Introduction: The Incorporation Problem in Interdisciplinary Legal Research

Part 1: Theoretical Discussions

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In the past decades, there has been a rapid increase of interdisciplinary research with regard to law, exemplified in socio-legal research and law and economics. More recently, there has also been – albeit in some countries more than in others – a growing interest in the methodology of legal research. This special issue combines those two trends. It focuses on a crucial obstacle in integrating interdisciplinary research and traditional legal research. It is the question how we can incorporate other disciplines and their findings into legal doctrinal research.

Traditionally, the methods of legal research are largely identical to those of legal practitioners, especially judges.[1] Basically, these methods are hermeneutic or interpretive; legal scholars collect legal sources (especially legislation and court cases), interpret the texts, analyse and address apparent contradictions and gaps, and construct a coherent legal doctrine. This systematic description of positive law may be called *legal doctrinal research* in a narrow sense. However, most legal scholars go beyond mere reconstruction, and include two additional aims in what may be called doctrinal research in a broad sense: critical evaluation and recommendations for law reform.[2] Some scholars base their critical evaluation and suggestions for reform merely on criteria of internal coherence (for example, does a decision by a court or a legislator fit in the general legal doctrine? does it conform to the fundamental legal principles implicit in that doctrine?). Others also appeal to substantive moral principles, whereas researchers with an interest in social sciences may point to deficiencies in efficiency, effectiveness, or popular legitimacy.

From the perspective of the empirical and natural sciences, the – largely implicit – methods used in doctrinal research may seem highly questionable.[3] The selection and interpretation of court cases and other legal sources seem arbitrary, an impression that is only reinforced by the controversies that often exist concerning the correct interpretation. It is a well-known criticism of judicial reasoning that it is often based on implicit ideological or political preferences, on naïve or distorted views of social reality and human psychology, or on mere subjective and intuitive reasoning. This type of criticism could, *mutatis mutandis*, be extended to traditional doctrinal research. There are usually no hypotheses that can be tested, and there is nothing resembling the rigorous methodologies that are common in certain other disciplines. The methods used for critical evaluation and for suggesting reforms may seem even more subjective, partly because the normative criteria used are often implicit and inconclusive. As the analysis is usually restricted to one legal order at a specific moment in its historical development, it does not yield generalisable results, let alone general theories. Moreover, for studying law in the complex multilevel legal orders resulting from European integration and globalisation, we need a methods discussion with a European rather than a national focus.[4] It has also been questioned whether legal research leads to an accumulation of legal knowledge.[5] Consequently, some even doubt whether law deserves to be called an academic discipline at all.[6] Even though a negative answer would be too radical, we must acknowledge that there is a serious methodological deficit, as there are no well-developed, rigorous methods for doctrinal research.

During the past century, partly in response to these and similar criticisms, many researchers have turned to *interdisciplinary studies* – also known as 'interdisciplines' – especially the various 'law and…' movements. Law & society, law & economics, and law & literature are among the most widespread. Some of these approaches apply robust methods used by social sciences like economics. Others, especially interdisciplines twinned with hermeneutical disciplines such as literature studies and ethics, often seem to suffer from methodological deficits

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1. R.A. Posner, 'Legal Scholarship Today', *Harvard Law Review*, at 1314-1326 (2002).
2. S. Taekema, 'Relative Autonomy: A Characterization of the Discipline of Law', in B. van Klink and S. Taekema (eds.), *Law and Method: Interdisciplinary Research into Law* (2011) 33-52, Mohr Siebeck.
3. *Cf.*, L. Epstein and G. King, 'The Rules of Inference', *University of Chicago Law Review* at 1-133 (2002).
4. M. Hesselink, 'A European Legal Method? On European Private Law and Scientific Method', *European Law Journal* 20-45 (2009).
5. G. Samuel, 'Is Legal Knowledge Cumulative?', *Legal Studies* 448-79 (2012).
6. *Cf.*, C. Stolker, '"Ja geleerd zijn jullie wel!" Over de status van de rechtswetenschap', *Nederlands Juristenblad* 1409-1418 (2002); C. Stolker, *Rethinking the Law School. Education, Research, Outreach and Governance* (2014), Cambridge University Press.

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similar to those of law itself. Most of these interdisciplines are interested in issues other than legal doctrine, such as the efficiency of legal rules or the degree of popular legitimacy. Thus, they do not provide answers to the doctrinal questions that are central to traditional legal research. As a result, they cannot provide a substitute for doctrinal analysis, even though they may provide valuable knowledge about law.

1 Towards Interdisciplinary Doctrinal Research

We suggest that this opposition between legal doctrinal analysis and interdisciplinary research must be transcended. The two must be integrated into what may be called *interdisciplinary doctrinal research*. To some readers, it may seem that an unbridgeable separation between doctrinal analysis and interdisciplinary research makes such integration impossible. However, we should not exaggerate the differences.[7]

First, there is no such thing as purely monodisciplinary doctrinal analysis. To study and interpret legal materials, researchers have to rely on history and linguistics. To deal with apparent contradictions, they need to apply logic, argumentation theory, and philosophy. To understand the purpose of legal regulations, they must understand the society in which law is embedded, and the human behaviour it attempts to regulate. This means that they need to incorporate behavioural disciplines such as economics, sociology, and psychology. Finally, as Dworkin has convincingly argued, in order to construct legal doctrine in its best light, legal analysis must incorporate moral and political philosophy.

Legal practitioners usually rely on a common-sense understanding of each of these disciplines, and for many practical purposes this may suffice.[8] Nevertheless, this reliance on common sense has come under severe criticism in recent years,[9] and it has contributed to judicial failures in cases such as *Lucia de B.* in the Netherlands. (In this case, a crucial mistake was a result of the court misunderstanding statistics.) For academic research, such a common-sense understanding of other disciplines is certainly not enough. Even for doctrinal analysis in the narrow sense, we need an interdisciplinary approach. For doctrinal analysis in the broad sense, including critical evaluation and recommendations for reform, the inclusion of interdisciplinary research is clearly inevitable. Adequate critical evaluation and advocacy for reform require at least some critical distance regarding the legal order, and the inclusion of insights from, for instance, political philosophy, legal sociology, or economics. In short, legal doctrinal research cannot be other than interdisciplinary by nature.[10]

Second, the notion that interdisciplinary research does not involve doctrine does not do justice to reality. Purely empirical studies may not include the reconstruction of legal doctrine, but they often do result in critical evaluation and recommendations for reform. Many researchers conducting interdisciplinary studies try to translate their findings in ways that are relevant for doctrinal research. In empirical interdisciplines, examples can be found in what is now often called socio-legal studies[11] and in law & economics.[12] Some Dutch researchers have even advocated a new interdiscipline combining private law and behavioural sciences, called 'civilology'.[13] In hermeneutical interdisciplines such as legal and political philosophy and legal history, similar attempts to translate findings into doctrinal analysis have always been present: for instance, in historical jurisprudence (authors such as Maine and Savigny) and in legal philosophy (authors such as Bentham and Alexy).

Nevertheless, an important disadvantage of these interdisciplines is that their partially external perspective of law is not easily translated, or easily incorporated, into the internal perspective of doctrinal analysis. Therefore, they cannot provide answers to the question as to how legal doctrine should be systematically reconstructed, nor do they provide more than *prima facie* arguments for critical evaluation and reform. For example, law & economics may show that a certain statute is inefficient, and political philosophy may show that it is unjust. Yet, these are only *prima facie* arguments for criticisms, as there may be countervailing reasons of – for example – coherence or popular legitimacy to keep the statute in the books.[14]

2 Methodological Obstacles

It is an open question as to what extent this integration will prove possible. Disciplines differ in many ways and everyone who has ever done interdisciplinary research knows that there are many obstacles. A discipline has not only distinct methods and different objects of research but also a different conceptual framework.[15] Words like institution, rule, justice, or even law, have different meanings in different disciplines. An example

7. D.W. Vick, 'Interdisciplinarity and the Discipline of Law', *Journal of Law and Society* 163-93 (2004).
8. M. MacCrimmon, 'What Is Common about Common Sense?: Cautionary Tales for Travelers Crossing Disciplinary Boundaries', *Cardozo Law Review* 1433-1460 (2001).
9. H. Crombagh, P. van Koppen & W.A. Wagenaar (eds.), *Dubieuze za'ken. De psychologie van strafrechtelijk bewijs* (2005), Olympus.
10. *Cf.*, K.M. Sullivan, 'Foreword: Interdisciplinarity', *Michigan Law Review* 1217-1226 (2007).
11. R. Banakar and M. Travers (eds.), *Theory and Method in Socio-Legal Research* (2005), Hart; R. Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?', *Journal of Law and Society* 171-92 (1998).
12. R.A. Posner, *Economic Analysis of Law* (2010), Aspen.
13. W. van Boom, I. Giessen & M. Smit (eds.), *Civilologie: opstellen over empirie en privaatrecht* (2012), Boom Juridische uitgevers.
14. J.B. White, 'Establishing Relations between Law and Other Forms of Thought and Language', *Erasmus Law Review* 3-22 (2008).
15. J.B. White, *Justice as Translation. An Essay in Cultural and Legal Criticism* (1990), Chicago.

is provided by Den Hartogh.[16] In Dutch law since 2004, the word 'euthanasia' has had a very specific meaning, which does not include medically indicated actions of pain relief that, as a side effect, may shorten the life of the patient (this is regarded as normal palliative care). A large scale research project into the occurrence of euthanasia repeated every five year since 1990 uses a slightly broader definition, which includes this category if the doctor explicitly intended to hasten the death of the patient. As a result, according to Den Hartogh, the empirical findings cannot really be used to evaluate the results of the law, because it does not provide information about euthanasia in the legal sense. Here translation is not possible, let alone incorporation.

On the one hand, for hermeneutical disciplines like history and philosophy, integration may be easier than for the abstract rational choice models of economics. On the other hand, economics seems to have the most rigorous methodologies, but may be less easy to translate and integrate. Therefore, we must investigate in which respects integration is possible and assess the barriers to a full integration. What we need, therefore, is a methodological framework for interdisciplinary doctrinal research.

Of course, in this special issue, we cannot address such a broad theme. We will focus on one central problem, namely that of *interdisciplinary incorporation*. How can we translate and incorporate the various non-legal disciplines and their findings into the language of legal doctrine?

We focus on this problem for two reasons. The first reason is obviously, that it is important for the various interdisciplines as such to understand and solve this problem. Researchers often do engage in socio-legal research or law and economics in order to come up with normative recommendations on how to improve the law, for example, by introducing new statutes or modifying or abolishing existing ones. Nowadays, many research projects are funded by government agencies with the express request to evaluate the law and formulate recommendations for reform. If they want to do so they need to know how to translate their empirical findings and incorporate them in legally relevant and valid arguments. Too often, we can find in such studies that there is a substantial gap between empirical findings and normative recommendations.

The second reason is Sullivan's observations that legal doctrinal research itself is interdisciplinary.[17] Therefore, it must build on the methods of other disciplines and incorporate some of these methods. Methods of political philosophy and history are part of the methods of legal research. That means that the methodological deficit in doctrinal research may be partly overcome by explicitly including those methods in legal research. So far, one strategy to address the methodological deficit has been to emphasise the autonomy of law and the distinctive character of legal research. Our strategy can be regarded as the opposite: the legal discipline may be distinctive not because of its autonomy but because of its inclusive interdisciplinarity. Therefore, we must address the incorporation problem for the sake of legal research.

A difficulty is that different ways exist to combine legal research with other disciplines. There are different purposes that interdisciplinary research is meant to serve, and a distinction can be made between five of them.[18] The first one is that of *heuristics*, where the second discipline is used merely to stimulate creativity and to obtain new ideas. A second type involves using a second discipline as an *auxiliary discipline* to provide data and input, for example sociological insights about effectiveness or economic insights about efficiency. A third type is that of *interdisciplinary comparative research* involving two parallel but separate projects – for example, a legal and an ethical one – on the same issue, with parallel questions and methods; this makes a comparison at the end possible. The fourth type is *dialectical cooperation*, in which two separate disciplinary projects interact throughout the research process, enabling researchers to continuously adjust and refine their research. The fifth type – and the most ambitious – is *integrated research*.

In the case of interdisciplinary doctrinal research, the ultimate aim is that of integrated research from the encompassing perspective of doctrinal research: namely, constructing, evaluating, and reforming legal doctrine. This does not mean, however, that legal doctrinal research always has to be so extremely demanding; for smaller research projects, usually the less ambitious types are sufficient. For example, often all we need from the other discipline are certain specific facts or general insights into human behaviour; if that is what is needed, we may settle for the second type of research: the appeal to an auxiliary discipline. As each of these types brings with it different methodological requirements, it is important for researchers to determine precisely why they want to include other disciplines in their projects.

3 This Issue

For this special issue of the *Erasmus Law Review*, we have invited the contributors to reflect on the central problem mentioned above, namely that of interdisciplinary incorporation. The common research question to be answered is thus: How can we translate and incorporate the various non-legal disciplines and their findings into the language of legal doctrine? What are the differences and commonalities in conceptual frameworks and

16. G. den Hartogh, 'De definitie van euthanasie in het onderzoek naar medische beslissingen bij het levenseinde', *Nederlands Juristenblad* 798-805 (2013).

17. K.M. Sullivan, 'Foreword: Interdisciplinarity', *Michigan Law Review* 1217-1226 (2007).

18. W. van der Burg, 'Law and Ethics: The Twin Disciplines', in B. van Klink and S. Taekema (eds.), *Law and Method: Interdisciplinary Research into Law* (2011), at 175-94, Mohr Siebeck; largely followed by S. Taekema and B. van Klink, 'On the Border. Limits and Possibilities of Interdisciplinary Research', in B. van Klink and S. Taekema (eds.), *Law and Method: Interdisciplinary Research into Law* (2011) at 7-32, Mohr Siebeck; for a different distinction, *see* M. Siems, 'Legal Originality', *Oxford Journal of Legal Studies* 147-64 (2008).

the methods between the discipline and legal research? What are the central conceptual and methodological stumbling blocks? How can we translate and incorporate these (inter)disciplines? Is it merely incorporating the results and insights or can we include the methods as well into interdisciplinary doctrinal research?

This double issue of consists of two parts. A number of case studies will appear in the next issue. We have asked the contributors to that issue to illuminate these general questions with their own experiences with interdisciplinary research. The present issue focuses on a more theoretical analysis of these questions, although this does certainly not exclude that the contributors also illustrate their arguments with concrete experiences from their own research. We will shortly introduce each of the three essays in this volume.

Obviously, before we can analyse how other disciplines can be integrated into doctrinal research, we must know what doctrinal research entails, and why it may – or may not – be deemed necessary to include other disciplines or insights derived from those disciplines. Matyas Bodig provides an introduction to these questions. He characterizes legal scholarship as a normative and interpretive discipline that offers an internalist and non-instrumentalist perspective on law. Interdisciplinary engagement is sometimes necessary for legal scholars because some concepts and ideas built into the doctrinal structures of law cannot be made fully intelligible by way of pure normative legal analysis.

Theunis Roux engages in a critical discussion with some of the theses put forward in this introduction. He argues that the seriousness of the incorporation problem in interdisciplinary legal research depends on how legal research is understood. If legal research is understood as a single, inherently interdisciplinary discipline, he suggests that the problem largely falls away. If, on the other hand, legal research is best conceived as a multi-disciplinary field, consisting of a core discipline – doctrinal research – and various other types of mono-disciplinary and interdisciplinary research, the incorporation of other disciplines presents real difficulties. These difficulties are further explored and illustrated in the article.

The debate on legal methodology and the use of insights from other disciplines can profit from similar debates that since a long time have been going on in the field of comparative law. Elaine Mak takes up this issue. Her article studies the significance of insights from non-legal disciplines (such as political science, economics and sociology) for comparative legal research and the methodology connected with such 'interdisciplinary contextualisation'. Based on a theoretical analysis concerning the nature and methodology of comparative law, the article demonstrates that contextualisation of the analysis of legal rules and case law is required for a meaningful comparison between legal systems.

Legal Doctrinal Scholarship and Interdisciplinary Engagement

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Abstract

The paper offers a legal theoretical analysis of the disciplinary character of the contemporary practice of legal scholarship. It is assumed that the challenges of interdisciplinary engagement are particularly revealing about the nature of legal scholarship. The paper argues for an understanding of legal scholarship that revolves around cultivating doctrinal knowledge about law. Legal scholarship is characterised as a normative and interpretive discipline that offers an internalist and non-instrumentalist perspective on law. The paper also argues that interdisciplinary engagement is sometimes necessary for legal scholars because some concepts and ideas built into the doctrinal structures of law cannot be made fully intelligible by way of pure normative legal analysis. This point is developed with the help of an epistemological clarification of doctrinal knowledge and anchored in an account of the practice of legal scholarship. The paper explores the implications of this account by way of analysing three paradigms of interdisciplinary engagement that respond to distinctive challenges facing legal scholarship: (1) understanding better the extra-legal origins of legal ideas, (2) managing discursive encounters that can generate frictions between disciplinary perspectives, and (3) building the knowledge base to handle challenge of validating policy initiatives that aim at changing the law. In different ways, all three challenges may require legal scholars to build competence in other disciplines. The third paradigm has particular relevance for understanding the methodological profile of legal scholarship. Legal scholarship is the only discipline with specific focus on how the social environment affects the doctrinal structures of law.

