview, the researcher has a list of question of questions or "fairly specific topics" to be covered, but the interviewee has "a great deal of leeway" in deciding how to reply: Jonathan Grix, *The Foundations of Research* (2nd ed., Palgrave Macmillan 2010) 468. In addition, questions that are not included in the original list 'may be asked as the interviewer picks up on interviewees' replies': *ibid.* I followed this instinctive approach, and as a result, some questions were asked of respondents that were not asked of others. While all respondents were asked: "what characteristics, for you, make a good/poor-quality defence lawyer?" and "what characteristics, for you, make an (in)effective defence lawyer?", only some were asked "what characteristics, for you, make an (in)competent defence lawyer?" or "what characteristics, for you, make an (in)adequate defence lawyer?".

<sup>27</sup> The purpose of constructivist grounded theory is to learn how people make sense of situations and act on them: Kathy Charmaz, *Constructing Grounded Theory* (2nd edn., SAGE 2014) 9.

building up word-based “codes” or descriptors that are gradually developed into more general concepts and categories which correlate to one’s own hypotheses and which relate to the existing literature.<sup>28</sup> The grounded theory method was chosen over analytical methods like classical content analysis or discourse analysis because of its inductive process<sup>29</sup> and emphases on theory building and constant comparison,<sup>30</sup> while constructivist grounded theory, in particular, was selected because it treats research as a construction whilst acknowledging that it occurs under specific conditions of which the researcher may or may not be aware.<sup>31</sup>

While there is always a “conceptual limit” in terms of how one can normatively judge the responses to quality received during interviews,<sup>32</sup> the data obtained from the coded transcripts was interpreted using a critical realism paradigm. Critical realism ‘operates with a different understanding of causation’—it seeks out ‘generative mechanisms’ that are responsible for ‘observed regularities in the social world and how they operated in particular contexts’.<sup>33</sup> Here, in this empirical study, the generative mechanisms of how a defence lawyer performs well (or not well) in their role was sought, in the context of the observed reality of the criminal justice system, its structures, and the presence (as in England & Wales) or absence (as in Belgium) of mechanisms by which to classify defence lawyering as poor. Critical realism is particularly suited to this study because it recognises that human knowledge is fallible, that only a small

---

<sup>28</sup> Grix (n 26) 581.

<sup>29</sup> Grounded theory involves developing theory as the research proceeds rather than testing a hypothesis posited in advance: Webley (n 14) 944. It begins, in other words, with a broad and conventional understanding of a topic or field and thereafter involves the collection of data from which ‘to divine a theoretical account’: Sarah Nason, *Reconstructing Judicial Review* (Hart, 2016) 33. Theory is generated and built through the analysis of, and interaction with, the empirical data’: Grix (n 26) 113.

<sup>30</sup> As one scholar has noted, the grounded theory method appeals to researchers because it follows the natural pattern of human inquiry: Webley (n 14) 944.

<sup>31</sup> Charmaz (n 27) 13. Charmaz notes that that if we start with the assumption that social reality is ‘multiple, processual, and constructed’, then we must take into account the researcher’s positions, privileges, perspective, and interactions as ‘an inherent part of the research reality. It too, is a construction’: *ibid.*

<sup>32</sup> James Thornton, ‘The Way in Which Fee Reductions Influence Legal Aid Criminal Defence Lawyer Work: Insights from a Qualitative Study’ (2019) 46 *Journal of Law and Society* 559, 572.

<sup>33</sup> Bryman (n 17) 68. Bryman notes that the multiple case study offers an ‘even greater opportunity’ with critical realism because the researcher is in a position to examine the ‘operation of generative causal mechanisms in contrasting or similar contexts’ (*ibid.*).

part of it may be captured, and that the researcher's active role in the construction of knowledge is an explicit one.<sup>34</sup>

As for the sample size, both overall (27 interviews in total) and by jurisdiction, it is difficult to judge whether saturation has been conclusively reached. Most define theoretical saturation as being when either no new or relevant data is emerging regarding a category of information, or when the 'category is well developed in terms of its properties and dimensions demonstrating variation', and the relationship between the categories is 'well established and validated.'<sup>35</sup> Given, perhaps, the topic of the research (and so, the interviews), to some extent new and relevant information was always being proffered at each interview.<sup>36</sup> That being said, the primary aim of in-depth interviewing (such as that undertaken) is to 'generate data which gives an authentic insight into people's experiences.'<sup>37</sup> As a result, some have argued that the notion of a "sample" is not appropriate here, as every respondent embodies and represents 'meaningful experience–structure links': each is a case study in of themselves, who exist and respond to a particular set of circumstances.<sup>38</sup>