Keywords: Doctrinal knowledge, interdisciplinary scholarship, interpretivism, internalism, non-instrumentalism

1 Introduction

It is fair to assume that there is significant methodological uncertainty around the very character of legal doctrinal scholarship.[1] It sometimes manifests itself in a sense of crisis among legal scholars.[2] Even though it is not particularly difficult to account for the characteristic activities of doctrinal scholars, it is much less obvious what qualifies their 'doctrinal' research as genuine, creditable scholarship. The sense of uncertainty within legal scholarship is often matched by a lack of understanding of its character on the part of other disciplines. Memorably, in Becher and Trowler's seminal analysis on the culture of disciplines, legal scholarship is depicted as a 'soft applied science', and it is made to look quite marginal on the academic landscape.[3] I believe that addressing the tensions around legal scholarship is one of the exciting challenges for contemporary legal theory. The present analysis uses the resources of legal theoretical reflection to address issues about the disciplinary character of legal scholarship. I hope to be able to shine some light on the specific epistemological merits of a doctrinal discipline about law. I am not one of those who seek a way of putting to rest the uncomfortable methodological challenges by reimagining legal scholarship – often by giving up on its doctrinal orientation.[4] The reasons why this crisis of identity and a sense of marginalisation plague legal scholarship are, of course, multifarious. Some of them are related to the gradual shift of the academic landscape in the nineteenth and twentieth centuries (and the emergence of the modern social sciences in particular) that was rather unfavourable for legal scholarship. One may even make the case for the view that we have seen the emergence of an imagery of disciplinarity (that revolves around processing facts, developing general theories, and testing hypotheses) that is not quite fitting for legal scholarship. Some further reasons may be related to the disciplinary culture of legal scholarship. In a discipline where the

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1. I will use the terms 'legal doctrinal scholarship' and 'legal scholarship' interchangeably in this analysis.

2. 'In the past 20 or so years the intellectual coherence of law as an academic discipline has increasingly been called into question'. S. Bartie, 'The Lingering Core of Legal Scholarship', 30 *Legal Studies* 345, at 345 (2010). *See also* M. Tushnet, 'Legal Scholarship: Its Causes and Cure', 90 *Yale Law Journal* 1205 (1981). E.L. Rubin, 'Law and the Methodology of Law', *Wisconsin Law Review* 521, at 521 (1997). M. van Hoecke and F. Ost, 'Legal Doctrine in Crisis: Towards European Legal Science', 18 *Legal Studies* 197 (1998). J.M. Smits, 'Redefining Normative Science: Towards an Argumentative Discipline', in F. Coomans, F. Grünfeld, & M.T. Kamminga (eds.), *Methods of Human Rights Research* (2009) 45, at 47.

3. T. Becher and P.R. Trowler, *Academic Tribes and Territories: Intellectual Enquiry and the Culture of Disciplines* (2nd ed. 2001), at 31.

4. *See* G. Samuel, 'Interdisciplinarity and the Authority Paradigm: Should Law Be Taken Seriously by Scientists and Social Scientists', 36 *Journal of Law and Society* 431, at 449 (2009). G. Samuel, 'Is Law Really a Social Science?: A View from Comparative Law', 67 *Cambridge Law Journal* 288, at 315 (2008).

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scholars often see themselves as 'academic lawyers' (rather than academics per se), there is no obvious place for deeper methodological reflection and explicit methodological controversies on the disciplinary character of law. It is no surprise that this may make adaptation to a changing social and academic environment slow, halting and disorienting.

This suggests that addressing the issues of disciplinary character and practice of legal scholarship requires us to raise deeper and broader questions – some of which go beyond the scope of this analysis. I do not deal here with issues of disciplinary culture in any detail, and I do not set out to develop a concept of disciplinarity that is more fitting for legal scholarship – even though I acknowledge that some of my claims are in need of validation from a broader and more ambitious investigation into the nature of legal scholarship. What I can undertake here is an aspect of understanding better the character of legal doctrinal scholarship as it is practised today. I reflect on the problems of interdisciplinary engagement in legal scholarship. I find them particularly revealing about the character of legal scholarship.

I specifically look at interdisciplinary engagement from the perspective of legal scholarship. I do not ask how engagement with legal scholarship might benefit other disciplines.[5] I ask what may make interdisciplinary engagement necessary for legal scholars in certain situations.[6] Nor do I explore the specific dynamics of interdisciplinary cooperation (e.g. in the context of particular research projects). What I am more interested in is the necessity for legal scholars of building some competence in other disciplinary perspectives. What makes it necessary for legal scholars to understand what related disciplines have to say about a particular epistemic object and to try to solve the methodological puzzle of accommodating in their work what they learn from other disciplines?

It is important to emphasise that my analysis is rooted in a particular conception of legal doctrinal scholarship that I have developed elsewhere[7] and keep developing. It confers on legal scholarship the function of cultivating doctrinal knowledge about law. This conception profoundly determines the way I perceive the problem of interdisciplinary engagement in legal scholarship. However, I can provide only a brief (and slightly underreflected) overview of this account here. (The next section will be dedicated to it.) I leave many implications of the salient features of legal scholarship on one side (e.g. I do not reflect on the, otherwise hugely important, functional connection with the legal profession and legal education). This paper can only have a narrow focus and relatively limited ambitions.

As to the substantive points of the paper, I argue that we can identify a distinctive rationale for interdisciplinary engagement in legal scholarship. Due to certain features of law (that I address below and especially in the fourth section), cultivating doctrinal knowledge about law requires legal scholars to work with concepts and ideas that cannot be made fully intelligible through mere normative legal analysis. Also, doctrinal knowledge exists in a state of permanent renewal due to the extralegal information flowing into legal procedures and policy debates. In a very real sense, interdisciplinary engagement becomes a vital aspect of maintaining and improving the ability of legal scholarship to cultivate doctrinal knowledge. However, it does not mean that there is one general pattern to the methodological challenge interdisciplinary engagement poses. I believe that it is more appropriate to think of interdisciplinary engagement in terms of a series of paradigms that originate from particular (but recurrent) methodological challenges facing legal scholars and that are related to different aspects of the work legal scholars do. I do not set out to identify all such paradigms. I will explore below three of them. It seems to me that they are the ones we need to elucidate and substantiate the points I formulate about the legal scholarship.

I have mentioned above that I do not seek to overcome the methodological uncertainties by reimagining legal scholarship. In an important sense, the present analysis is part of a broader argument about the way legal scholarship can become more assured about its disciplinary identity. Even though there is a very real sense of uncertainty about its role and character, legal scholarship has also shown remarkable resilience and staying power. Occasional attempts to reconstitute it on the model of, say, the social sciences were frustrated time and again. It may be a sign of the viability of a doctrinal discipline about law. I am convinced that once we subject the epistemological profile of legal scholarship to more thorough theoretical scrutiny, we find there a methodological paradigm that must be an integral part of the academic landscape. There are epistemic gains to be realised by doctrinal scholarship that are ripe for academic study and that are not accessible to other disciplines. Raising questions about interdisciplinary engagement in legal scholarship is one of the pathways towards that more thorough theoretical scrutiny.

Even though it is part of my ambitions to raise the profile of existing legal scholarship, it does not mean that I advocate the sort of conservatism about the practice of legal scholarship that would leave everything as it is. Even though legal scholarship is built on an eminently

5. Of course, some ways in which other disciplines can benefit from engaging with legal scholarship are not hard to figure out. For example, other disciplines (like sociology and political science) often need to fight the intuition that doctrinal reasoning in important judicial decisions is just window-dressing. *See* E.H. Tiller and F.B. Cross, 'What is Legal Doctrine?', 100 *Northwestern University Law Review* 517 (2006).

6. I note that, for the sake of simplicity, I completely set aside the problem of interdisciplinary engagement between doctrinal disciplines (like law and theology). That raises significantly different methodological issues (and it does not seem to shape the contemporary practice of legal scholarship significantly anyway). What I deal with is the methodological challenge of interdisciplinary engagement with non-doctrinal disciplines (like economics, sociology, political science, etc.). This is what brings into sharp relief the key features of legal scholarship – its normative, interpretive, and internalist character.

7. *See* M. Bódig, 'Legal Theory and Legal Doctrinal Scholarship', 23 *Canadian Journal of Law and Jurisprudence* 483 (2010); M. Bódig, 'Doctrinal Devices, Legal Expertise, Empirical Knowledge, and the Doctrinal Structures of Causation Jurisprudence', 1 *Theory and Practice of Legislation* 469 (2013).

viable epistemological paradigm (that I will outline in section three), currently it is not in the best shape to fulfil its potentials. Significant changes to the practice of legal scholarship are inevitable (and, probably, they are already happening[8]). In order for legal scholarship to be able to preserve its doctrinal orientation, and to keep its practices continuous with its proud historical legacy, it must become more self-conscious about the potentials and limitations of doctrinal disciplinarity.

More clarity about the rationale and paradigms of interdisciplinary engagement can be helpful in exactly this respect. It is a good bet that interdisciplinary engagement will become ever more important for legal scholarship, and it will keep shaping the everyday practice of legal scholarship. Currently, the growing practice of interdisciplinary legal scholarship offers the best chance to break the culture of insularity that has been a feature of legal scholarship in many countries (and a damaging feature at that). Legal scholars are often guided by an intuitive sense that their scholarship is essentially different to the works of philosophers, social scientists, or other scholars. As I argue below, there is indeed something very specific about legal scholarship. But it is not and never has been a justification for a culture of insularity – for thinking that legal scholars can benefit little from other disciplines. In fact, the sense of the distinctiveness of legal scholarship can underlie a healthy disciplinary identity only if it is asserted, justified, and adequately articulated. Interdisciplinary engagement constitutes a discursive field where that might happen. In that sense, more interdisciplinary engagement actually strengthens the identity of legal scholarship as a doctrinal discipline. It is built into the very conceptual dynamics of interdisciplinary engagements that it brings into sharp relief the methodological integrity of participating disciplines. As it is engagement *between* disciplines,[9] it is premised on acknowledging ineradicable differences in disciplinary character and methodological profile.

I have mentioned above that I trace some features of legal scholarship to certain characteristics of law. In order to put the claims I make in that respect into perspective, it may be helpful to highlight here (before we start the more detailed analysis) that I operate with a couple of simplifying assumptions about law. I admit that they are open to contestation. But they are fitting for my characterisation of legal scholarship, and I regard them as defensible. First, the law is a normative and institutional social practice that seeks to guide behaviour.[10] It does that primarily by authoritatively fixing norms (that can be formulated in terms of the rights and obligations of recognised agents). The law is implemented in procedures that facilitate argumentative engagement. Secondly, the law is open to deliberate changes. In fact, it has institutional procedures to bring about deliberate (even planned) modifications of its normative material. Those procedures attract extensive deliberation about institutional design. The ability to engage in debates on institutional design is an important aspect of advanced legal competence. These two assumptions have an implication that profoundly shapes my account of doctrinal scholarship: the legal practice generates fields (or arenas) of contestation. And it does that on two basic levels. The first is the contestation on the practical implications of the normative material. The law is open to interpretation: it accommodates differences of opinion and functions in the face of ineradicable disagreement. The second level is contestation on the ways in which the law could be changed for the better. Naturally, the two levels of contestation affect each other in many ways – creating dialectical tensions in the legal competence of lawyers, as well as legal scholars.

2 The Character of Legal Doctrinal Scholarship

As I have indicated above, my arguments are rooted in a particular conception of legal doctrinal scholarship. It confers on legal scholarship the function of cultivating doctrinal knowledge about law. As the point about legal scholarship and doctrinal knowledge is potentially the most controversial aspect of my theoretical position, I need to embed it in an epistemological clarification of doctrinal knowledge and anchor it in account of the practice of legal scholarship.

I do not think it is particularly difficult to provide an abstract account of the characteristic activities of doctrinal scholars. Most obviously, they engage with the current law. They develop and maintain a systemic perspective on existing normative materials and legal developments.[11] Legal scholars work from conceptions on how the elements of the law fit together in their respective fields, and this qualifies them for assessing whether current developments can be reconciled with the given normative structures of law. The systemic perspective on the law also enables legal scholars to reorder and 'remap' the doctrinal structures of law when facing sweeping changes to legal materials (as a result of major legislative reforms or groundbreaking judicial decisions). It is similarly clear that legal scholars exercise a

8. Fiona Cownie has shown that British law schools are becoming more varied places than ever before – in terms of methodological credos and research practices. *See* F. Cownie, *Legal Academics: Culture and Identities* (2004). *See also* D.L. Rhode, 'Legal Scholarship', 115 *Harvard Law Review* 1327, at 1329 (2002).
9. Cf. D.W. Vick, 'Interdisciplinarity and the Discipline of Law', 31 *Journal of Law and Society* 163, at 188 (2004).
10. See M. Bódig, 'The Issue of Normativity and the Methodological Implications of Interpretivism I: The Idea of Normative Guidance', 54 *Acta Juridica Hungarica* 119 (2013). Mátyás Bódig, 'The Issue of Normativity and the Methodological Implications of Interpretivism II: The Distinctive Normativity of Law', 54 *Acta Juridica Hungarica* 207 (2013).
11. *See* van Hoecke and Ost, above n. 2, at 197. Cf. N. MacCormick, *Institutions of Law: An Essay in Legal Theory* (2007), at 6.

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sort of quality control over judicial reasoning as it is manifested in upper court practice.[12] Perhaps a bit less obviously, they also address contested matters on the exact normative scope of legal materials.[13] These characteristic activities may cover most of what legal scholars do, but we should not forget that legal scholars also characteristically engage with issues of institutional design. It is not just that the assessment of the upsides and downsides of the existing law can culminate in reform proposals. Increasingly, contemporary legal scholarship is filling with policy content, and legal scholars often position themselves as experts on certain policy matters (energy policy, environmental policy, etc.).[14] It is not that they claim doctrinal, as well as policy expertise. The two are intertwined because doctrinal plausibility is a vital factor in assessing the feasibility of policies in an institutional environment. Legal scholars may be the ones best qualified to figure out which policies (and by what legal strategies) can be written into law[15] and also to figure out how the prospects of policies are affected by institutional decisions (like a court ruling).

I believe that these activities can be usefully understood as manifestations of the epistemological profile of a distinctive disciplinary perspective. They hint at the methodological characteristics of a normative and interpretive discipline that looks at legal practices from a strong internalist point of view.[16] Let me explain briefly the constitutive elements of this claim.

Legal scholarship is explicitly normative (as opposed to having a hidden normative agenda – which is often the case with some sociological and anthropological research. It is not simply that legal scholarship deals with the normative aspects of a social practice. More importantly, it makes an explicit commitment to maintain the practice in its integrity and rationality.[17] Without this, it could not take on the role of exercising quality control over judicial reasoning – it could not claim to offer an insider look on legal developments and challenges.[18] It is this 'insider perspective' that I point to when characterising legal scholarship as internalist. Actually, one of the key features of legal scholarship is the way its normative character and internalism come to be closely intertwined.[19] Legal scholarship does not simply engage with given institutional practices: it internalises their value assumptions. More specifically, a value-laden assumption about legal practices is constitutive of the perspective of legal scholarship: it is an improvement on the normative structures of social life and the institutional procedures of governance that they are permeated by legal norms.[20] The authority manifested in the legal materials commands (and warrants) respect. Or, to put it in more abstract terms, 'legality' (that is, the ideal of the 'rule of law' as manifested in legal practices) is an attractive value with great social and political importance.[21]

We can also glean from the characteristic activities of legal scholars that legal scholarship is interpretive in character. It means, first of all, that legal scholarship always remains practice specific.[22] Legal scholarship construes the normative materials as positive law – as opposed to a repository of abstract political or moral principles that have independent normative force regardless of acts of enactment. An understanding of the normative implications of the practice, the competence criteria for participation, and the feasible ways of improving the given practice all develop from interpretive engagements with the positive law. Uniquely among disciplines, legal scholarship does not treat the law as the mere object of scholarly reflection: the normative content of the law also provides the conceptual framework that one must rely on to make sense of the legal practice.[23] In fact, without an epistemologically

12. *See* H.T. Edwards, 'The Growing Disjunction between Legal Education and the Legal Profession', 91 *Michigan Law Review* 34, at 43-5 (1992).
13. I see this in human rights law in particular. We have abundant literature on, say, whether transnational corporations have human rights responsibilities. The main benefit from such analyses is a better understanding of the scope of human rights obligations. *See, e.g.*, A. Clapham, *Human Rights Obligations of Non-State Actors* (2006). D. Kinley and J. Tadaki, 'The Emergence of Human Rights Responsibilities for Corporations in International Law', 44 *Virginia Journal of International Law* 931 (2004). E. Engle, 'Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?', 20 *St. John's Journal of Legal Commentary* 287 (2006).
14. For an example from a legal scholar, *see* A. Boute, 'Energy Efficiency as a New Paradigm of the European External Energy Policy: The Case of the EU–Russian Energy Dialogue', 65 *Europe-Asia Studies* 1021 (2013).
15. As we will see, this interplay between doctrinal expertise and policy issues is actually a major driver of interdisciplinary scholarship. I will say more about this interplay in section 4.
16. *See* S. Perry, 'Interpretation and Methodology in Legal Theory', in A. Marmor (ed.), *Law and Interpretation: Essays in Legal Philosophy* (1995) 97, at 98.
17. Cf. Peter Birks, 'The Academic and the Practitioner', 18 *Legal Studies* 397, at 401 (1998). *See also* MacCormick, above n. 11, at 6.
18. An important implication of this is that legal scholarship has a conservative streak to it. It does not mean that legal scholarship cannot embody bold imagination on matters of institutional design or that it cannot be fiercely critical of legal developments. But it means that its potential radicalism is tempered by the need to remain a manifestation of an insider perspective on the given legal practice. I will say more about legal scholarship and institutional design in section 4.
19. Cf. C. McCrudden, 'Legal Research and the Social Sciences', 122 *Law Quarterly Review* 632, at 633 (2006).
20. It has to be noted, even though it will not be at the centre of my analysis, that the unquestioning acceptance of legality as a value (and the explicit commitment to improving the legal practice) confers an ideological character on legal scholarship. There is no running away from this. We should not forget that it is not that legal scholars happen to end up advocating the value of legality (like an anthropologist may become sympathetic to the cultural values she comes into contact with). The commitment to the ideal of the rule of law is an internal even constitutive feature. From within the perspective of legal scholarship, it cannot be questioned. It is an ideological commitment. Note that, for Mark Tushnet, this is the reason why legal scholarship can never be a real science. *See, e.g.* Tushnet, above n. 2, at 1222.
21. *See, e.g.* Ronald Dworkin, *Justice in Robes* (2006), at 5. D. Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition', in William Twining (ed.), *Legal Theory and Common Law* (1986), at 27.
22. Cf. E.J. Weinrib, 'Can Law Survive Legal Education?', 60 *Vanderbilt Law Review* 401, at 404 (2007). Dworkin (2006), above n. 21, at 2.
23. I rely here on a brilliant insight by Pauline Westerman. *See* P. Westerman, 'Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law', in Mark van Hoecke (ed.), *Methodologies of Legal Research* (2011), at 90-4.

plausible idea of 'positive law', we could not even make sense of legal scholarship. All epistemic gains legal scholarship offers are premised on knowing what the law is. At the end of the day, its epistemic gains are meaningful only for those who know the law or want to know the law as it has been laid down by authorities.

I note that the way interpretivism plays out in legal scholarship is crucial to understanding its distinctive character. Interpretive engagement with normative materials is common in other disciplines as well – most obviously in history. Interpretive engagement combined with explicit practical concerns can also be characteristic of applied ethics (e.g. bioethics[24]). The distinctive feature is that the interpretivism of legal scholarship revolves around the authority attributed to canonical normative texts (i.e. positive law). In this respect, the only other discipline on par with legal scholarship in terms of its methodological features is theology (when it attributes the authority of the 'sacred' to certain texts).

Perhaps, we can make these points clearer by drawing a few more explicit contrasts with other disciplines. Legal scholarship is unlike political and moral philosophy: the latter is explicitly normative but not practice specific and interpretive in their truth claims. Much of the practice of the social sciences is interpretive (e.g. social anthropology), but, unlike legal scholarship, it is not explicitly normative. Some disciplinary perspectives are normative and offer ways of interpreting the normative material but still remain characteristically different from legal scholarship. For example, the economic analysis of law (that has the methodological profile of economics) has a normative agenda, but it is imposed on law – not revealed from it by way of interpretive engagement with positive law. It interprets the law from a fundamentally extralegal normative perspective. As a result, it offers a thoroughly instrumental perspective on law that sits uneasily with the epistemological profile of legal doctrinal scholarship.[25]

3 Doctrinal Knowledge and Doctrinal Scholarship

Of course, this is still not enough as an account of the character of legal scholarship. We still miss something essential if we remain on the level of a formal characterisation of a normative and interpretive discipline. We need to see the distinctive a point to building an academic discipline that takes this interpretive and normative approach to legal practices. As I have indicated, my way of making sense of these characteristics is to say that legal scholarship has the function of cultivating doctrinal knowledge.[26] Without asking a few questions about doctrinal knowledge, my account of legal scholarship would remain partly unintelligible.

In my understanding, doctrinal knowledge grows in and around normative social practices (like the different incarnations of law or religious practices), and it is specifically focused on their normative aspects. Mastering doctrinal knowledge presupposes the familiarity with the norms of the given practice ('knowing what the rules are'), but this is not what determines its character. Doctrinal knowledge builds competence about the justificatory implications of the normative terms of participation. In principle, one can recite each norm of the practice and can still be incompetent in this specific sense. Gaining doctrinal knowledge enables one to align one's actions and practical judgments with the normative content of the given practice – to get clear on what it takes to act and reason without subverting its integrity. It helps figure out how far one can go without falling foul of the normative terms of participation. In other words, it is knowledge fit into the normative parameters for social practices. Importantly, it means the doctrinal knowledge 'internalises' the viewpoint of the committed participants of the practice. Doctrinal knowledge is premised on the acceptance of normative guidance from the relevant practice. Doctrinal knowledge is particularly important for those who seek to gain competence in navigating fields of contestation within normative practices. Doctrinal knowledge enables them to figure out what is compatible with fidelity to the given practice – what can be done and said without running the risk of becoming an outsider.

A crucial implication of all this is that what mastering doctrinal knowledge facilitates is not improved compliance (and definitely not blind obedience) but the ability to negotiate one's options in a normatively constructed social environment.[27] In other words, doctrinal knowledge thrives on contestation. In fact, doctrinal knowledge comes into its own when the normative assessment of situations is opened up for contestation within the practice itself – that is, when the complexity of the practice leaves room for significant interpretative disagreement.[28] At first glance, this point may seem to be in tension with the commitment to maintaining the given practice in its integrity (that I have emphasised above). But it is actually the shared commitment that makes intense contestation among the participants possible

24. *See, e.g.*, H.T. Engelhardt, *The Foundations of Bioethics* (2nd ed., 1996).
25. I believe that Ernest Weinrib was right on the point in his 'crusade' against the growing influence of the Economic Analysis of Law. *See, e.g.*, Weinrib, above n. 22, at 406-14.
26. As I work from a more abstract epistemological paradigm, I could not rely on *a* 'legal doctrine' or *the* 'legal doctrine' as my basic conceptual building block, even though they might have looked more familiar (even plausible) for legal scholars.
27. Compliance is often a matter of basic social skills that do not require the development of any specialised knowledge. Compliance is often and repeat compliance is typically habitualised.
28. There is a further condition that I do not go into here. Contestation can only shape the practice if normative disagreements are not suppressed by unfavourable power dynamics. This concerns the sociological conditions under which doctrinal knowledge can unfold and can influence social practices.

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without the disintegration of the given practice.[29] It is more accurate to say that doctrinal knowledge thrives on contestation that remains internal to particular normative practices.

A further implication of this inherent connection with contestation is that doctrinal knowledge is premised on taking a perspective on social practices that makes them appear as dynamic and contingent constructions continuously shaped by human efforts – by what participants do about them and think of them. Doctrinal knowledge, by generating an awareness of interpretive variability, internal tensions, and patterns of contestation, facilitates 'active agency'[30] both among the addressees of the norms of the given practice and, in the case of formally institutionalised practices, the officials. Within the bounds of fidelity to the given practices, doctrinal knowledge brings about creative engagement with practice-related normative materials.

Crucially for my analysis, these observations suggest that the character-defining features of legal scholarship (that I have listed in the precious section) are actually rooted in the epistemological profile of doctrinal knowledge.[31] (1) Doctrinal knowledge is *practice oriented*: it is born out of engagement with the normative aspects of social practices. (2) Doctrinal knowledge perceives practices as *contingent, man-made, and subject to change*. It understands social practices as inherently precarious: they would not survive without the commitment and contribution of its participants. (3) Doctrinal knowledge is *practice specific* and *interpretative*: it takes an internal point of view to actual, historically contingent practices and is limited to those practices in its truth claims. (4) Doctrinal knowledge is *normative* and not simply because its objects are norms and their justificatory implications but mainly because it is adjusted to a practical orientation: accepting normative guidance from the given practice[32] and being committed to maintaining it in its integrity. (5) And, finally, doctrinal knowledge is *noninstrumental* about the practice it is related to.

Due to its special significance, we need to say more about this final point on noninstrumentalism. I have claimed that doctrinal knowledge answers to the epistemic needs of those who accept normative guidance from the practice. This is the point that needs some elaboration to get a grip on the noninstrumentalist character of both doctrinal knowledge and legal scholarship. In the sense relevant for us here, accepting normative guidance does not simply mean that one factors in the norms of a social practice in practical deliberations. It is actually a manifestation of a specific mode of participation. Engaging with the practice is never simply about how to use its normative materials and institutional structures to one's subjective ends. Doctrinal knowledge is generated in the process of not simply learning about the practice but also learning *from* the practice. Its epistemic merits are conditional on accepting that the practice has a value content that one can access only through participation[33] and that the practice engages with what a committed participant can regard as appropriate practical objectives and the appropriate ways of pursuing them. In that sense, one of the very functions of doctrinal knowledge is to shape one's perspective on social life – one's moral and political outlook.[34]

The way doctrinal knowledge takes on a noninstrumental character helps us understand better the close connection between the internalist (practice related and practice oriented) and interpretivist features of doctrinal knowledge, as well as doctrinal scholarship. The mere challenge of making sense of social practices by way of interpretive engagement with their normative materials does not make it necessary that one takes a strong internal point of view to them.[35] It becomes necessary only in light of the commitment to maintaining the given practice in its integrity. And the epistemological justification for that commitment lies in the conviction that a noninstrumentalist perspective on the given practice promises specific epistemic gains. It is this promise of specific epistemic gains (on values with major social significance) that underlies the disciplinary character of legal scholarship. This is how it can offer knowledge that other disciplinary perspectives do not have access to.

29. I believe that this is one way to make sense of Dworkin's claim that the law is an 'argumentative practice'. Cf., *e.g.*, R. Dworkin, *Law's Empire* (1986), at 13-4.
30. Many have realised that the law operates by using, as opposed to suppressing, the agency of humans. For a recent formulation of the point, *see* J. Waldron, 'The Concept and the Rule of Law', 43 *Georgia Law Review* 1, at 26 (2008). I tie this feature to the doctrinal character of law.
31. This close connection between doctrinal knowledge and doctrinal scholarship makes the functional connection between the legal profession and legal scholarship rather obvious. Legal doctrinal scholarship exists in a constitutive relationship with the legal profession (paradigmatically manifested in its role in legal education). This is widely acknowledged by scholars who reflect on the character of legal scholarship – although they are very much divided on whether they should welcome its implications. *See, e.g.*, C. Tomlins, 'Framing the Field of Law's Disciplinary Encounters: A Historical Narrative', 34 *Law and Society Review* 911, at 925 (2000). Vick, above n. 9, at 175. S. Taekema, 'Relative Autonomy: A Characterisation of the Discipline of Law', in B. van Klink and S. Taekema (eds.), *Law and Method: Interdisciplinary Research into Law* (2011). As I have indicated above, I leave on one side the rich implications of this point.
32. For my account of normative guidance, see Bódig (2013), above n. 10, at 124-30.
33. This claim is inspired by MacIntyre account of 'internal goods'. *See* A. MacIntyre, *After Virtue* (2nd ed., 1984), at 190-1.
34. It is for this reason that I insist on the somewhat counterintuitive claim that, even though its elements can be employed instrumentally, the character of doctrinal knowledge does not fit an instrumentalist model. One can borrow doctrinal knowledge (on what can and cannot be done without falling foul of the norms of the given practice) with manipulative or simply self-serving intentions. One may fake the commitment implied in the idea of participation, and one may use strategically some piece of intimate practice-related knowledge to plot one's way around the given practice. But it means consciously giving up on one of the epistemic gains that define the character of doctrinal knowledge (the capacity to shape one's outlook on social life). In fact, it is very difficult to provide an adequate explanation for the very emergence of doctrinal knowledge from a purely instrumentalist perspective. No known body of doctrinal knowledge could have developed without commitment to maintaining the underlying social practices in their integrity.
35. Cf. Perry, above n. 16, at 123, G. Postema, 'Jurisprudence as Practical Philosophy', 4 *Legal Theory* 329, at 341 and 350 (1998).

4 The Paradigms of Interdisciplinary Engagement

It is time to test whether these considerations about doctrinal knowledge and the character of legal scholarship will help us understand better why and how interdisciplinary engagement makes sense for legal scholars. Above, I distinguished between two aspects of the practice of legal scholarship: dealing with the existing legal materials and engagement with challenges of institutional design. The two remain analytically distinguishable, but they interact with each other in important ways. It seems to me that legal scholarship of any notable quality is very much characterised by the shuffling between the multifarious analysis of given normative materials and addressing issues of institutional design. Engaging with institutional design facilitates creative approaches to the systemic aspects of existing law. It brings home the point that the normative elements of law are (to a varying extent) contingent. And the challenge of reforming the law again and again raises stark questions for legal scholarship about the ways of protecting the integrity, coherence, and rationality of the law. Also, the concern with institutional design brings into focus the complicated relationship between the normative implications of the existing law and considerations of public policy. If we want to understand the problem of interdisciplinary engagement in legal scholarship better, we need to be able to associate its manifestations to these two aspects of the practice of legal scholarship.

I have indicated above that I do not set out to provide a complete theory of interdisciplinary interaction for legal scholarship. Instead, I identify a few paradigms of interdisciplinary engagement for legal scholarship in order to explore the implications of my account of doctrinal scholarship and doctrinal knowledge. Nor do I go into analysing the exact typology of interdisciplinary methods that legal scholars may apply. Taekema and van Klink have already offered a useful analysis of interdisciplinary methods that I do not wish to second guess here.[36] I hope that my analysis will remain largely compatible with theirs, and I can shift the focus to what makes interdisciplinary engagement necessary (and beneficial for legal scholarship) in certain contexts.

I have also pointed out above that, even though interdisciplinary engagement in legal scholarship has broad methodological varieties, it still has a distinctive rationale (that is due to certain features of law). It is important to elaborate on this point before we turn to the paradigms of interdisciplinary engagement. It will help us understand better what links the three paradigms I address and what distinguishes them.

As to the distinctive rationale of interdisciplinary engagement, it needs to be linked to the very function of legal scholarship: cultivating doctrinal knowledge. What we need to keep in mind is that the challenge of cultivating doctrinal knowledge about law is complicated by the fact that the law operates with concepts and principles that cannot always be made fully intelligible through normative analysis that remains internal to given legal practices. There is a constant flow of extra-legal information into legal procedures and practice-related policy debates that has a pervasive impact on how the normative materials of law turn out. The law is not just a system of action-guiding norms but a framework for deliberation and public justification as well,[37] and, even when it develops artificial categories (like 'legal causation' and 'remoteness of damage'), the justifications it provides for practical judgements must remain intelligible for its addressees. The law has its own internal value structures, but they interact with a large amount of extralegal information. As a result, doctrinal knowledge exists in a state of permanent renewal, and legal scholarship cannot claim exclusive semantic competence to define the categories it operates with (the way some formal sciences like mathematics can). In an important sense, the law is constituted as a 'parasitic discipline'.[38] And, of course, it means that interdisciplinary engagement becomes a vital aspect of maintaining and improving the ability of legal scholarship to cultivate doctrinal knowledge.

If this is true, the paradigms of interdisciplinary engagement must all be related to the various challenges that the flow of extralegal information into the law poses. This is what is reflected in the 'paradigms' I address below. The first concerns gaining some interpretive depth on the concepts and ideas deposited in law. The second concerns situations where legal scholarship comes into potential conflict with alternative disciplinary perspectives. And the third concerns the pressure of extra-legal considerations for altering the law.

4.1 Understanding Extralegal Origins

In a sense, the first paradigm of interdisciplinary engagement is the most straightforward. It can be traced back to a direct implication of a point I have made above on the limited 'epistemic' reach of legal scholarship: the conceptual elements of the current law cannot always be made fully intelligible from an internal perspective. The conceptual elements doctrinal structures are built from typically have some historical depth (they did not always mean what they mean now), and they often reflect the impact of political controversies and compromises. Legislation and adjudication are prone to be influenced by

36. S. Taekema and B. van Klink, 'On the Border: Limits and Possibilities of Interdisciplinary Research', in B. van Klink and S. Taekema (eds.), *Law and Method: Interdisciplinary Research into Law* (2011).

37. Cf. G. Postema, 'Law's Autonomy and Public Practical Reason,' in R.P. George (ed.), *The Autonomy of Law: Essays on Legal Positivism* (1996) 79, at 112.

38. *See* A. Bradney, 'Law as a Parasitic Discipline', 25 *Journal of Law and Society* 71 (1998).

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broader political, social, and intellectual trends.[39] Ignorance about this pedigree of the normative materials of law can make legal scholarship positively implausible. It can make the interpretive engagement with the positive law (which is the bread and butter of legal scholarship) shallow and erratic. It is no surprise that all legal scholars demonstrate some understanding of the historical depth of legal concepts – e.g. of the political philosophical categories that found their way to their doctrinal arsenal (like the 'separation of powers', 'sovereignty', or 'democracy'). This indicates how the interpretive character of legal scholarship can stimulate interdisciplinary engagement.

Of course, merely acknowledging the impact of social and political realities on the content of law does not necessarily imply the need for genuine interdisciplinary engagement. Most importantly, it does not necessarily require legal scholars to build competence in other disciplines. This may come about when there is some specific doctrinal stake in gaining more clarity about the extra-legal disciplinary roots of important legal categories. An example for this may be the engagement with philosophical problems of corrective justice in tort scholarship a few decades ago.[40] It meant taking a far deeper look at philosophical issues than mere doctrinal reflection could ever warrant: it indeed meant significant interdisciplinary engagement. The main reason for this phenomenon was that the emergence of the economic analysis of law made raised the stakes of debates on tort law doctrines and generated controversies about the very point of tort law. For those who resisted the reconstitution of tort law along the lines of an essentially consequentialist project, digging down to the (Aristotelian) philosophical origins of traditional tort law doctrine offered the promise of more interpretive and theoretical depth in their doctrinal positions. In a sense, the motivation for interdisciplinary engagement was not just interpretivism but the felt need to preserve the non-instrumentalist perspective of legal scholarship.