This was the advantage of utilising grounded theory: I was able, after the first few interviews to initially code the transcripts produced and begin analysing the data they contained, thereafter theorising and developing the lawyer's conceptions of quality (and how these related to both my conceptions, and the conceptions offered by the courts and regulatory bodies).<sup>39</sup> In doing so, I was able to identify incomplete understandings and posit possible

---

<sup>34</sup> Anna Pivaty, *Criminal Defence at Police Stations: A Comparative and Empirical Study* (Routledge 2020) 182.

<sup>35</sup> *Ibid.*, 412.

<sup>36</sup> This is also expected where grounded theory (with its emphasis on theory building) is used.

<sup>37</sup> Mira Crouch and Heather McKenzie, 'The logic of small samples in interview-based qualitative research' (2006) 45 *Social Science Information* 483, 485.

<sup>38</sup> *Ibid.*, 493. I could, of course, have continued to interview practitioners in both England & Wales and Belgium. I suggest, however, that the 'implicit requirement' that every case should be taken into account puts the emphasis not on the individuality of each, but 'on the unimportance of the *number* of cases to theoretical explanation' (*ibid.* *Emphasis in original*). For my purposes, 27 respondents has proved sufficient.

<sup>39</sup> The grounded theory process following data collection is, to remind: initial coding—focused coding and categorising—theory building—writing up/dissemination. It involves, however, a constant comparative method, meaning theoretical sampling will be deployed to develop theoretical categories: Charmaz (n 27) 18.

explanations for these knowledge deficiencies. Theoretical sampling<sup>40</sup> was then used to fill these gaps while nonetheless progressing towards theoretical saturation<sup>41</sup>: the first interviews identified initial categories of data (concretely: the characteristics and features of each “attribute” of quality enquired about) from which I was able to construct preliminary definitions. This allowed me, in further interviews, to refine those definitions by “testing” various aspects of them, through particular questions or observational (often, comparative) comments to my interviewee(s). With each interview, I explicitly sought to understand how each attribute of quality I asked about was possibly understood by my respondents. Theoretical sampling thus assisted in filling out the properties of each category (attribute of quality), aiding the development of their accompanying (theoretical) definition and, towards the end of the study, demonstrated possible links between the categories, further encouraging comparative analysis.<sup>42</sup>

### **3. In their words: results of interviews**

Without delving too deeply into the results of the interviews themselves, for a full discussion of this is outside the main scope of this article (and demanding of much more space and time), there are a couple of observations I would like to make. The first is the general “definitions” of quality as construed from the interviews themselves.<sup>43</sup> Given the aforementioned

---

<sup>40</sup> Theoretical sampling means seeking pertinent data to develop the merging theory—its main purpose is to ‘elaborate and refine’ the categories that constitute the theory: *ibid.*, 193. To be clear, theoretical sampling involves ‘starting with data, constructing tentative ideas about the data, and then examining these ideas through further empirical inquiry’: *ibid.*, 199.

<sup>41</sup> Theoretical saturation is reached when gathering fresh data no longer sparks new theoretical insights nor reveals new properties of these core theoretical categories: *ibid.*, 213.

<sup>42</sup> *Ibid.*, 205.

<sup>43</sup> In terms of quotations from the transcripts, while the transcripts are an accurate record of the interview recording, in that they include each respondent’s own means of speaking (e.g. repeating words, using fillers, vocalising agreement during a question), these “quirks” were later edited out, where necessary, to ensure smoother reading of the respective answer, particularly for coding. Text within a square bracket is used to clarify how or what was said, either due to the respondent missing out that connection, or the recording making it difficult to catch.

limitations, I will touch upon two aspects of this: the definition of “good-quality” lawyering and the definition of “poor-quality” lawyering, as ascertained from my interviews (and as naturally dichotomous “properties” of quality).