Even though it has very significant potential to influence doctrinal debates, and it raises its own methodological challenges (legal scholars may have difficulties with guaranteeing that they do not misunderstand the alternative disciplinary perspectives), I still maintain that this is the least interesting paradigm of interdisciplinarity in law. This paradigm has been present in legal scholarship from effectively the beginning, and its focus on understanding better what is already in the law makes it an unlikely candidate for being a major driver of either doctrinal development in the law or the methodological renewal of legal scholarship. It seems to me that the other two paradigms I address here have a more direct bearing on the pressing methodological challenges of contemporary legal scholarship.

4.2 Addressing Frictions between Disciplinary Perspectives

As I have indicated, the second paradigm concerns situations where legal scholarship comes into potential conflict with alternative disciplinary perspectives. As we have seen, the first paradigm revolves around acknowledging the limitations of legal scholarship in making adequate sense of ideas and concepts that came to be integrated into legal materials. It assumes a fundamentally supportive relationship between legal scholarship and the relevant other disciplines. One discipline can lend more interpretive depth to the other. There are cases, however, when the engagement between disciplines is characterised more by rivalry and even tension. There are categories that are crucial for legal scholarship for their doctrinal significance but other disciplines also have significant stakes in them. Nothing guarantees that the different disciplinary perspectives on them will not end up at least partly incompatible. In many cases, this raises no serious challenge because the alternative uses of the affected concepts can be contextually separated. (We can learn to appreciate that 'fault' or 'acceptance' means something different in law than elsewhere.) Occasionally, however, the engagement simply cannot be avoided, and it can even become strategically important for legal scholarship to maintain some control over the semantic boundaries of the relevant categories. The internal coherence of the doctrinal structures may depend on it. Communication and some form of accommodation are unavoidable.

I think I can best explain the challenges that the second paradigm addresses through a concrete example: the challenges facing causation jurisprudence in the law of delict.[41] There are aspects to the doctrinal approach to causation issues that are internalised by legal scholarship but make little sense for other disciplines. Most importantly, for lawyers and legal scholars, issues of causation are never simply a matter of factual relations: they remain intertwined with issues of the scope of liability.[42] This is bound to cause some friction with scientific accounts of causal connections that treat causation as a

39. I have in mind the well-documented trend shift in the United States in the New Deal era. Before the New Deal, Supreme Court jurisprudence was characterised by a rigid and formalistic emphasis on individual freedom. Infamous decisions like *Lochner* v. *New York* (1905) 198 US 45 were manifestations of this trend. The New Deal brought about a major shift that ultimately generated the judicial activism of the Warren court in the 1950s – with its more substantive approach to civil rights (and the equal protection clause of the Constitution in particular). *See* N. Duxbury, *Patterns of American Jurisprudence* (1995). American legal scholars are all aware of this impact of broader social and political trends (and they factor it in when dealing with precedents from different periods), but, in the context of academic writing, they could not verify their assumptions about them without resorting to other disciplinary perspectives.

40. *See, e.g.*, E. Weinrib, 'Toward a Moral Theory of Negligence Law', 2 *Law and Philosophy* 37 (1983). C.P. Wells, 'Tort Law as Corrective Justice', 88 *Michigan Law Review* 2348 (1990). C.H. Schroeder, 'Corrective Justice, Liability for Risks, and Tort Law', 38 *UCLA Law Review* 143 (1990). J.L. Coleman, 'Tort Law and the Demands of Corrective Justice', 67 *Indiana Law Journal* 349 (1992).

41. I rely here on an earlier analysis of mine. See Bódig (2013), above n. 7.

42. 'The causal requirements for liability often vary, sometimes quite subtly, from case to case. And since the causal requirements for liability are always a matter of law, these variations represent legal differences...', *Fairchild* v. *Glenhaven Funeral Services* (2003) 1 AC 32, at 72, per Lord Hoffmann. *See also* T. Honoré, *Responsibility and Fault* (1999), at 4-5 and 100-1.

straightforward factual problem and that keep influencing legal decisions through the contribution of forensic experts in court procedures. These frictions cannot be addressed by simply giving priority to one disciplinary perspective over the other. The non-instrumental perspective of legal scholarship would be an insurmountable obstacle to that. They can only be handled through a productive engagement with the alternative disciplinary perspectives. Inevitably, the terms under which doctrines of causation can remain fully intelligible and practicable will at least partly be dictated by forensic expertise.[43]

We should be a bit clearer about the dynamics of this pressure on causation jurisprudence. Its root is the realisation that lawyers and legal scholars simply cannot ignore the relevant scientific knowledge (or openly contradict scientific evidence) when addressing causation issues. They are not well positioned to insist that a causal connection is there when they say it is – that they can develop a self-standing, specifically 'legal-doctrinal' sense of causation.[44] Simply ignoring what sciences (like medicine) figure out about causal relations (e.g. on the causes of a disease) would look downright irrational. It would raise very serious legitimacy issues about the epistemic authority and academic credibility of legal scholars.[45] What legal scholars need to achieve is an acute understanding of how the insights of forensic science can be accommodated without subverting the doctrinal structures of causation jurisprudence. It means building competence in forensic science, and it has produced some important pieces of interdisciplinary legal scholarship.[46] Some say that, at least in the context of the legal procedure, this has resulted in the mutual erosion of a stark contrast between the legal and the scientific approach to causation (without erasing the salient differences).[47] I would prefer to talk of an ongoing learning process that has never lost its original focus on doctrinal integrity. It meant opening up causation doctrines to scientific developments but maintaining the lawyers' claim to superior interpretative competence in determining which accounts of causal relations are preferable when dealing with issues of liability.

As we see, in this context, interdisciplinary engagement means taking on a constant methodological challenge that comes to drive the development of doctrinal knowledge. In relation to causation issues, it has encouraged theoretical sophistication to a previously unknown extent.[48] It has brought into focus exciting questions about the interplay of normative and factual considerations.[49] On the other hand, I cannot help thinking that this paradigm of interdisciplinary engagement still has not fulfilled its potential for informing and shaping the broader practice of legal scholarship. Its impact is largely local: it generated 'pockets' of a more interdisciplinary minded discourse in legal scholarship. This is regrettable because the 'skirmishes' between different disciplinary perspectives have systemic significance for legal scholarship. Perhaps, this is where legal theory could do more to draw the epistemological and methodological lessons from the way discursive mismatches between disciplinary perspectives come to reflect the epistemological character of legal scholarship.[50]

4.3 Doctrinal Knowledge, Policy Initiatives, and Institutional Design

Let me turn now to a third paradigm of interdisciplinary engagement. I have mentioned at the beginning of this section that we can distinguish between two aspects of the practice of legal scholarship: dealing with the existing legal materials and engaging with challenges of institutional design. The two intersect in complex ways, but the analytical distinction remains a sound one – determinative of the character of legal scholarship. I believe that the distinction has a bearing on the paradigms of interdisciplinary engagement. It seems to me that the first and second paradigms are more closely related to handling normative materials. With the third one, we shift the focus to issues of institutional design. The third paradigm is more closely related to a point that I have also highlighted above: for contemporary legal scholarship, issues of institutional design arise in an intellectual and political environment in which a flood of policy initiatives keep the law under constant pressure.[51] In that environment, competence in policy matters plays an increasingly important role in preserving

43. It is worth emphasising that I do not claim that the progress of forensic knowledge is the only driver of doctrinal development. Other considerations often play a decisive role. But it is one important factor.
44. No doubt, it was sometimes tempting to cut through the complications by acknowledging that lawyers are free to mean by causation whatever they see fit. 'For lawyers, just as 'duty' and 'damage' mean what we decide they should mean in a legal context, so it should be with the concept of causation'. M. Hogg, 'Developing Causal Doctrine', in R. Goldberg (ed.), *Perspectives on Causation* (2011), at 44. But this approach never came to dominate causation jurisprudence.
45. *See* G. Edmond and D. Mercer, 'Rebels without a Cause? Judges, Medical and Scientific Evidence and the Uses of Causation', in I. Freckleton and D. Mendelson (eds.), *Causation in Law and Medicine* (2002), at 86-7.
46. *See* R. Goldberg, *Causation and Risk in the Law of Torts: Scientific Evidence and Medicinal Product Liability* (1999).
47. Cf P. Greenberg, 'The Cause of Disease and Illness: Medical Views and Uncertainties', in I. Freckleton and D. Mendelson (eds.), *Causation in Law and Medicine* (2002), at 53.
48. In this respect, in the English language literature, Jane Stapleton and Richard Wright stand out among the doctrinal writers. *See* J. Stapleton, 'Scientific and Legal Approaches to Causation', in I. Freckleton and D. Mendelson (eds.), *Causation in Law and Medicine* (2002). J. Stapleton, 'Cause-in-Fact and the Scope of Liability for Consequences', 119 *Law Quarterly Review* 388 (2003). R. Wright, 'Causation in Tort Law', 73 *California Law Review* 1735 (1985). R. Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics and Proof: Pruning the Bramble Bush by Clarifying the Concepts', 73 *Iowa Law Review* 1001 (1988). R. Wright, 'Proving Causation: Probability versus Belief', in R. Goldberg (ed.), *Perspectives on Causation* (2011).
49. See Bódig (2013), above n. 7.
50. That is the issue that was at the heart of my earlier analysis in Bódig (2010), above n. 7.
51. I see this as a natural consequence of the way modern political systems work: a broad range of agents have the (often slight) opportunity to influence the way the polity is governed. But lasting impact on governance is only possible if the initiatives are consolidated as legal measures. Attempts to influence the practice of governance are bound to take the form of policy proposals to amend the law.

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the influence of legal scholarship over debates on institutional design. The third paradigm of interdisciplinary engagement I address is an aspect of handling this challenge.

It is important to emphasise that the way this pressure affects legal scholarship reflects a particular feature of the disciplinary character of law. The pressure is not really generated by policy preferences internal to legal scholarship clashing with policy initiatives arising from extra-legal social and political processes. Legal scholarship is thin in policy content. Even though its concern with maintaining the integrity, coherence, and rationality of doctrinal structures has some direct policy implications,[52] legal scholarship exhibits remarkable openness and flexibility when it comes to absorbing policy preferences. For a discipline that takes an internalist and interpretivist perspective on normative materials (and that, by implication, is premised on deference to what is already built into the normative structures of law), internal intellectual resources can hardly generate a forceful policy agenda. The internal value structures law (and the ideal of the rule of law in particular) do not embody blueprints for comprehensive purposive arrangements of human relations. It is no surprise then that the tools of doctrinal reasoning legal scholars master can be used to support a broad variety of different policy initiatives (often in direct conflict with each other). A crucial implication of this is that, contrary to what one might think, legal scholarship has very limited potential when it comes to generating independent visions of institutional design.[53] The potential does not extend far beyond addressing internal dysfunctions that doctrinal analysis often uncovers.[54] The pressure from ambitious policy initiatives to alter or restructure the law tends to come from outside legal scholarship.

Under these circumstances, it becomes a challenge for legal scholarship to make judgements on the merits of policy initiatives.[55] We know that policies cannot be accommodated in the legal materials without some doctrinal 'encoding'. This makes legal scholars crucial agents in the (essentially political) discourse on how changes to the law can be implemented without system-level dysfunctions. But, of course, before addressing the issue of what the best ways of implementing those policies are, legal scholars need to make a judgement on which policies are worth the effort of doctrinal encoding. Exactly because of its propensity to absorb policy considerations, the doctrinal analysis legal scholars resort to has precious few internal resources to support the judgement on the merits of policy initiatives. In this respect, once again, the essential internalism of the doctrinal perspective comes with severe methodological limitations. Wasting efforts on figuring out doctrinal models for policy initiatives that are not worth it can make legal scholars look misguided and hopelessly out of touch.

This is where interdisciplinary scholarship offers pretty much the only feasible way to preserve the competence of legal scholarship in exercising some control over doctrinal development. Legal scholars cannot rely on a raw political logic in taking a stand on the demands to make changes to the law – without running the risk of looking cynical. As an academic discipline, legal scholarship needs academic validation for the substantive ideas that it chooses to embed in the doctrinal structure of the existing law. Only other disciplines can vouch for the claim that, say, 'indirect discrimination' is a genuine problem that calls for new regulation,[56] that a crisis of democracy makes the overhaul of the constitutional mechanisms of popular representation necessary, or that we need more imaginative normative tools to address the human rights aspects of environmental harm. What these examples suggest is that assessing the worth of policy initiatives has at least three dimensions – each of them outside the remit of doctrinal analysis properly so-called. The first is conceptual clarity: are ideas like 'welfare dependency' clear enough to lend itself to practicable solutions by government action in the first place? The second concerns the plausibility of factual assumptions: are there people in significant numbers who can be described as 'welfare dependant'? The third dimension concerns normative plausibility (i.e. the fit with accepted political and moral values): is proportional representation fairer or a better fit for the democratic ideal than the 'first past the post' system of electing the members of parliament?

Importantly for us, this does not simply mean that legal scholarship must pass certain issues on to other disciplines. The judgement on the worth of policy initiatives cannot be simply outsourced. We are talking about judgements of feasibility that put the professional credibility of legal scholars on the line. That is why they need to build competence by way of interdisciplinary engagement. They need to be able to find their way around the

52. This is mainly because the rationality of legal materials can be a hotly contested matter itself.

53. Legal scholars, of course, can be vigorous advocates of law reform. What I claim is that their preferences for the desired changes in the content of law or its institutional structures cannot be explained from considerations internal to doctrinal knowledge. They reflect political choices that go well beyond the concern with cultivating doctrinal knowledge.

54. In Britain, this typically takes the form of pointing out some glaring flaw in the way the case law has developed in a particular area. Here is a paradigmatic example: 'The law on recovery in negligence for psychi atric injury where the pursuer has not suffered any physical injury but has witnessed the death or injury of another has been described as "confusing and arbitrary", a "panoply of artificial rules", "irrational and unsympathetic", and "the area where the silliest rules now exist and where criticism is almost universal". In fact, it is difficult to think of another branch of delict that has been subject to such extensive condemnation.' F. Leverick, 'Counting the Ways of Becoming a Primary Victim: *Anderson* v. *Christian Salvesen Plc*', 11 *Edinburgh Law Review* 258 (2007).

55. I elaborate on a point here that I developed elsewhere. See M. Bódig, 'Doctrinal Knowledge, Legal Doctrinal Scholarship and the Problem of Interdisciplinary Engagement', in S. van Praagh and H. Dedek (eds.), *Stateless Law?: Evolving Boundaries of a Discipline* (2015).

56. Initially, UK anti-discrimination law only addressed what we now call 'direct discrimination'. Prohibiting indirect discrimination as well was one of the pivotal doctrinal developments in this area, and it happened when Sex Discrimination Act of 1975 was enacted.

disciplines related to their own fields of law (be it ecology, political sociology, or economics). Otherwise, as I have pointed out, they risk losing some of their influence over the way the law will change.

As I have mentioned above, it is indeed more and more typical that contemporary legal scholars build competence in other disciplines along these lines. Many of them see themselves experts for the academic validation of policy preferences, as well as experts of doctrinal analysis. I believe that this is an implication of an interesting (and insufficiently analysed) shift in contemporary disciplinary practice. We witness the growing significance of interdisciplinary fields of study (on migration, international conflicts, sustainable development, climate change policy, energy, etc). Legal scholars gravitate towards these fields (not least because of the attractive opportunities for research funding), and combining doctrinal and policy expertise makes it much easier to establish themselves in any one of them.[57]

The third paradigm of interdisciplinary engagement may well be the most significant from a methodological point of view – the most revealing about the character of doctrinal knowledge, of legal scholarship, and of the way doctrinal disciplinarity fits into the broader academic environment. The shuffling between doctrinal analysis and the elucidation of the background to policy challenges is rich in implications for the ways knowledge from different disciplines (doctrinal and non-doctrinal) can be reconciled with each other. Focusing on the third paradigm might offer the best vantage point to understanding the strategic importance of getting the terms of interdisciplinary engagement right in legal scholarship. It also helps us understand that there is no inherent tension between the concerns of legal scholarship and policy-driven approaches to practical challenges. And it certainly does not make it plausible to think that the law is a mere institutional tool for implementing policies.

Even though this pattern of interdisciplinary engagement can have a pervasive impact on the agendas for individual legal scholars, the increased concern with policy challenges (that animates the third paradigm) does not obscure the distinctive character of legal scholarship. Even in the context of intense interdisciplinary communication, the primary focus for legal scholarship remains markedly different from other disciplines. When it comes to questions about the ways in which the changing social environment and the shifting commitments to political values interact with the normative functioning of legal institutions, we might be concerned with two clearly different sets of considerations. We can be interested in how the law affects its social environment and whether it offers a viable opportunity to institutionalise important political ideals. Or, alternatively, we can be concerned with the ways in which the changing social and political environment affects the conditions of maintaining the doctrinal coherence of the normative elements of law. That is, we might want to know the consequences *for the law* of the shifting patterns of knowledge about social and political relations, ideals and attitudes, as well as institutional realities. Legal scholarship (due to its noninstrumentalist take on law) stands alone among the disciplines with its obvious focus on the latter point. Without its contribution, the question of how the social environment affects the law (as opposed to how the law affects the social environment) and what can and cannot be done without undermining the doctrinal structures of law would be left without adequate academic reflection.

It is also important to point out that my characterisation of the third paradigm is designed to draw a marked contrast to an alternative model of interdisciplinary engagement that has proved enduringly attractive among legal scholars. This alternative model would derive the opposite conclusion from the inherently plausible idea that legal scholarship needs to engage more with the social and political environment in which the law operates. It concludes that legal scholarship must learn more about the social consequences of operating the characteristic legal mechanisms. Memorably, American legal realists often argued along these lines,[58] and Richard Posner also formulated a similar position when assessing how legal theory and legal scholarship could be helpful for legal practitioners. Posner stands for a shift towards a more 'consequentialist' paradigm in legal scholarship.[59]

The attraction of this line of reasoning is understandable. It is undeniable that those who make legislative or judicial decisions must be sensitive to the social consequences of their actions (the impact they make on actual people's lives). If legal scholarship engages with the way those decisions affect the law, it is tempting to think that it will have to replicate this sensitivity to social consequences. The problem with this logic, however, is that it ignores the specific epistemological character of legal scholarship. It ignores what legal scholarship can do well: understanding the consequences of institutional changes for doctrinal knowledge (as opposed to understanding the impact of law on social and political changes). In fact, when it comes to the impact the law makes on society, other disciplines – and sociology and economics in particular – are far better positioned than legal scholarship. And it is certain to stay that way. Even though what these disciplines figure out about the social consequences of law are a huge inspiration for legal scholarship, we must accept a natural division of labour here. Legal scholarship must focus on what it can do better than other disciplines.

57. [In contemporary universities, we see the emergence of] interdisciplinary research centres that are welcoming for legal scholars (e.g....). Narrow doctrinal focus, however, is not rewarded.

58. *See, e.g.*, K. Llewellyn, 'Some Realism about Realism', 44 *Harvard Law Review* 1222, at 1249 (1931).

59. As is well known, this is a strong motive in Posner's writings – in relation to the theoretical support judges need from the academia. *See, e.g.*, R. Posner, 'The Problematics of Moral and Legal Theory', 111 *Harvard Law Review* 1637 (1998).

5 Conclusion

I have organised this analysis around three paradigms of interdisciplinary engagement in legal scholarship: (1) understanding better the 'footprints' of other disciplines in law, (2) managing discursive encounters that can generate frictions between disciplinary perspectives, and (3) building the knowledge base to handle challenge of validating policy initiatives for their feasibility. My claims about the paradigms were grounded in an account of the disciplinary character of legal scholarship that puts the commitment to cultivating doctrinal knowledge about the law at the centre. I have focused on the challenges legal scholars cannot tackle without communicating with other disciplines or even without building some competence in other disciplines. Legal doctrinal scholarship is in a constant need of renewing its arsenal of doctrinal constructs. Without it, it would struggle to deal with the influx of knowledge into legal scholarship from other disciplines. Interdisciplinary engagement necessitates as well as facilitates this renewal. It remains crucial for finding the adequate knowledge base for legal scholarship, as well as for enabling legal scholarship to adapt to its ever-changing social and disciplinary environment.

My analysis was only preliminary in important respects. Most importantly, I focused on demonstrating the analytical distinctions between the paradigms. That meant setting aside issues of their overlaps and intersections and the ways in which interdisciplinary engagement can move (or even have to move) from one paradigm to the other. It can turn out that philosophical accounts of corrective justice are not that supportive of the existing doctrinal structures of the law negligence. What starts off as an attempt to gain a better understanding of what is in the law may end up managing frictions between disciplinary perspectives. Managing the frictions between disciplinary perspectives can lead to challenges of institutional design, and thereby creating space for a different kind of interdisciplinary engagement. And when a policy initiative comes to be embedded in the law (like it is happening to the 'precautionary principle' in the context of environmental law right now[60]), handling policy challenges can morph into trying to understand better what is in the law already. Many important implications of my analysis can only be clarified in light of a more comprehensive analysis that factors in the complex dynamics of actual interdisciplinary scholarship. That more comprehensive analysis, however, was beyond the scope of the present paper.

60. *See, e.g.*, Consolidated Version of the Treaty on the Functioning of the European Union, 2012, Article 191(2). *See also* N. de Sadeleer, 'The Precautionary Principle in EC Health and Environmental Law', 12 *European Law Journal* 139 (2006).

The Incorporation Problem in Interdisciplinary Legal Research

Some Conceptual Issues and a Practical Illustration

Theunis Robert Roux*

Abstract

The seriousness of the incorporation problem in interdisciplinary legal research, this article argues, depends on how legal research is understood. If legal research is understood as a single, inherently interdisciplinary discipline, the problem largely falls away. On this view, the incorporation of other disciplines into legal research is what legal academics have for the last 40 years already successfully been doing. If, on the other hand, legal research is best conceived as a multi-disciplinary field, consisting of a core discipline – doctrinal research – and various other types of mono-disciplinary and interdisciplinary research, the incorporation of other disciplines presents real difficulties. For legal academics engaged in socio-legal research, in particular, two problems arise: the practical problem of trying to address a legal professional and academic audience at the same time and the philosophical problem of trying to integrate the internal perspective of doctrinal research with the external perspective of other disciplines. In the final part of the article, these practical and philosophical difficulties are illustrated by reference to the author's research on the politics of judicial review in new democracies.

Keywords: legal research, doctrinal research, interdisciplinary, incorporation problem, comparative constitutional law

1 Introduction

Can the conceptual frameworks and methods of other disciplines be incorporated into the discipline of law? Yes, absolutely, or no, definitely not. It all depends on how the discipline of law is understood and, indeed, on whether there is such a thing as 'the discipline of law' at all. If law is understood as a single, inherently interdisciplinary discipline that has been progressively expanding over the last 40 years to encompass a wide variety of types of research,[1] incorporation does not really present a problem. On this view, incorporating the conceptual frameworks and methods of other disciplines is what legal academics have already been doing: taking bits from this discipline here, pieces from that discipline there, and using those bits and pieces to deepen our understanding of law's role in society. To be sure, legal academics have exposed themselves in this way to the charge of interdisciplinary dilettantism – of having become academic dabblers with no real conceptual frameworks and methods of their own. This charge can be met, however, by improving the rigour with which other disciplines are used, and by emphasising legal academics' continuing connection to the legal profession.

If, on the other hand, we understand the research that legal academics have been doing as belonging, not to a single discipline, but to a variety of disciplines and interdisciplines, everything changes. For then, legal research is best conceived as a multidisciplinary field consisting of a core discipline – doctrinal research – and two other main types of research: (i) interdisciplinary research that combines doctrinal research and the conceptual frameworks and methods of one or more other disciplines and (ii) research about law and legal institutions that has no doctrinal component. On this understanding, incorporation does present something of a problem, at least for legal academics who are interested in the first of these two other main types of legal research, or what is commonly called 'socio-legal research'. For these academics, one of two things is at risk of happening: either the conceptual frameworks and methods of the other disciplines on which they are drawing might become distorted under the pressure of doctrinal incorporation or the reverse might occur – the doctrinal part of their research might become subsumed under the non-doctrinal part, to the point where their research ceases to be of much value to the legal profession, whatever wider scholarly value it may have.

The rest of this article sets out the thinking behind this conception of the incorporation problem. The next section addresses the disciplinary question. While legal academics have always drawn on other disciplines, it is argued, it is wrong to conclude from this that legal research is an inherently interdisciplinary discipline. Doctrinal research, for its part, is best understood as research that is directed at the construction of legal doctrine in a particular legal system. Such research characteristically draws on other disciplines to improve the rational coherence and social efficacy of law. Provided

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1. *See*, for example, A. Bradney, 'Law as a Parasitic Discipline', 25 *Journal of Law & Society* 71 (1998).

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doctrinal researchers respect the conventionally accepted reasoning techniques of the legal tradition in which they are working, there is no reason why such research should be regarded as interdisciplinary. It follows that legal research as a whole is best conceived as a multidisciplinary field in which doctrinal research is but one of many mono-disciplinary and interdisciplinary forms of research being pursued.

The paper then moves on to consider the incorporation problem when legal research is understood in this way. The problem does not really concern doctrinal researchers, it is argued, because their use of other disciplines by definition occurs on law's terms, meaning that the methodological standard they need to observe is an entirely internal doctrinal standard. Rather, the problem affects those who are engaged in the particular kind of socio-legal research that legal academics do: research that attempts to integrate the internal doctrinal perspective of the trained lawyer with the external perspective of one or more other disciplines. For these researchers, the incorporation problem is partly a practical problem of belonging – of being forced to choose between two audiences: the legal-professional community and the wider academic community. It is also partly a philosophical problem in as much as it raises the question, common to all interdisciplinary research, of whether it is possible to participate in two different practices at the same time.

The final section of the article illustrates this understanding of the incorporation problem by referring to my own research area: the politics of judicial review. Like many other legal academics, I became frustrated fairly early on in my career with a purely doctrinal approach. I wanted not just to participate in the construction of constitutional law doctrine from an internal, legal-professional perspective but also to place the work of the court whose jurisprudence I was studying – the South African Constitutional Court – into a broader, comparative perspective. That interest led me to begin reading political science accounts of judicial decision-making in the United States. I found those accounts fascinating because they were so dismissive of the perspective that I had taken for granted: that law is capable of constraining judicial decision-making in a way that sets it apart from politics. After 15 years of research in this area, I think I may have found a way of integrating my specifically South African understanding of the constraining influence of law with an American political science understanding of constitutional courts as deeply implicated in politics. Not just that, but I think that the interdisciplinary conceptual framework I have developed is capable of delivering insights that each of these disciplines on its own is not. I should be happy with that, but I am plagued by a concern that I have lost both my potential audiences along the way – that my work is now not doctrinal enough to be of much interest to South African (or even comparative) constitutional lawyers and insufficiently sophisticated from a methodological point of view to be of much interest to political scientists.

2 Defining Law as a Discipline

As Sanne Taekema has argued: 'Interdisciplinarity does not make sense without the idea of disciplinarity. To say anything sensible about interdisciplinary research into law, it is therefore necessary to have an idea of what the discipline of law is'.[2] This is clearly correct. The nature of law as an academic discipline, however, is contested, and the severity of the incorporation problem differs accordingly.

In the editors' introduction to this special issue, Kathleen Sullivan's 2002 *Michigan Law Review* foreword is cited in support of the proposition that 'legal doctrinal research cannot be other than interdisciplinary by nature'.[3] It is not clear, however, that this is what Sullivan was arguing. Her actual claim is that 'the discipline of law is itself multidisciplinary, built upon if not reducible into elements of the humanities and social sciences'.[4] That claim seems to be addressing legal research as a whole rather than doctrinal research in particular. Be that as it may, the idea that *any* discipline may be inherently interdisciplinary is controversial.[5] To be sure, many new disciplines do arise from the combination of two or more disciplines – like biochemistry, for example, which has its origins in the separate disciplines of biology and chemistry. But it is a defining quality of a discipline that it must possess its own distinctive conceptual frameworks and methodologies.[6] However much it draws on existing disciplines, if a form of academic research is to be recognised as a discipline in its own right, it must transcend the disciplines on which it is drawing to create some larger whole. Disciplines on this view of things may have interdisciplinary origins, but it is conceptually impossible for there to be such a thing as an interdisciplinary discipline.

This position may come across as a little dogmatic. Definitions of the term 'discipline' are largely a matter of taste, and some scholars might prefer to define disciplines so as to leave space for the notion of an interdisciplinary discipline. I thus have no desire to defend the above conception as the 'correct' one. There madness (and great deal of fatuousness, too) lies. In relation to the editors' specific claim that 'legal doctrinal research cannot be other than interdisciplinary by nature', how-

2. S. Taekema, 'Relative Autonomy: A Characterization of the Discipline of Law', in B. van Klink and S. Taekeman (eds.), *Law and Method* (2011) 33.
3. *See* Editors' introduction to this special issue.
4. K.M. Sullivan, 'Foreword: Interdisciplinarity', 100 *Michigan Law Review* 1217, at 1218-1219 (2002).
5. I can understand (although I do not completely agree with) the claim that socio-legal research is inherently interdisciplinary, for there one is talking about a field to which a number of researchers are contributing, either from within their different disciplines (making the field strictly speaking multidisciplinary) or by combining two or more of those disciplines (interdisciplinary research proper). But to say that a single discipline is inherently interdisciplinary challenges conventional notions of what a discipline is.
6. S. Taekema and B. van Klink, 'On the Border: Limits and Possibilities of Interdisciplinary Research', in B. van Klink and S. Taekema (eds.), *Law and Method* (2011) 7.

ever, I do have a bit of an axe to grind – or three to be precise. Firstly, I think that this claim gets the essence of doctrinal research wrong. At the very least, the alternative possibility – that doctrinal research, in drawing on other disciplines, simply absorbs them into its own logic – needs to be properly considered. Secondly, the proposition that *doctrinal* research is *inherently* interdisciplinary needs to be carefully distinguished from the proposition that *legal* research is today *characteristically* interdisciplinary. That alternative proposition seems to me more defensible – not because legal research is an exception to the rule that disciplines may not be inherently interdisciplinary but because legal research is not a discipline, but rather a convenient, catch-all term for the research that legal academics do. Thirdly, the claim that doctrinal research is inherently interdisciplinary makes it hard to understand the particular kind of interdisciplinary research that legal academics do, which combines doctrinal research with research that draws on the conceptual frameworks and methods of other disciplines. If doctrinal research is inherently interdisciplinary, what is the difference between that form of research and socio-legal research? The rest of this section grinds each of these axes in turn.

Consider first my worry about the editors' claim that 'legal doctrinal research cannot be other than interdisciplinary by nature'. The lead-in paragraph to this statement reads:

> First, there is no such thing as purely monodisciplinary doctrinal analysis. To study and interpret legal materials, researchers have to rely on history and linguistics. To deal with apparent contradictions, they need to apply logic, argumentation theory, and philosophy. To understand the purpose of legal regulations, they must understand the society in which law is embedded, and the human behaviour it attempts to regulate. This means that they need to incorporate behavioural disciplines such as economics, sociology, and psychology. Finally, as Dworkin has convincingly argued, in order to construct legal doctrine in its best light, legal analysis must incorporate moral and political philosophy.

My difficulty with this argument is that it uses the fact that doctrinal researchers 'rely' on, 'apply', 'understand', and 'incorporate' knowledge from other disciplines as conclusive support for the proposition that doctrinal analysis cannot be 'purely mono-disciplinary'. As indicated, that way of proceeding ignores the alternative understanding that, in drawing on other disciplines, doctrinal researchers are not conducting interdisciplinary research, but simply deploying the accepted reasoning techniques of the legal tradition in which they are working. On one famous view, after all, law's characteristic mode is to be 'cognitively open' to other social systems but 'normatively closed'.[7] In just the same way, doctrinal research may draw on knowledge produced by other disciplines, and even mimic their methods, without necessarily becoming interdisciplinary. If a doctrinal researcher makes a philosophical point about the meaning of a legal concept, for example, that is not necessarily interdisciplinary research. Its status as such depends on whether an argument like that can be made according to conventionally accepted reasoning techniques in the legal tradition concerned. If it can, such research is 'purely mono-disciplinary' in the sense that it remains within the confines of acceptable doctrinal argument in that legal tradition.

Underlying my difficulty with the editors' approach, it should by now be clear, is a particular understanding of the nature of doctrinal research as an academic discipline. As I have argued at greater length elsewhere,[8] the crucial defining feature of doctrinal research is that it is offered as a participant act in a particular legal system.[9] Unlike other academic disciplines, doctrinal researchers are not primarily addressing a scholarly community, but a legal-professional community engaged in a joint enterprise of constructing legal doctrine. Their function in that community is not the same, to be sure, as legislatures and judges. They are systematisers and refiners, not primary producers. That entails certain differences of perspective. Legal academics, for example, have greater freedom to explore the connections between cases and the impact of new statutory frameworks on the legal system as a whole. They also have a role as change agents in the legal system, using their greater distance from practice and the time they have for reflection to make suggestions about how the law might be improved. Even when criticising the way a particular case has been decided or a statute's attempts to reform the law, however, doctrinal researchers need to present their arguments in a form that legal practitioners find intelligible and consonant with accepted reasoning techniques. This understanding of doctrinal research as a participant act in a particular legal system means that the methodological standards for doctrinal research are set by the legal tradition in which the researcher is working.Unlike other academic disciplines, doctrinal research has no transnational standards or claim to universal applicability. Rather, what constitutes sound research is determined by highly localised standards peculiar to the legal tradition, and even the particular area of law,[10,11] in which the researcher is working. Provided the doctrinal researcher respects those standards, the fact that his or her research may not be convincing

7. N. Luhmann, *Law as a Social System* trans. K.A. Ziegert, ed. F. Kastner, R. Nobles, D. Schiff & R. Ziegert (2004).

8. Theunis Roux, 'Judging the Quality of Legal Research: A Qualified Response to the Demand for Greater Methodological Rigour' (2014) 24 *Legal Education Review* 173.

9. *See* C. McCrudden, 'Legal Research and the Social Sciences' (2006) 122 *Law Quarterly Review* 632, 633 ('traditional legal analysis adopts an "internal" approach', which involves 'the analysis of legal rules and principles taking the perspective of an insider in the system').

10. For a similar view, *see* D. Nelken, 'Why Must Legal Ideas Be Interpreted Sociologically? Roger Cotterrell and the Vocation of Sociology of Law', in R. Nobles and D. Schiff (eds.), *Law, Society and Community* (2014) 23, at 28.

11. See Roux, above n. 8.

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to a researcher from another discipline is irrelevant. At least, the answer to any such criticism is the same answer that an economist would give to criticism from an historian, or a political theorist to criticism from an empirical social scientist: that is not the way we do things here.

It follows further that, if the legal tradition in which the doctrinal researcher is working supports a particular way of using knowledge from another discipline, it is open to the doctrinal researcher to adopt that method, however incompetent this may seem to scholars within that other discipline. Equally, if a doctrinal researcher can show that the way the legal tradition in which he or she is working uses knowledge from other disciplines is deficient, measured by that tradition's standards, this should be pointed out. But that would again be with a view to participating in the construction of legal doctrine in a particular legal system. Doctrinal researchers' primary fidelity, in other words, is to the standards, including the internal values and purposes, of the legal tradition in which they are working, not to the methodological standards of the disciplines on which they may from time to time draw.