At the heart of the lawyer’s responses to “what is a good-quality defence lawyer?” was a constant: the client, and the lawyer’s empathy and communication towards them. This was described as ‘it’s about can you related to that [your client’s circumstances] in some way? Can I give an answer that shows empathy to that person?’<sup>44</sup> or someone who ‘listens to what their client wants, explains properly the allegations against them, works out with them how best to progress their case to get them the result which they want.’<sup>45</sup> The client, one barrister observed, ‘is a really important human element to criminal law that you need to be aware of as a barrister. And you’ve got to try and think of the position you client would have been in’.<sup>46</sup> One respondent, in Belgium went as far as to suggest that maintaining client satisfaction is a marker of good-quality: if you obtain the best result possible for the client, they suggested, ‘then you deliver good quality and [the client] is happy.’<sup>47</sup> In both England and Belgium, the lawyers saw upholding the client’s confidence in them to be an indicator of quality: as one solicitor in England described it—

‘you need the ability to instil confidence in your clients. You need the ability to be able to see the wood for the trees as I call it; see all the information and know what’s important quickly. To be able to get to the crux of what matters and to be able to convey that in a simple way. And to do all that with confidence so that the client trusts that you know what you’re doing.’<sup>48</sup>

---

<sup>44</sup> Transcript, S-1-UK-1.

<sup>45</sup> Transcript, S-2-UK-2.

<sup>46</sup> Transcript, B-1-UK-5.

<sup>47</sup> Transcript, L-2-BE-2.

<sup>48</sup> Transcript, S-3-BE-8.

A poor-quality lawyer, in contrast, while invariably being described as uncaring, was also repeatedly viewed (and so, described) by the lawyers I spoke with as simply “poor” or “lacking”: lacking in knowledge, communication skills or simply preparedness. ‘[Y]ou do [the job] badly if you turn up scruffily dressed without having read the papers, having forgotten part of the papers, [are not] aware of the latest law reports, that sort of thing’<sup>49</sup> or, ‘someone who does not turn up to the hearings, is reading boating magazines during prosecutorial proceedings, has done no legal research, gives a superficial defence.’<sup>50</sup> As one solicitor expressed it, the poor lawyer has ‘either become jaded or they don't analyse the evidence. They assume that the person sat in front of them must be guilty. They don't read everything and they advise the client wrongly or don't listen to what they've got to say’<sup>51</sup>; or, another succinctly summarised it, poor-quality ‘indicates a sort of demonstrable lack of [skills]... to the point where their clients achieve a worse outcome than they [might have] expected if represented by someone who was at least competent.’<sup>52</sup>

The lawyers I spoke with highlighted, clearly, that quality— whether good or poor—is a “slippery concept”.<sup>53</sup> Much depends on whose normative frame is used to define it—not only do the courts, regulatory bodies, and defence practitioners all prioritise different values<sup>54</sup> but the lawyers themselves accorded different hierarchical values to different traits and characteristics within their descriptions. While they did, as stated, proffers some grounds of commonality, these were not the only suggestions put forward to the above questions, nor was the client or the lawyer’s lack of preparedness (for example) always accorded the same

---

<sup>49</sup> Transcript, B-1-UK-2.

<sup>50</sup> Transcript, L-BE-1-3. The example of a poor-lawyer ‘reading boating magazines’ in court is a real one seen by the respondent.

<sup>51</sup> Transcript, S-3-UK-8.

<sup>52</sup> Transcript, S-2-UK-2.

<sup>53</sup> Tamara Goriely, ‘Debating the Quality of Legal Services: Differing Models of the Good Lawyer’ (1994) 1 *International Journal of the Legal Profession* 159, 160.

<sup>54</sup> This is a point discussed at length in the thesis itself.

importance by each respondent. Rather, the respondents “on average” mentioned (at least) these aspects of good- and poor-quality defence lawyering, allowing me to accord these features significance (and so, primacy) in my analysis. But it may, indeed, be unfair of me to suggest or infer that these values, and these values alone, are the “most important” markers of good- vs. poor-quality.