Of course, the internal values and purposes of a legal tradition usually include a commitment to improving the way justice is administered (or 'making the law better', as it is sometimes put). To that extent, it is open to the doctrinal researcher to argue that the values and purposes of his or her legal tradition would be better served if knowledge from another discipline were used more rigorously.[12] Even in this case, however, such an argument would not entail a holus bolus subordination of the standards of the legal tradition in which the doctrinal researcher was working to the standards of the other discipline. Only so much of the other discipline's standards as were necessary to promote the particular legal tradition's values and purposes would need to be respected. The aim of this type of doctrinal research, in other words, would not be interdisciplinary synthesis or even dialogue, but one-way borrowing with a view to the improvement of legal doctrine.

This understanding of doctrinal research entails certain consequences for law as an academic discipline (my second axe). Most importantly, the diversification of legal research over the last 40 years should not be understood as an expansion of the discipline of *doctrinal* research, but as an expansion of *legal* research – the sum total of research activities in which legal academics are engaged. But legal research in this expanded form is not an academic discipline according to either of the main criteria: it has no governing conceptual framework and no dominant methodology. Rather, it is a collection of disciplines and interdisciplines: doctrinal research as the core discipline, legal academics' version of socio-legal research (which combines doctrinal research with at least one other discipline), sociology of law (the mono-disciplinary study of law from a sociological perspective), legal history, comparative legal research, legal philosophy (which is today typically treated as a sub-discipline of philosophy), and a variety of critical approaches (which are often concerned with doctrine, but for purposes of deconstructing rather than constructing it). In addition to this, there are the various forms of 'law and __' research in which legal academics and other scholars are engaged, much of which is mono-disciplinary research that just happens to be about law and legal institutions.[13]

There is no unifying conceptual framework for all these approaches and no dominant methodology that they all employ. It is thus wrong to think of legal research in the broad as a discipline. This is what Sullivan meant, I think, when she wrote that 'the discipline of law is itself multidisciplinary, built upon if not reducible into elements of the humanities and social sciences'.[14] Subject to my point about disciplines not being inherently interdisciplinary, this is an accurate description of what legal research has today become: a multidisciplinary field that is unified only by the fact that the research being conducted within it has something to do with law and legal institutions.

Within that broad multidisciplinary field, as several studies have shown,[15] the most prominent form of research being conducted by legal academics in the Anglo-American world is socio-legal research. The terminology is somewhat confusing because socio-legal research is itself a multidisciplinary field that includes contributions from scholars in sociology, anthropology, political science, and so on.[16] How can the typical research that legal academics do belong to a field to which they are only one of many contributors? The answer is that legal academics mostly engage in one very particular kind of socio-legal research: interdisciplinary research that combines doctrinal understandings with insights from other disciplines. Their specialisation within the broader field of socio-legal research, and the reason why they are able to do this type of research from within the legal academy, comes from the fact that they use their legal-professional training to research the interrelationship between law and society. Whereas a pure sociologist of law might be interested, say, in the way attitudes to law affect bureaucratic decision-making, a legal academic might be interested in whether a

12. I leave aside here the question whether the internal values of a legal tradition are 'normatively insulated from other values' (as it was put to me by one of the anonymous reviewers of this piece). Of course, as a sociological matter, the internal norms of a legal tradition are exposed to influence by broader societal values. The point here is simply that, when it comes to assessing the soundness of a doctrinal argument, it is the internal values of the legal tradition that matter; however, much they may have been influenced in the course of their development by broader societal values. My position, in other words, is not that law is completely autonomous from other social systems but that the standards for assessing the quality of doctrinal research are internal legal standards.

13. *See* further Roux, above n. 8.

14. Sullivan, above n. 4, at 1218-1219.

15. *See* F. Cownie, *Legal Academics: Culture and Identities* (2004).

16. L.M. Friedman, 'The Law and Society Movement', 38 *Stanford Law Review* 763, at 773 (1986); S. Scheingold, 'A Home Away from Home: Collaborative Research Networks and Interdisciplinary Socio-Legal Scholarship', 4 *Annual Review of Law and Social Science* 1 (2008).

particular administrative law rule has actually had the effect on bureaucratic decision-makers that the court developing the rule anticipated.[17]

This point is the segue to my third and final axe: the complaint that, if doctrinal research is understood as being inherently interdisciplinary, it is not at all certain what the difference is between doctrinal research and the particular kind of socio-legal research that legal academics do. Perhaps this is what is meant by the statement that 'we're all socio-legal now'.[18] But there are still legal academics (including some of my colleagues) who would strenuously deny that their research is socio-legal, and the basis for that denial has to do with the difference between doctrinal research as defined above and the legal-academic variant of socio-legal research. For the pure doctrinal researcher, reference to other disciplines always occurs on law's terms,[19] with a view to improving the quality of legal doctrine. There is never any thought of subordinating the conventionally accepted reasoning techniques in the legal tradition in which they are working to the methods of another discipline. Even entering into a productive exchange between another discipline and legal doctrine is not really what their research is about. Rather, the insights and methods of the other discipline are used only in so far as, and to the extent that, they assist in shedding light on a particular doctrinal problem.[20] The conception of the problem and the methods for resolving it are determined from within the discipline of doctrinal research.

The flipside of this point is that the very idea of interdisciplinarity in legal research depends on there being some distinctively legal discipline capable of entering into dialogue with other disciplines. Douglas Vick expresses this point well, I think, when he says that: 'In fact, without the strong and distinctive disciplinary basis for legal inquiries provided by doctrinalism, there would be no benchmark against which interdisciplinary experimentation could define itself.'[21] In the same vein, we might ask, what was all the fuss about when the field of socio-legal studies was launched? If doctrinal research is inherently interdisciplinary, why did that development initially meet with such resistance from doctrinalists, and why did socio-legal scholars breathe such a collective sigh of relief when they finally broke free of the doctrinal shackles that bound them? The answer can only be that the shackles were real and that they survive to this day, although they now bind only those who choose to be bound by them.

17. For the court developing the rule, its precise sociological effects might not have been important. Where the legal academic examines those effects and goes beyond what was doctrinally required for purposes of critiquing the rule, his or her research is properly described as socio-legal.
18. R. Collier, '"We're All Socio-Legal Now": Legal Education, Scholarship and the "Global Knowledge Economy" – Reflections on the UK Experience', 26 *Sydney Law Review* 503 (2004).
19. For a similar idea, *see* J.M. Balkin, 'Interdisciplinarity as Colonization', 53 *Washington & Lee Law Review* 949, at 958 (1996) (giving an example of 'legal work' that looks interdisciplinary, but is in 'another sense' not because 'it does not stray very far from two familiar lawyerly tasks: arguing over which rule better serves public policy and finding additional citations to put in the footnotes of one's brief').
20. *Cf.* the idea of using other disciplines 'heuristically' in Taekema and van Klink, above n. 6.
21. D.W. Vick, 'Interdisciplinarity and the Discipline of Law', 31 *Journal of Law & Society* (2004) 163, at 166.

3 The Real Nature of the Incorporation Problem in Interdisciplinary Legal Research

With this understanding of legal research in place, the dimensions of the incorporation problem in interdisciplinary legal research become clearer. The real problem is not what it is said to be in the editors' introduction, viz.: 'How can we translate and incorporate the various non-legal disciplines and their findings into the language of legal doctrine?' Rather, the problem is whether it is possible to do genuinely interdisciplinary research when one of the disciplines involved is doctrinal research.

Why does the editors' problem fall away? On the understanding of doctrinal research set out here, the incorporation of non-legal disciplines into doctrinal research necessarily occurs on law's terms. As practitioners of a discipline that has always used knowledge and methods from other disciplines as part of its argumentative machinery, doctrinal researchers are expert cannibalisers of material from other disciplines.[22] From the point of view of legal doctrine, there is nothing particularly untoward about this. Legal doctrine's primary interest is not fidelity to the disciplines on which it draws, but fidelity to law. So the only limit on the incorporation of other disciplines from the point of view of legal doctrine is the need to ensure that other disciplines are used in a way that promotes the coherent and socially efficacious development of the law. The methodological standards that doctrinal researchers need to observe in this respect are the methodological standards of the legal tradition in which they are working.

I would place only two qualifications on this argument. First, doctrinal researchers play a particular role within the legal-professional community, which I have elsewhere described as that of a 'doctrinal clean-up team'.[23] They are the systematisers and the ex post rationalisers, making coherent and smoothing out what legislatures and judges have done in the heat of parliamentary debate or case-specific law making. As part of that general clean-up role, doctrinal researchers have a heightened duty to point out instances where knowledge from other disciplines has been misapplied in ways that have produced sub-optimal results for the legal system. Thus, a doctrinal researcher might argue that Judge So-

22. I prefer the term 'cannibalising' to 'colonising' to reflect the fact that doctrinal research has no imperial ambitions. *Cf.* Balkin, above n. 19, at 964-67.
23. *See* Roux, above n. 8.

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and-So relied on this particular piece of research from that discipline in support of such and such a conception of a legal norm, but the research, properly understood, does not actually support that understanding of the legal norm. In arguing thus, however, the doctrinal researcher is not primarily motivated by the desire to maintain the standards of the incorporated discipline, but by the desire to improve legal doctrine.

As to their own suggestions for reform, doctrinal researchers' status as academics within the university makes them more susceptible than judges to criticism that they have misunderstood the disciplines on which they are drawing. Where the doctrinal researcher is trying to make a contribution to those disciplines, such criticism is warranted. But where the doctrinal researcher is doing purely doctrinal research – focused only on the improvement of legal doctrine – such criticism may be misplaced. At least, the mere fact that concepts or methods from another discipline have been used in a way that researchers from that discipline think lacks rigour is not conclusive. The standard for incorporation is an internal legal standard, and doctrinal researchers are best placed to judge whether that standard has been met.

The second qualification on the argument that the incorporation of non-legal disciplines into doctrinal research necessarily occurs on law's terms is that doctrinal research, as a discipline, has an interest in continually improving its use of other disciplines. A particular legal tradition's internal standards for drawing on other disciplines are not static. Whereas, in 1950, say, a judge in Australia might have gotten away with an armchair-observer argument about the likely social effects of a legal rule, today he or she might be expected to support such an argument by reference to empirical research. This sort of phenomenon is a reflection of the evolution of legal traditions and their tendency to require ever more sophisticated reasoning techniques over time. But there is nothing in this process that means that doctrinal research is necessarily subject to the full panoply of methodological standards applied in other disciplines.[24] The evolution occurs at the legal tradition's own pace, on its own terms, and doctrinal researchers are beholden to those internal, evolving standards, not to the standards of other disciplines.

As noted, doctrinal researchers' particular function within the legal system means that they may play a vanguard role in this evolutionary process. As rationalisers and systematisers, they need continually to point out to judges and legislators how they might make better use of knowledge from other disciplines. They need in this sense to push the boundaries of their discipline by challenging all participants to become more sophisticated. As educators, doctrinal researchers also have a role to play in training their students to make better use of knowledge and methods from other disciplines. Such interventions not only assist in making the students more effective practising lawyers but also enable doctrinal researchers to play the role of change agents in the legal profession. A successful piece of doctrinal research, on this view, is one that expands lawyers' horizons by showing how knowledge from other disciplines may be incorporated in a way that promotes the fairness or social effectiveness of law.

Subject to these two qualifications, the answer to the question of how other disciplines and their findings may be translated and incorporated into doctrinal research is that this must be done in the way doctrinal researchers have always done it: by following the methodological standards set by the legal-professional community of which they are a part. Since doctrinal researchers by definition have no interest in contributing to the disciplines on which they are drawing, they need not observe all of their methods to the nth degree. When faced by the criticism, as they increasingly are, that their research does not meet the standards set by other disciplines, they may legitimately respond: we are practitioners of a separate discipline, with its own standards.[25] What doctrinal researchers need to get better at, of course, is explaining those standards to researchers from other disciplines. But that is a different question.

As noted, the real incorporation problem in interdisciplinary legal research is whether it is possible to do genuinely interdisciplinary research when one of the disciplines involved is doctrinal research. The essence of the problem here is that researchers who engage in the typical kind of interdisciplinary research in which legal academics are engaged – socio-legal research – are pulled in two seemingly incompatible directions. On the one hand, they need to satisfy the standards of the legal tradition in which they are working – to be faithful enough to conventionally accepted methods of legal reasoning that their doctrinal arguments carry sufficient weight to be accepted. On the other hand, they need to satisfy the standards of the scholarly literature to which they are contributing, a literature whose standards are in the nature of things policed by scholars from other disciplines. Straddling this divide is very difficult, if not impossible, for two main reasons.

The first reason is illustrated by Judge Harry Edwards's famous attack on the irrelevance of much contemporary legal-academic research.[26] For many judges and legal professionals, Judge Edwards argued, legal academics' increasing interest since the 1970s in other disciplines has taken them further and further away from their primary social function: to act as a sounding board and source of support for the legal profession. As much as legal academics may welcome the fact that their research is becoming more sophisticated in a scholarly sense, many legal professionals today think that their research is out of touch with the practical problems facing legal decision-makers. While it may be very interesting to

24. My position in this respect thus differs from that set out in K. Burns and T. Hutchinson, 'The Impact of "Empirical Facts" on Legal Scholarship and Legal Research Training', 43 *The Law Teacher* 153 (2009).

25. *See* Roux, above n. 8.

26. H.T. Edwards, 'The Growing Disjunction between Legal Education and the Legal Profession', 91 *Michigan Law Review* 34 (1992).

know, for example, whether judges are influenced by their class position when deciding property rights disputes, this may be less interesting to judges than whether s 55(1)(f) of the Invented for Purposes of this Example Land Act really means that they have no discretion to issue an eviction order.

Legal academics may, of course, defend themselves against this kind of charge by confronting it head on. They can attempt to show why the problem they have identified really is a problem for the legal system, even though those involved in the practical workings of that system have not taken notice of it yet. That is part of legal academics' vanguard function, as noted earlier. But there is a point at which the pursuit of scholarly knowledge for its own sake comes into tension with the practical requirements of the legal profession. Just as much as we might want to say that the legal profession should not exclusively determine what questions legal academics research, so we might want to say that practising lawyers are under no obligation to find everything that legal academics do interesting. Practising lawyers tend to lead busier, more stressful lives than legal academics, and thus they are entitled to expect legal academics to write in a more focused, economical way if they want to make an impact. The more they respond to that legitimate expectation, however, the less credibility legal academics' work tends to have in the scholarly community.[27]

That is the practical dimension of the problem. The second reason why straddling the divide between legal doctrine and an external body of social scientific or humanities knowledge is difficult is a more philosophical one. It concerns the question whether it is possible to be simultaneously inside the law for purposes of contributing to legal doctrine and outside the law for purposes of contributing to another academic discipline.[28] On the understanding of legal doctrine propounded here, doctrinal research is a participant act in a particular legal tradition, in which the legal researcher accepts the constraints imposed by an attitude of fidelity to law in that tradition. Importantly, this internal perspective is not just an *interpretive* perspective in the ordinary social science sense[29] but also a *participatory* perspective in as much as the doctrinal researcher intends to contribute to the practice of law in the legal tradition concerned.[30]

How may this perspective be integrated with non-interpretive or interpretive but non-participatory perspectives? 'Can you simultaneously operate within a practice', as Stanley Fish puts the point, 'and be self-consciously in touch with the conditions that enable it?'[31]

Fish's question suggests that the incorporation problem in interdisciplinary *legal* research may be no different to the incorporation problem in all interdisciplinary research: one of the disciplines involved is always going to come out on top and that is typically going to be the discipline in which the researcher was first trained. This is what one might call the 'spectacles' view of the problem, where training in a particular discipline is understood as a form of socialisation that is very hard to shake. Even if researchers take two undergraduate degrees, say, or do specialised postgraduate courses in the methods of another discipline, the discipline that gets to their untrained mind first is going to be the discipline through which they see the world, and through which they ineluctably translate the insights of the second discipline, even as they attempt to conduct their research in a scrupulously even-handed way.

If there is a special dimension to this problem in the case of interdisciplinary legal research, it is that the two communities between which the legal researcher is trying to move are very different: the one a mixed legal-professional/academic community and the other a pure academic community. This may entail certain added difficulties. The knowledge system to which legal researchers are contributing, for one, is not the privately produced, corrigible work product of a purely academic discipline, but the state-sanctioned legal system, with its corpus of authoritative norms and its conventionally accepted ways of working with those norms. The practical dimension to this, as we have seen, is the problem of moving between two very different audiences, each with its own expectations and standards. The philosophical dimension is that the two audiences are engaged in very different sorts of practices: one that is about the construction of legal doctrine and another that is about the accumulation of scholarly knowledge.

Rather than trying to contribute to the philosophy of interdisciplinarity (for which I am not equipped), the rest of this paper tries to illustrate the practical and philosophical sides of the incorporation problem as I have experienced them in my own research. Given my insistence on respecting the disciplinary boundaries of doctrinal research, it may come as a surprise to learn that my own research is interdisciplinary. As I hope to show, however, successful interdisciplinarity is not about ignoring or transgressing disciplinary boundaries, but about researching across two or more disciplines while remaining true to their methods and purposes.