For example, also mentioned as “markers” of good-quality lawyering were decision-making and advocacy skills and knowledge of the law. The first was expressed as the need to make ‘right strategic choices’,<sup>55</sup> or the need to have ‘the ability as an advocate’, this was also described as ‘crucial’,<sup>56</sup> a ‘first and foremost’ quality.<sup>57</sup> The latter (knowledge) was described as ‘up-to-date and in-depth knowledge of the law’,<sup>58</sup> ‘competent in criminal law and procedural criminal law’<sup>59</sup> and knowing ‘all the details of the procedure [and] the possibilities of [the case].’<sup>60</sup>

Arrogance, or hubris, was another, specific, trait mentioned by some respondents as being indicative of poor-quality lawyering. This was described, for example, as ‘lack [of] judgment [or] inability to form a connection with the jury’<sup>61</sup>; as not bothering to keep oneself up to date with the law ‘or assum[ing] that they [the lawyer] know what the right answer is’<sup>62</sup>; ‘Complacency. Arrogance. Narcissism. Lack of enthusiasm. Carelessness’<sup>63</sup> or ‘lawyers who didn’t even know the name of their clients, who didn’t know whether they were for the defence or the [prosecution], who did not know anything about the contents of the case.’<sup>64</sup>

---

<sup>55</sup> Transcript, B-1-UK-1.

<sup>56</sup> Transcript, B-1-UK-2.

<sup>57</sup> Transcript, B-1-UK-6.

<sup>58</sup> Transcript, L-1-BE-1.

<sup>59</sup> Transcript, L-1-BE-3.

<sup>60</sup> Transcript, L-1-BE-1.

<sup>61</sup> Transcript, B-1-UK-1.

<sup>62</sup> Transcript, B-1-UK-3.

<sup>63</sup> Transcript, S-1-UK-1.

<sup>64</sup> Transcript, L-2-BE-2.

As an empirical source of data, the lawyers neatly demonstrated Tata's concept of "ethical indeterminacy": the idea that changes in lawyers' practice(s) are 'mediated and negotiated' by a range of competing normative justifications 'about the character of "good" (or even "adequate") defence work'<sup>65</sup> (as seen in their disparate and varied "hierarchies" of "quality values"). 'Ethical indeterminacy', Tata suggests, gives recognition to the highly contestable nature of defence work, in which 'there is a range of very different perspectives defining the idea of "quality."' <sup>66</sup>

Ethical indeterminacy, in other words, suggests that the "proper role" of the lawyer is thus dependent on the normative perspective one takes—a point already made by other scholars.<sup>67</sup> Where Tata develops this idea further, however, is in his proposition that, given there are different ways in which lawyers can approach the same situation in 'a range of reasonably defensible ways', lawyers should be able to draw on differing normative values (and combinations of them) 'as a reservoir of resources of principled justifications for their decisions and advice.'<sup>68</sup> Tata subsequently identifies five broad normative perspectives: that of the traditionalist, 'bureaucratic-efficient', adversarialist, 'radical', and 'client-centred.' For each, the overriding normative value is, respectively: legal knowledge and skill, efficiency, protection from the state, amelioration of 'oppression', and—as the name suggest—client-centred.<sup>69</sup> As they answered my questions, the lawyers I spoke with invariably 'dipped' in and out of each of these normative perspectives. As they did, the answers they gave represent, I suggest, a more holistic picture. More than the courts or regulatory bodies (being the

---

<sup>65</sup> Cyrus Tata, 'In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and "Ethical Indeterminacy" in Criminal Defence Work' (2007) 34 *Journal of Law and Society* 489, 496.

<sup>66</sup> *ibid.*

<sup>67</sup> See Goriely (n 53) 161–165, who proposes the normative lenses of "traditionalist," "specialist," "funder," and "consumer."

<sup>68</sup> Tata (n 65) 497.

<sup>69</sup> *ibid.*



institutions most like to assess, judge or comment upon a lawyer's conduct, performance or quality), the practising lawyers were, I proffer, better able to nuance the conceptions of quality I inquired about. In so doing, they demonstrated to me that the "good-quality" defence lawyer, or the "incompetent" defence lawyer (*etc.*) is not a single thing; they can be many things, some of which may, at times, appear to contradict each other.

An example: some described "poor-quality" lawyering as being both "lacking" (a lack of preparedness, lack of judgment, or lack of knowledge) as well as lazy: 'they've become complacent and they don't care enough so they don't try enough.'<sup>70</sup> Yet as the solicitor quoted expresses—'they don't try enough'—laziness suggests an active motivation on the part of a poor-quality lawyer *not* to prepare or acquire the requisite knowledge. Inherent within this is the suggestion that this lawyer (whoever they are) *could* prepare, for example; only they have chosen not to. This is different to the idea that the lawyer is, on a basic level, actually lacking the ability to prepare adequately, or to acquire the knowledge necessary to perform their role properly. Both "traits" are forms of poor-quality lawyering my respondents suggest. But both are also different *kinds* of poor-quality lawyering.

This brings me to my next observation: it was only through interviewing my respondents that I realised—indeed, learned— that the positive descriptors of quality are not the automatic inverse of their antonym: what amounts to competence, for example, is not necessarily opposite to what amounts to incompetence. Few, if any, of my interviewees, when asked to describe opposing characteristics of quality, did so by automatically giving the inverse or antonym. One barrister, to give but one example, described competence as simply 'not negligent' but incompetence as 'doesn't know the law, doesn't know their own case and I think that does

---

<sup>70</sup> Transcript, S-3-UK-8.

suggest that they probably don't present it very well either.<sup>71</sup> This is interesting, for it suggests that normative descriptors of quality (and thus the values on which they are based) may be different depending on whether the quality being described is positive or negative. This is an especially curious point, because while the regulatory bodies, for example, tend to describe their expectations of the lawyers they regulate along positive lines (“competent”, “diligent”), the courts, in contrast, focus on the negative descriptors (“inadequate defence”, “flagrant incompetence”). Quality, then, cannot necessarily be defined by what it is not, nor can poor-quality be defined by simply stating it is “not quality”. This point is, of course, little more than an untested hypothesis at present. But it has opened a possible line of inquiry I may not have found, had I not engaged in empirical research.

Likewise (eventually) requiring further elaboration, but nevertheless worth mentioning briefly here is the discussion around what I term the “factors of influence” on the behaviour (and performance) of defence practitioners. I directly asked each of the practitioners what, to them, might affect or influence whether a lawyer is able to perform their job on any given day (or at any given moment). For those in England & Wales, such factors include the impact of (decreasing) Legal Aid funding (which many scholars now observe correlates to a ‘lack of morale’ and ‘alienation’ for defence practitioners<sup>72</sup>), and the effect of the Criminal Procedure Rules, first introduced in 2005, which have—arguably—strengthened the lawyer’s duty to the

---

<sup>71</sup> Transcript, B-1-UK-3.

<sup>72</sup> Cf. Thornton (n 32); James Thornton, ‘Is Publicly Funded Criminal Defence Sustainable? Legal Aid Cuts, Morale, Retention and Recruitment in the English Criminal Law Professions’ [2020] *Legal Studies* <<https://doi.org/10.1017/lst.2019.31>>; Lucy Welsh, ‘The Effects of Changes to Legal Aid on Lawyers’ Professional Identity and Behaviour in Summary Criminal Cases: A Case Study’ (2017) 44 *Journal of Law and Society* 559; Daniel Newman and Lucy Welsh, ‘The Practices of Modern Criminal Defence Lawyers: Alienation and Its Implications for Access to Justice’ (2019) 48 *Common Law World Review* 64; Tom Smith, “Justice For Sale”: An Empirical Examination of the Attitudes of Criminal Defence Lawyers Towards Legal Aid Reform’ <<https://pearl.plymouth.ac.uk/handle/10026.1/9003>> accessed 3 June 2022. Both Thornton, and Newman and Welsh observed an increasing dislike amongst defence practitioners over the ways in which decreased funding was restricting their ability to perform their role to the best of their abilities. Thornton writes that ‘what seemed to make [the lawyers] unhappy was the way [the] lower fees forced them to work) to keep their practices solvent—often in ways that they found restrictive, distasteful or even unethically uncomfortable’ (Thornton (2020) 22).

court at the expense of their duties to the client.<sup>73</sup> For the lawyers in Belgium, such factors include training (one respondent described insufficient training as being akin to a young trainee, ‘even if clever and bright’, becoming ‘like a young sapling that grows without the support of a stake’<sup>74</sup>) and one’s relationship with their client, for whom, ultimately, the defence lawyer is representing and acting.<sup>75</sup> While further analysis on this is—for the moment—beyond the scope of this article, a final observation should be made that “quality”, however defined, cannot be considered in isolation. The context surrounding a legal practitioner can be extraordinarily influential, whether they are much aware of this or not. An obvious remark, perhaps, it was nonetheless my respondents who directed me to—or at least, emphasised, through their answers—this point.