27. This tension is experienced in Australia in the lower status accorded to 'practitioner journals'. Under the new Research Performance Measure about to be introduced at UNSW Australia, for example, legal academics who write for those journals will receive fewer points than those who publish in highly regarded international journals.
28. *See* B.Z. Tamanaha, 'The Internal/External Distinction and the Notion of a "Practice" in Legal Theory and Sociolegal Studies', 30 *Law & Society Review* 163 (1996).
29. M.S. Moore, 'The Interpretive Turn in Modern Theory: A Turn for the Worse?', 41 *Stanford Law Review* 871 (1989).
30. *See* R.M. Dworkin, *Law's Empire* (1986) 14.
31. S. Fish, *There's No Such Thing as Free Speech (and It's A Good Thing Too)* (1994).

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4 Illustration from My Own Research

My main research interest for the last 15 years or so has been the politics of judicial review. Typically, this research interest has been thought to be a research specialisation in comparative politics, which is itself a specialisation in political science. Having had no formal training in political science, however, I necessarily had to come at the politics of judicial review from an interdisciplinary perspective. In particular, my research is being conducted at the interface of comparative constitutional law (a rapidly growing international research field in which legal academics from a number of different countries have been participating[32]) and comparative judicial politics (the specialisation within comparative politics that looks at the role of constitutional courts in national political systems[33]).

Constitutional lawyers and political scientists have, of course, long been engaged in an interdisciplinary dialogue, particularly in the United States, where the study of judicial politics grew out of the American legal realist call for a science of judicial decision-making.[34] Despite that starting point, political scientists initially went their own way, their methods heavily influenced by the behaviourist movement in the social sciences.[35] Behaviourists took an entirely external perspective on judicial decision-making, using quantitative methods to discern causal relationships between, say, the party of the appointing President and the outcome of judicial decisions in ideological terms. This approach modelled law in a way that was so radically alien to the legal-academic perspective that academic lawyers mostly ignored it. It was only from the mid-1980s or so that legal academics started to pay more attention to political science accounts of judicial decision making. This was facilitated, first, by the proliferation of rational choice scholarship, which permeated both the legal academy and political science departments, and then by the rise of historical institutionalism in political science, which conceives of law in a way that most legal academics recognise – as a relatively autonomous social system with its own internal values, traditions, and thought processes.[36] Within political science, the historical institutionalist perspective has influenced judicial behaviourists, who have begun to model law in more sophisticated ways.[37] At the same time, legal academics have started to do their own quantitative research on judging.[38] All of this has brought political scientists and academic lawyers in the United States much closer together than they have been for some time.[39]

Beneath the apparently calm surface, however, there is still quite a lot of tension between the two sets of scholars. Lee Epstein and Gary King's brutal attack on the empirical methods used in American law reviews is the most famous instance of this,[40] but there have been other interventions as well.[41] In my own particular area of specialisation, Ran Hirschl has been particularly hard-hitting in his criticisms of comparative constitutional lawyers, dismissing much of their work as being of little scholarly value.[42] As with Epstein and King's more general critique, Hirschl's comments focus on legal academics' alleged lack of comprehension of the 'rules of inference' – of how to move from empirical observations about particular cases to more generalised propositions of social science. Even allowing for the fact that not all social scientists would necessarily see things the same way, these criticisms have been bracing, to say the least. There is also reason to think, however, that political scientists do not always properly understand what is at stake for legal academics when they undertake cross-country comparisons. The fact that a particular legal tradition, for example, may authorise reference to foreign law in a particular way, is a point often missed.

In my own research, I have tried to integrate my understanding of constitutional law doctrine in the two jurisdictions in which I have worked with the conceptual frameworks and methods of comparative judicial politics. My first proper attempt at doing so was published in my 2013 book on the South African Constitutional Court (CCSA).[43] Chapter 1 of that book sets out what I argued was a necessarily interdisciplinary research question: how it came about that the CCSA, in the first 10 years of its existence, had been successful in two very different senses – a political science sense, which had to do with its effectiveness as a veto player in South African politics, and a legal-doctrinal sense, which had to do with its internationally admired, principled interpretation of the 1993 and 1996 South African Consti-

32. The field has its own specialist journal (the *International Journal of Constitutional Law*) and scientific body (the *International Association of Constitutional Law*).
33. For a useful introduction, see Part III of K.E. Whittington, R.D. Kelemen & G.A. Caldeira (eds.), *The Oxford Handbook of Law and Politics* (2010).
34. See B.Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (2009).
35. *Ibid.*, at 112-15.
36. See C.W. Clayton and H. Gillman (eds.), *Supreme Court Decision-Making: New Institutionalist Approaches* (1999).
37. See B.L. Bartels, 'The Constraining Capacity of Legal Doctrine on the U.S. Supreme Court', 103 *American Political Science Review* 474 (2009); M.A. Bailey and F. Maltzman, *The Constrained Court: Law, Politics, and the Decisions Justices Make* (2011).
38. See, for example, C.R. Sunstein, D. Schkade, L.M. Ellman & A. Sawicki, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* (2006).
39. There are chairs in Law and Political Science at Yale, Duke, and Chicago, for example.
40. L. Epstein and G. King, 'The Rules of Inference', 69 *University of Chicago Law Review* 1 (2002).
41. See also G.N. Rosenberg, 'Across the Great Divide (Between Law and Political Science)', 3 2d *Green Bag* 267 (2000).
42. See R. Hirschl, 'On the Blurred Methodological Matrix of Comparative Constitutional Law', in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (2007) 39 and R. Hirschl, 'Editorial', 11 *International Journal of Constitutional Law* 1 (2013).
43. Theunis Roux, *The Politics of Principle - The First South African Constitutional Court, 1995-2005* (2013).

tutions.[44] While definitive of mature constitutional courts, I argued, simultaneous success on these two fronts is something that is very rarely achieved by a constitutional court in a new democracy and something which neither a purely doctrinal understanding of the Court's decisions nor comparative judicial politics on its own could properly explain. In Chapter 2 of the book, I accordingly proceeded to develop an interdisciplinary conceptual framework for addressing my research question. The main argument of that chapter was that some mediating concept was required to bring the two disciplines on which I was relying into dialogue with each other. In particular, I suggested that the idea of 'constraint', which features in both disciplines albeit in different guises, could be used as a basis for examining how constitutional courts negotiate the competing demands of law and politics.

The rest of the book applied that framework to analyse the CCSA's decision-making record, in the process blending doctrinal analysis with insights from the comparative judicial politics literature. For example, in Chapter 9, I tried to show how the CCSA's case law enforcing political rights was perhaps the most disappointing aspect of its record in purely doctrinal terms and that this could be explained by the difficulty the judges experienced in adapting their decisions in that area of law to the cooperative working relationship they were trying to forge with the ruling African National Congress. To make this kind of argument, I coined various terms to emphasise the interdisciplinary approach I was using, including 'adjudicative strategy' (to capture the way in which a court in a developed legal tradition like the South African must establish its independence in and through the constraints imposed by law), 'micro-politics' (to capture the local political circumstances surrounding a case that might give the court greater freedom to mediate the competing demands of law and politics), and 'legal-cultural lag-effect' (to capture the way in which the received legal tradition exerts an inertial effect on changes in reasoning style apparently required by a new, rights-based Constitution).

I do not as yet know whether my book has succeeded in laying the basis for a new interdisciplinary conversation. Two reviews have thus far been published, but neither really focuses on the interdisciplinary aspects of my work. I do know for certain, however, that my book did not impress at least one judge on the CCSA who wrote to me to complain about the absence of a table of cases. I had in fact included such a table in the draft manuscript submitted to the publisher, but then took it out, partly because the cases were already referenced in the index, but partly also to signal that my book was not a traditional doctrinal commentary on the work of the CCSA that could be used in legal argument and judgment writing. That signalling attempt obviously failed, suggesting that there is still work to do, in South Africa at least, in convincing practising lawyers that a book about judicial decision-making might have a broader scholarly purpose than simply assisting the legal profession to do its job better.

Perhaps I should also take this incident as an indication that, of the two audiences I was trying to address in the book – the South African legal-professional community and the international comparative constitutional law/judicial politics community – I might have ended up catering more to the second. Certainly, no advocate arguing a case before the CCSA or judge writing an opinion for the Court will find anything particularly helpful in my book of a purely doctrinal nature. It is not written for that purpose. Rather, I was trying to inject into the local South African conversation a more realistic appreciation of the political constraints under which the CCSA was operating. To the extent that I dealt with doctrine, my purpose was to show how the judges were able to fashion review standards that supported a sustainable institutional role for the Court. In presenting the development of legal doctrine in this way, I argued that the political context in which the Court was working influenced its decisions – that it deliberately chose doctrines that enhanced its capacity to continue independently enforcing the Constitution over the long run. In so doing, I wanted to reappropriate for liberal legalism a sense of law's malleability in the service of political ideals that has for too long been the preserve of critical legal theory. The proposition that judges' sense of their court's institutional vulnerability might influence their decisions is, however, anathema to South African constitutional law's conception of itself as separate from politics. As soon as I made that argument, therefore, I was no longer participating in the construction of legal doctrine but viewing legal doctrine from the external perspective of political science. I had my cake, but I could not eat it.

5 Conclusion

What does my experience have to teach about the difficulties of doing interdisciplinary legal research? The first lesson, I think, is that, however hard one tries to straddle the divide between doctrinal research and another discipline, one does ultimately need to pick an audience. As much as one's skills as a trained lawyer help one to understand the internal demands of the law, there comes a point when what one is researching ceases to be of much interest to legal practitioners and has broader scholarly significance only. In this respect, academic lawyers are in a peculiar situation. Their competitive advantage is that they know better than the average social scientist what the internal demands of the law are on the judges deciding the cases they are examining. Their competitive disadvantage, however, is that they tend not to be terribly well versed in the methodologies required to support a sophisticated social science research project.

The philosophical concern mentioned earlier is also borne out, albeit in a somewhat unexpected way. On the

44. *Ibid.*, at 15-71.

one hand, my experience suggests that Stanley Fish was right to argue that it is virtually impossible to participate in two disciplinary practices at the same time; one practice is invariably going to dominate the other. On the other hand, in my case at least, it has not been my primary training as a lawyer that has come to dominate but my aspirations to contribute to the political science literature on judicial decision-making. There may be idiosyncratic reasons for this. The fact that I migrated from South Africa to Australia in 2009 means that since then I have been working outside my primary legal-professional environment. Like others who have left their home jurisdictions,[45] this has given me an acute sense of the differences between countries in legal-cultural terms, which is how law now mainly figures as an explanatory variable in my work. Had I not left South Africa that might have not been the case, and thus Fish's argument may still be valid as a general rule.

Still, I think my experience is generalisable to the extent that it suggests that interdisciplinary research is hard to do, at least in a sustained way. The problem is not, as I have been stressing, that it is difficult to incorporate knowledge from other disciplines into doctrinal research. Doctrinal researchers do that all of the time, using the methods that have developed in their legal tradition for doing this. Rather, the problem is that it is very difficult to sustain a long-term research project that is genuinely interdisciplinary in the sense that it: (i) is driven by a research question that no single discipline on its own can adequately answer and (ii) combines doctrinal research with at least one other discipline in a more or less even-handed way. A true synthesis or complete integration of disciplines, of course, might be the ultimate goal. In my case, that would mean the integration of comparative judicial politics and comparative constitutional law in a way that took both politics and law seriously as separate forms of constraint on judicial decision-making. Even, then, however, the question would be whether the research being conducted was still interdisciplinary or whether it was contributing to the formation of a new discipline.

45. David Nelken's research, for example, took a distinct legal-cultural turn after his move to Italy. *See*, for example, D. Nelken, 'Using the Concept of Legal Culture', 29 *Australian Journal of Legal Philosophy* 1 (2004).

Watch Out for the Under Toad

Role and Method of Interdisciplinary Contextualisation in Comparative Legal Research

Elaine Mak*

Abstract

This article studies the significance of insights from non-legal disciplines (such as political science, economics, and sociology) for comparative legal research and the methodology connected with such 'interdisciplinary contextualisation'. Based on a theoretical analysis concerning the nature and methodology of comparative law, the article demonstrates that contextualisation of the analysis of legal rules and case law is required for a meaningful comparison between legal systems. The challenges relating to this contextualisation are illustrated on the basis of a study of the judicial use of comparative legal analysis as a source of inspiration in the judgment of difficult cases. The insights obtained from the theoretical analysis and the example are combined in a final analysis concerning the role and method of interdisciplinary contextualisation in comparative legal analysis conducted by legal scholars and legal practitioners.

Keywords: comparative law, legal methodology, interdisciplinary incorporation, judicial use of comparative law

1 Introduction

In John Irving's novel, *The World According to Garp*,[1] the protagonist warns his son for the undertow when going for a swim in the sea. The boy mistakenly understands there to be an 'under toad' and imagines a scary creature lurking in the water to catch him. The incorporation of interdisciplinary insights in comparative legal analysis holds a risk similar to the misunderstanding between Garp and his son.[2] The meaning of a foreign legal concept can be hard to grasp for someone who is just getting acquainted with the system to which this concept is connected. Obstacles exist in the form of the unfamiliar sound of foreign legal terminology and the absence of knowledge of the foreign system's characteristics, history, and political and societal context. To overcome these obstacles, comparative legal analysis requires the development of an understanding of the examined foreign law and the society in which this law operates.[3] In other words, comparative legal analysis requires contextualisation.

However, the collection of relevant contextual insights and the incorporation of these insights in legal analysis are not self-evident. Indeed, methodological choices are required concerning the scope of contextual research that is required in order to produce an adequate comparative legal analysis and concerning the appropriate concepts, theories, and methods to be 'borrowed' from non-legal disciplines.[4] Furthermore, the comparative researcher will need to consider how and to what extent the obtained contextual insights can be translated into the language of legal doctrine. Which disciplines should be consulted and how should these be used in a comparative analysis concerning debated legal issues in national societies, such as the acknowledgement of 'wrongful life' claims or the extradition of citizens suspected of criminal acts to a legal system which still applies the death penalty?[5]

This article analyses the need for and the challenges of contextualisation in comparative legal research. The starting point of this contribution is the idea that the demand of a contextual understanding of compared legal rules implies an interdisciplinary research approach. I will argue that comparative legal analysis should refer to background information on foreign legal systems obtained through studies from the perspective of non-legal disciplines, such as history, economics, political science, and sociology. Furthermore, I will analyse how relevant insights from research in these other disciplines can be collected and integrated in the legal analysis of foreign law and in the comparison of selected laws from different jurisdictions. In this regard, the arti-

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1. J. Irving, *The World According to Garp* (1978).
2. Comparative law can be considered as a method, consisting of the comparative study of law. It can also be seen as a body of knowledge concerning the substantive laws of different legal systems. Concerning this distinction, *see* M. Siems, *Comparative Law* (2014), at 5-6. This article focuses on comparative law as a method, which will be referred to hereafter as 'comparative legal analysis'.
3. M. Van Hoecke and M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law, 47 *International and Comparative Law Quarterly* 495, at 498 (1998). *See* further below, Section 2.1. The terms 'research' and 'analysis' are used in this article with a similar meaning. However, the term 'research' is generally more strongly connected with scholarship, whereas the term 'analysis' is more neutral with regard to the work of academics and legal professionals.
4. Concerning types of interdisciplinary legal research, *see* S. Taekema and B. van Klink, 'On the Border: Limits and Possibilities of Interdisciplinary Research', in B. van Klink and S. Taekema (eds.), *Law and Method: Interdisciplinary Research into Law* (2011) 7, at 10-13.
5. *See* further below, Section 3.2.

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cle's central research question is: *To what extent is it needed and possible to include interdisciplinary insights regarding foreign law and societies in comparative legal research?*
In order to illustrate the methodological possibilities and limitations of contextualised comparative legal analysis, furthermore, the article addresses a specific area in which this type of analysis has become more prominent and debated in recent years. This area concerns the judicial recourse to foreign law in deliberations and in the reasoning of judgments, in particular at the level of national highest courts. In the globalised legal context, national supreme courts and constitutional courts increasingly refer to legal sources from other jurisdictions (statutory provisions, case law) when deciding domestic cases.[6] Sometimes, this practice consists of a mere citation of foreign law, but in other instances, a comparison is conducted between domestic and foreign legal sources.[7] However, judges struggle to find an adequate methodological approach regarding this use of foreign law.[8] Starting out from this observation, a subquestion addressed in this article is: *How is the incorporation problem handled in comparative legal analysis conducted in the framework of judicial decision-making?*
This article presents a legal-theoretical analysis and uses an illustration from comparative legal and socio-legal analysis. The legal-theoretical analysis, firstly, is based on academic literature concerning the nature and particularities of comparative legal research. The input from comparative legal and socio-legal analysis, secondly, is connected with the example regarding the use of foreign law in judicial decision-making.[9] In connecting the two strands of the analysis, differences between the methodology of legal research and judicial decision-making are taken into account. It seems that the step of interpretation of the law is mostly identical for researchers and judges, although carried out with a different aim.[10] However, when considering the justification of used sources, judicial reasoning is often less elaborate and sometimes different from academic legal reasoning.[11] The article will address these similarities and differences and discuss their implications for different types of comparative legal analysis.
As a preliminary step, Section 2 sets out in more detail what the incorporation problem in comparative legal research consists of. Attention is paid to the inherent interdisciplinary nature of this type of research and the particularities of the research approach relating to specific types of comparative legal analysis. Next, Section 3 illustrates this incorporation problem with regard to the contextualisation of foreign law in the judicial use of comparative law. This analysis addresses theoretical views and examples from case law regarding the use of comparative law in judgments of highest national courts in Western jurisdictions. Section 4 connects the findings of the analysis in Section 3 with the broader topic of comparative legal research. This section outlines methodological considerations relating to judicial comparisons, including the relevance of contextual aspects, and distinguishes similarities and differences with comparative legal scholarship. Section 5 contains some concluding remarks.