#### **4. A pinch of salt? Reliability of lawyers as sources**

In an article about empirical legal methodology, it is pertinent, I think, to discuss both the virtues and possible pitfalls of the methodology under examination. And there are a number of drawbacks to be brought to attention. First, the limitations of the “interview” as a form of data gathering: as an “obtrusive” method, it elicits the statements to be analysed—nothing a respondent says can be viewed in “contextual isolation” without also accounting for the influence and interaction of the interviewer.<sup>76</sup> Interviewing is also “individually-focused”,

---

<sup>73</sup> For further discussion on this, see Mike McConville and Luke Marsh, ‘Adversarialism Goes West: Case Management in Criminal Courts’ (2015) 19 *The International Journal of Evidence & Proof* 172; Tom Smith, ‘The “Quiet Revolution” in Criminal Defence: How the Zealous Advocate Slipped into the Shadow’ (2013) 20 *International Journal of the Legal Profession* 111; Ed Cape, ‘The Rise (and Fall?) Of a Criminal Defence Profession’ [2004] *Criminal Law Review* 401; Ed Cape, ‘Rebalancing the Criminal Justice Process: Ethical Challenges for Criminal Defence Lawyers’ (2006) 9 *Legal Ethics* 56; and Ed Johnston, ‘The Adversarial Defence Lawyer: Myths, Disclosure and Efficiency—A Contemporary Analysis of the Role in the Era of the Criminal Procedure Rules’ (2020) 24 *The International Journal of Evidence & Proof* 35.

<sup>74</sup> Transcript, L-BE-1-3.

<sup>75</sup> Transcript, L-BE-2-2.

<sup>76</sup> Crouch and McKenzie (n 37) 486. Crouch and McKenzie note that it is for this reason ‘that the literature on interviewing contains extensive discussions of problems associated with the interactive aspect of the interviewing process.’ (ibid.)

which can lead one down the ‘slippery slope of methodological individualism’ when it comes to explanations.<sup>77</sup> It can be easy to attribute the rationale or explanans to an individual, rather than to a field-level or relational explanation.<sup>78</sup> In the context of this research, for example, I must ask whether the insights I have gained from the practitioners with whom I spoke are to be credited or attributed only to the practitioners (as—self-acknowledged—individual examples of “good-quality” lawyers) without providing a wider system or contextual analysis. I cannot, for example, easily identify or attribute the extent to which their responses are influenced by (and so, came about because of) their training, professional experiences and the general vernacular which surrounds their work, or whether their perceptions and views on the topic stem from inherent values and traits unrelated to their profession. Differences between the foci of the English and Welsh lawyers’ answers compared to those given by the lawyers in Belgium were also evident: the Belgian lawyers generally characterised good-quality lawyering, for example, as meeting the client’s expectations, as opposed to acting in their client’s best interests (a common suggestion in England and Wales). Further researcher is needed to understand the potential reasons behind these differences: are they due to differences in education, training and legal culture, for example, or because Belgium more readily allows civil proceedings to be brought against a lawyer by dissatisfied clients?

Furthermore, my role, as the interviewer and researcher, must be recognised. I see insights in my respondents’ answers, for example, in part because they use the vocabulary that I both expect and am myself, as a legal research, familiar with (and because my own experiences and training have given me this familiarity). This too is a limitation of interviews: they ‘encourage

---

<sup>77</sup> Michèle Lamont and Ann Swidler, ‘Methodological Pluralism and the Possibilities and Limits of Interviewing’ (2014) 37 *Qualitative Sociology* 153, 162.

<sup>78</sup> *ibid.*

us to find coherence in narratives and worldviews.’<sup>79</sup> In other words: I see answers to my questions in part because I infer that they are there and that they can be used. Qualitative research like interviewing relies on an inductive form of reasoning, deriving general themes or patterns from the data collected.<sup>80</sup> As the interpretivist school of thought argues, one’s analysis will always reflect one’s own frame of reference; as such, it cannot be disregarded that ‘socially significant data’ do not (in fact) ‘exist independently of the researcher’<sup>81</sup> and that interview material is, therefore, ‘ultimately comprehended within a frame of situation’, a social milieu which is assumed to exist ontologically prior to both the respondents’ and the interviewers’ actions ‘and therefore causally related to them.’<sup>82</sup> I must acknowledge, therefore, that a different researcher, asking the same questions, could both elicit different responses *and* draw different conclusions. Nonetheless, whilst acknowledging this limitation, I chose to utilise both constructivist grounded theory and the critical realism paradigm in the hope I might both understand and attempt to explain the phenomena I am researching—the quality of defence lawyering—while still paying heed to the specific role my presence, as the researcher, has played in the obtaining and interpreting of the data acquired.<sup>83</sup>

This is where the title of this article comes from: that the data and analysis produced from empirical research should be taken with a “pinch of salt”: for just as it has been influenced, however accidentally (or subtly) by the researcher themselves, so too is dependent on the context in which the responses are given and recorded (of which I too am part). An interviewee who consents to being both anonymised and recorded is aware that they are being watched,

---

<sup>79</sup> *ibid.*

<sup>80</sup> Webley (n 18) 929.

<sup>81</sup> Reza Banakar, ‘Reflections on the Methodological Issues of the Sociology of Law’ (2000) 27 *Journal of Law and Society* 273, 275. The institutional context of subject-matter, including professionalism affect, Banakar notes, ‘how studies are actually conducted and the form of knowledge which is produced.’ (*ibid.*)

<sup>82</sup> Crouch and McKenzie (n 37) 485–486.

<sup>83</sup> While strict interpretivists do not strive to establish causal explanations (their emphasis is on understanding), critical realists, in contrast, generally seek to both understand and explain the social world: Grix (n 26) 83, 86.

noted and recorded; this can also lead to “selective recall” or “performative engagement”. On the former, I cannot overlook the possibility that my respondents, in answering my questions about quality, selectively recalled experiences which presented them as (always) of good- or admirable quality, and never of poor- or questionable quality. This remark stems, in part, from the observation that *none* of the 27 lawyers I spoke with voluntarily admitting to having ever been (even, perhaps, excusably or understandably) a “poor lawyer” themselves, yet all noted they had “seen” poor-lawyering. By the same token, each of the lawyers I spoke with was just that—a (trained) lawyer. Lawyers are known to engage performatively in their professional work, for (especially, in defence) their role requires them to present as both partisan and neutral as the situation allows.<sup>84</sup> I cannot, therefore, overlook the fact that in agreeing to be interviewed, and in responding to the questions I posed, my respondents engaged in a similar kind of “performance”, with me. This was a known limitation to this research methodology: in asking the lawyers to identify what quality is, to them, I risked that their responses would reflect their own values and practices, with little (or admitted) self-awareness as to whether they were, or had even been, of poor quality themselves.<sup>85</sup> As one scholar wryly observed, writing on the incompetence of counsel as a ground for appeal, applications for appeal drafted by counsel ‘very rarely allege error by the applicant’s lawyers in marked contrast to applications drafted by convicted persons.’<sup>86</sup> The lawyers, it is suggested, are not quick to find fault with themselves.

---

<sup>84</sup> On this idea, see Smith (n 73).

<sup>85</sup> This observation has been observed in both socio-legal and legal studies on the topic. See, for example, Mike McConville, Jacqui Hodgson, Lee Bridges and Anita Pavlovic, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press 1994), in particular Chapter 3 on ‘The Culture of Criminal Defence’. See also the studies referenced at fn. 11.

<sup>86</sup> Rosemary Pattenden, *English Criminal Appeals, 1844–1994: Appeals against Conviction and Sentence in England and Wales* (Clarendon Press 1996) 105–106.

## 5. Conclusion

Many view legal decision-making as an ‘esoteric activity primarily concerned with the judgement of values’ as referenced against or with legal valid ‘prescriptive positions and standards.’<sup>87</sup> This activity, so it goes, cannot be scrutinised by empirical investigations.<sup>88</sup> As judgment or assessment of a defence lawyer’s quality naturally includes judgment or assessment of their decision-making, does this too mean that this, their quality, cannot be empirically inspected or measured? A lawyer’s “quality”, it is said, is something more nuanced, something more complex, than merely a ‘a standard or nature of something as measured against other things of a similar kind’.

And yet, if we consider the legal practitioner’s understanding of the law as not being predicated on ‘substantive law alone’, but as also being based on their first-hand experience of legal practice, then we also see those that apply and uphold the law are speakers of not a single, concrete body of legal rules, a single ‘language game’, but multiple language games, and so, multiple concepts.<sup>89</sup> Put simply: the legal practitioner does not “just” apply the law, they apply the law knowing how the law is used in the ‘day-to-day life of the judicial system’: as they advise their client, or prepare their case, the (defence) lawyer engages in a prediction of how the other legal actors involved (the prosecution, the police, the judge) will also behave.<sup>90</sup> And it is, in fact, to this almost “sociological” assessment that (my) empirical research seeks to get at. *How* a lawyer reaches a decision (particularly on their defence strategy) can reveal much about what they prioritise in the case before them. To repeat Tata’s point, made earlier in this article, as there are different ways in which lawyers can approach the same situation, they

---

<sup>87</sup> Banakar (n 81) 281.

<sup>88</sup> *ibid.*

<sup>89</sup> *ibid.*, 282–283.

<sup>90</sup> *ibid.*

should be able to draw on differing normative values (and combinations of them) to justify and explain their advice and decisions. And yet, we also need to be clear on which values are justifiable and which are not. Which, in other words, suggest a lawyer may be of sufficient “quality” (and so made the “right” decision(s), even if the outcome was not to their client’s, or the court’s liking) and which may not (and who, therefore, made the “wrong” decision(s)). In order to do this, and in order to determine, therefore, whether “quality” is in fact the right parameter or metric by which to make this assessment, one needs to hear from, and so learn from, those making the decisions in question: the legal practitioners themselves.

The natural limits of empirical research methodologies must also be mentioned: empirical research proceeds on the assumption that the data gathered constitutes ‘all that is objectively true’ about the topic in question.<sup>91</sup> This is, of course, a false assumption, for there may be truths about the topic—here, poor lawyering—that cannot be discovered or refuted by empirical data alone.<sup>92</sup> This is not to undermine the value of empirical research, however. Rather, however imperfectly, this article has sought to demonstrate the usefulness of empirical research as a means by legal theory may be developed, articulated and tested. While theories founded on empirical evidence might be seen as parochial and dependent on context, the law is, first and foremost, a social construction.<sup>93</sup> To this end, its theories cannot be advanced in isolation from its interpretation and application: rather, such theories can—and should—anchor themselves in the social context of the law, its day-to-day practice and experience, as ascertained by empirical research methodologies. This is the value of empirical data. And this, I suggest, is the value of this study: if we are to define quality lawyering in the hope of demarcating

---

<sup>91</sup> Nason (n 29) 33.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.* See too Galligan, who suggests that while ‘empirical studies certainly support the idea that, while rules guide and structure the legal environment, their application involves other social factors, elsewhere described as contextual contingencies, entering into and forming part of that environment’: DJ Galligan, *Law in Modern Society* (Oxford University Press 2007) 47.



“sufficient” quality from “insufficient”, then it is both natural and necessary to involve the subjects of this research, the lawyers. A qualitative empirical study which utilises constructivist grounded theory and critical realism is, this article suggests, one means by which this delineation may be ascertained, one which seeks to contextualise the data obtained whilst acknowledging the role and effect of the researcher in question.

As one practitioner I spoke with observed—

‘the problem is that there is a lot of poor-quality representation and there doesn’t really seem to be a way to kind of stop that happening.’<sup>94</sup>

This study, and the wider PhD research to which it forms a part, is an attempt to do just this: it strives to construct a theoretical framework by which poor-quality defence representation may be identified, understood, contextualised, addressed and remedied. To this end, the empirical research undertaken and outlined here in part, forms a key component: one might even go as far as to say the lawyers’ contributions are worth their weight in salt.

---

<sup>94</sup> Transcript B-UK-1-6.