2 The Incorporation Problem in Comparative Legal Analysis

Comparative legal scholars recognise the significance of a contextual understanding of the social and cultural setting in which the law operates in different legal systems. In this respect, it can be said that there is an inherent interdisciplinary aspect in comparative legal analysis (Section 2.1). However, this aspect raises some specific issues of research methodology regarding the required degree of interdisciplinary contextualisation in comparative legal analysis (Section 2.2).

2.1 An Inherent Interdisciplinary Aspect

Traditional legal scholarship regarding national systems concerns the construction, evaluation, and reform of legal doctrine.[12] Comparative legal analysis shares this perspective and in this sense represents 'an instance of the more general form of legal research'.[13] Nonetheless, comparative law has a distinct feature when compared to traditional legal research. Scholars in the field of comparative law have argued that comparative legal research should focus on 'law as culture' rather than 'law as rules', indicating 'that law, and the understanding of law, involves much more than the mere reading of statutory rules and judicial decisions'.[14] In this regard, Van Hoecke and Warrington have stated that 'law and legal practice are one aspect of the culture to which they belong'.[15] The understanding of the context in which law operates then becomes significant for a fruitful comparison between legal systems. Considered from this perspective, a comparison of the laws of different legal systems requires that the analysis takes into account legal culture, meaning the 'specific way in which values,

6. *See* inter alia B. Markesinis and J. Fedtke, *Judicial Recourse to Foreign Law* (2006); T. Groppi and M.C. Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges* (2013).
7. *See* below, Section 3.
8. This is illustrated very clearly by the debate in the United States, where Supreme Court Justices disagree about the legitimacy and usefulness of citations to foreign law. *See* N. Dorsen, 'The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer', 3 *International Journal of Constitutional Law* 519 (2005).
9. E. Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (2013).
10. J. Vranken, *Asser Algemeen Deel***** (2014), at nr. 184.
11. *Ibid. See* further below, Section 2.2.
12. S. Taekema, 'Relative Autonomy: A Characterisation of the Discipline of Law', in van Klink and Taekema (eds.), above n. 4, 33, at 35.
13. J. Bell, 'Legal Research and the Distinctiveness of Comparative Law', in M. Van Hoecke (ed.), *Methodologies of Legal Research. Which Kind of Method for What Kind of Discipline?* (2011), at 175.
14. Van Hoecke and Warrington, above n. 3, at 496.
15. *Ibid.*, at 498.

practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal texts'.[16] Another characteristic of comparative legal research is that the construction of a legal analysis based on comparative knowledge requires an explicit justification of methodological choices. Such a justification is often more implicit in the analysis of a single legal system. The comparative legal researcher needs to consider which systems are taken into account in the research, for which reasons, and in which way. In this sense, comparative legal methodology might be distinguishable from legal methodology generally, which often focuses on research of the 'law in the books'.[17] Comparative legal methodology then also provides lessons for traditional legal research, as 'it makes us aware of the elements which are influencing the law at all levels, it confronts us with our hidden conceptual, ideological framework'.[18] Still, the extent to which interdisciplinary elements are taken into account in comparative legal analysis is dependent on the focus and aim of the comparative research.

2.2 The Degree of Interdisciplinary Contextualisation

When considering the methodology of comparative legal analysis, some further observations can be made. Indeed, the extent to which interdisciplinary insights are needed in comparative legal analysis varies based on a number of factors. These factors concern the research focus (Section 2.2.1), the object of the comparative analysis (Section 2.2.2), and the aim of the analysis (Section 2.2.3).

2.2.1 Research Focus: Functionalism versus Contextualism

In terms of research methodology, insights produced by research in non-legal disciplines can assist in obtaining historical, political, economic, and other explanations regarding the law and the way it operates in a specific jurisdiction. However, comparative legal analysis which makes use of interdisciplinary insights is still legal-doctrinal analysis, in the sense that the comparative legal researcher does not conduct research using the methods of other disciplines.[19] Two main approaches to comparative legal research can be identified. The first one focuses on similarities between legal systems, primarily with regard to legal rules, and the second one on differences between legal systems, in particular relating to context.[20]

Traditional comparative legal analysis, firstly, generally starts out from an existing socio-economic problem, taking a so-called 'functionalist' approach.[21] A first step in the research is to describe the situation selected for analysis, *that is*, to 'construct comparables' or system-neutral descriptions.[22] Next, the selected legal orders are described. Thirdly, the actual comparison takes place, resulting in an overview of similarities and differences, and an explanation is provided for the identified similarities and differences.[23] Concerning this explanation, arguments can only be speculative unless other disciplines are used to obtain insight into the context in which the examined legal rules have been developed and operate.[24]

Postmodern comparative legal analysis, by contrast, emphasises the complexity of legal systems and focus on differences rather than on similarities between systems.[25] Postmodern approaches start out from the idea that comparative legal analysis is never neutral, as the researcher's reasoning and assessment take place within specific epistemic, linguistic, cultural, and moral frameworks.[26] In this field, the stream of 'deep-level comparative law' claims that the traditional approach cannot yield more than a shallow understanding of the similarities and differences between legal systems.[27] The stream of critical comparative law questions the validity of the outcomes of traditional comparative analysis altogether.[28]

Both approaches are vulnerable to criticism. Functionalist approaches can be accused of focusing too much on black-letter law, thereby ignoring relevant differences between the contexts of legal systems. Postmodern approaches can be criticised for not fully supporting certain premises with a solid argumentation, for example, concerning the alleged fundamental differences between legal systems.[29]

When comparing the role of interdisciplinary contextualisation in the two approaches, it appears that the incorporation of interdisciplinary insights in comparative legal analysis has a more prominent place in postmodern approaches than in the traditional approach to comparative legal analysis. A 'deep-level' understanding of legal systems requires the study of the context in which legal rules function. This study might include, inter alia, the use of insights from the perspective of

16. J. Bell, 'English Law and French Law – Not So Different?', 48 *Current Legal Problems* 63, at 70 (1995). Cited by Van Hoecke and Warrington, above n. 3, at 498.
17. K. Lemmens, 'Comparative Law as an Act of Modesty: A Pragmatic and Realistic Approach to Comparative Legal Scholarship', in M. Adams and J. Bomhoff (eds.), *Practice and Theory in Comparative Law* (2012) 302, at 312-13.
18. Van Hoecke and Warrington, above n. 3, at 497. *See also* Lemmens, above n. 17, at 313.
19. This approach could be called multidisciplinary rather than interdisciplinary. It concerns the combination of methods, not an integrated research approach. Compare Taekema and van Klink, above n. 4, at 10. An approach which takes a step further is 'socio-legal comparative research'. This type of comparative research concerns the study of legal culture as such. It uses empirical methods to describe the context in which law operates and to establish relations of causality between the development of law and society. *See* Siems, above n. 2, at 121-22.
20. Compare J. Husa, 'About the Methodology of Comparative Law: Some Comments concerning the Wonderland...', *Maastricht Faculty of Law Working Paper* 2007/5.
21. Siems, above n. 2, at 13; Van Hoecke and Warrington, above n. 3, at 495; Lemmens, above n. 17, at 321.
22. Lemmens, above n. 17, at 320.
23. *Ibid.*, at 321-22.
24. *Ibid.*, at 322.
25. Siems, above n. 2, at 97.
26. *Ibid.*, at 98.
27. *Ibid.*
28. *Ibid.*, at 108.
29. *Ibid.*, at 117.

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economics, political science, or sociology. Critical awareness demands the study of the cultural and other aspects of the researcher's framework of analysis, possibly by referring to insights from linguistic and cultural research.[30] Still, the differences between these two approaches should not be exaggerated. Indeed, comparative legal research might combine the analysis of rules and contexts and then requires 'a *sliding scale of methods* fitted to the purpose of present comparative study'.[31] In this regard, the methodology of a specific comparative study should be adapted to the object of the research and to the aim of the research.

2.2.2 Research Object

Concerning the object of the analysis, the interdisciplinary aspect of comparative legal analysis is subject to variation on the basis of the examined field of law, the research question, and the research methods.

Firstly, the relevant discipline to be taken into account can differ depending on the examined field of law. In this regard, an economic perspective might be more useful in the field of private law, where this perspective can provide relevant insights into human behaviour and in this way contribute to the development of effective rules concerning the regulation of private legal interactions. By contrast, political science might offer more valuable insights for the field of constitutional and administrative law.[32] Indeed, constitutional law and political theory are closely connected and are combined, for example, in research regarding political practices and constitutional history.[33]

Secondly, the particularities of the research question should be considered. Vranken has argued that interdisciplinary insights are required when arguments with an empirical connotation play a role in legal reasoning.[34] Empirical data are not always required, for example, if a legal research question is purely theoretical or concerns a question of systemising. However, when questions with an empirical connotation occur, fact-checking is generally recommended.[35] Examples of research questions with an empirical aspect are those involving arguments concerning: reasonable and context-oriented interpretation; feasibility; effective legal protection; the efficiency of laws; preventive effect; and the demands of society or of the parties. Interdisciplinary research is also required to verify the validity of statements about the consequences of specific points of view in legal reasoning; for example, the argument that accepting a specific claim will prompt a stream of further court cases ('floodgates argument').[36] Research questions addressing such issues will demand an interdisciplinary approach, whether or not a legal comparison between different jurisdictions forms part of the research.

Finally, the selection of legal systems for the comparison is of significance. In this regard, an important limitation to the possibilities of comparative legal analysis relates to the differences between specific legal cultures in terms of opposing basic values of rationalism-irrationalism and individualism-collectivism, in particular between Western legal culture, Asian legal culture, Islamic legal culture, and African legal culture.[37] Van Hoecke and Warrington have argued that in their approach, which they call 'law as culture', comparative legal analysis can take place at three levels, concerning the comparison between: (i) legal cultures at a global scale; (ii) legal families, sharing a similar historic and socio-economic basis; and (iii) legal systems, sharing the same legal culture, concepts, and legal language.[38] Each of these three levels requires a different methodology, taking account the degree of shared elements between the compared cultures, traditions, or systems.[39]

Besides these factors relating to the object of the analysis, the role of interdisciplinary contextualisation further depends on the aim of the comparative research.

2.2.3 Research Aim

Comparative legal analysis can serve different purposes. Depending on the aim of the analysis, interdisciplinary insights concerning the social and cultural setting in which the law operates are of lesser or greater relevance. This can be clarified by considering three different general aims of comparative legal analysis. These aims are: (i) the collection of knowledge regarding legal rules and their functioning in context; (ii) the search of guidance for legal practice; and (iii) the search of guidance for the harmonisation of laws.[40]

Firstly, an aim of comparative legal analysis can be to obtain knowledge of foreign legal rules or an understanding of how legal rules work in context. Comparative law then enables a reflection on the laws of one's own system or the identification of historical origins, current trends, and political, cultural, and socio-economic reasons explaining similarities and differences between the rules of different legal systems.[41] Legal scholarship offers countless examples of this type of comparative legal research. Indeed, Jan Vranken has observed that the incorporation of a comparative analysis has become fairly usual in Dutch PhD theses in the field of private law.[42]

30. *Ibid.*
31. Husa, above n. 20, at 16, citing V.V. Palmer, 'From Lerotholi to Lando: Some Examples of Comparative Law Methodology', 4 *Global Jurist Frontiers* (2004, nr. 2).
32. Siems, above n. 2, at 9, citing D. Nelken, 'Comparative Law and Comparative Legal Studies', in E. Örücü and D. Nelkin (eds.), *Comparative Law: A Handbook* (2007) 3, at 17.
33. S. Halliday, 'Public Law', in C. Hunter (ed.), *Integrating Socio-Legal Studies into the Law Curriculum* (2012), at 141.
34. J. Vranken, '"Wij weten wel wat we doen". Over juridisch-dogmatisch onderzoek in het privaatrecht, maar wel een slag anders', 89 *Nederlands Juristenblad* 1728, at 1733 (2014). *See also* Vranken, above n. 10.
35. *Ibid.*
36. *Ibid.*
37. Van Hoecke and Warrington, above n. 3, at 503-8.
38. *Ibid.*, at 519-20 and 532-33.
39. *Ibid.*, at 510.
40. Siems, above n. 2, at 2-5.
41. *Ibid.*, at 2-3.
42. Vranken, above n. 10, at nr. 18. Vranken argues that when setting up research on a specific question of private law, a check should be done on whether the research requires a comparative analysis, an analysis of European law, and/or a multidisciplinary analysis. *Ibid.*, chapter 6.

Research conducted with this general aim of knowledge building or the study of the 'law in action' will pay equal attention to the contextual understanding of all legal systems included in the analysis. Moreover, this analysis will be thorough and include perspectives from non-legal disciplines in order to sketch a complete picture. It is generally connected with legal scholarship. However, a distinction can be made between comparisons of different 'weight', defined by Husa as the degree of systematic and interdisciplinary analysis in comparative legal research.[43] Comparative legal analysis aimed at knowledge building concerns the research of the field-of-law academic, who uses a 'middleweight comparison' for the analysis of laws within a specific conceptual framework. It also concerns the comparative law academic, who uses a 'heavyweight comparison' to explain similarities and differences between legal systems.[44]

Secondly, comparative law can be of practical assistance to legislators, judges, and other practising lawyers in national legal systems. Comparative law needs to be considered in cases of conflicts of law, and it can serve as an inspirational source in law reforms or the deciding of difficult cases.[45] Examples in the field of conflicts of law concern the comparison between the legal rules of two different jurisdictions regarding a specific legal issue, such as marriage or parental authority.[46] An example of inspiration drawn from comparative law in the field of constitutional reform concerns the Bill submitted to the Dutch Parliament by Member of Parliament Femke Halsema in 2002 regarding the amendment of Article 120 of the Dutch Constitution. This provision prohibits judicial review of Acts of Parliament in light of the Constitution. Halsema presented systems of review in European countries and in the United States to justify allowing the judicial review of statutory acts in light of fundamental rights provisions contained in the Constitution.[47] Comparative law was also used by the State Committee chaired by Wilhelmina Thomassen, which advised the Dutch Government on possible reforms of the Constitution. In its Report, issued in 2010, this Committee referred to the Constitutions of other European countries to support its suggestions concerning the revision of the Dutch Constitution.[48]

In this type of comparative legal analysis, the main aim is to present a persuasive argument concerning the applicable law in the domestic jurisdiction or to defend an argument in favour of a reform of the law. Contextual elements of the law will be studied in order to assess the possibilities of interpreting legal rules in conformity with each other or to assess the usefulness of foreign legal arguments for the reasoning in domestic cases. Husa has argued that the interest in obtaining inspiration from foreign law might be satisfied through a 'feather weight comparison', which is functionalist and non-systematic.[49]

Finally, comparative law can have a practical role at the international and supranational level in the context of formal unification of law or gradual convergence of legal systems.[50] Vranken has argued that comparative law is required for successful internationalisation, because of comparative law's contribution to a better understanding of the domestic law as well as the insight it provides into the differences between legal systems.[51] From a bottom-up perspective, comparative law can guide the development of national legal systems. In this regard, comparative law is used in order to realise the harmonisation of laws in the European Union. An example concerns the development of harmonised contract law, which has resulted in the Principles of European Contract Law (PECL), drafted by the Lando Commission,[52] and the Draft Common Frame of Reference (DCFR), prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law.[53] From a top-down perspective, comparative law can guide the development of international and supranational law by institutions at these levels. In this regard, comparative law plays a role with regard to the application of the European Convention on Human Rights (ECHR). The European Court of Human Rights (ECtHR) considers the existence of consensus amongst the contracting states when interpreting provisions of the ECHR. In this way, the Court aims to provide effective protection of fundamental rights and to ensure that states follow its judgments.[54]

In this type of comparative legal analysis, contextual aspects regarding the law and its functioning in member states of the EU and contracting states of the ECHR will be taken into account in order to determine the limits of unification or convergence of legal systems. Husa has connected the harmoniser's interest in comparative law with the method of a 'lightweight comparison', in which the search for the 'most fitting' model is central.[55]

When comparing these three possible aims of comparative legal analysis, the first aim is most neutral in its scope and its inclusion of contextual elements. The second and third aims entail the use of the outcomes of the comparative research for the support of a specific legal argument. In this respect, the comparative analysis might lack a systematic approach or the presented work (*e.g.* a judgment or proposal of law reform) might only present a selection of the outcomes. Also, there might be

43. Husa, above n. 20, at 17-18.
44. *Ibid.*, at 18.
45. Siems, above n. 2, at 3-4. *See also* N. Lupo and L. Scaffardi (eds.), *Comparative Law in Legislative Drafting: The Increasing Importance of Dialogue amongst Parliaments* (2014).
46. *See* M. Reimann, 'Comparative Law and Private International Law', in M. Reimann and R. Zimmermann (eds.), *Oxford Handbook of Comparative Law* (2006).
47. Kamerstukken II, 2001/2002, 28 331, nr. 3.
48. State Committee on the Constitution, *Report State Committee* (2010).
49. Husa, above n. 20, at 17.
50. Siems, above n. 2, at 4-5.
51. Vranken, above n. 10, at nr. 23.
52. O. Lando et al., *Principles of European Contract Law* (2000).
53. C. von Bar et al. (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (2009).
54. K. Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights', 12 *German Law Journal* 1730 (2011).
55. Husa, above n. 20, at 18.

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more emphasis on similarities between legal rules and contextual aspects, based on a functionalist approach.

With regard to the interest in interdisciplinary contextualisation, a practical concern should be mentioned here as well. Some non-legal research methods are easier for legal scholars to master or to understand than others. In this regard, a difficulty is that legal researchers are not trained to conduct empirical research or to assess the outcomes of research in non-legal disciplines. Moreover, from a practical point of view, it is possible that no empirical data can be obtained or not at short notice, in particular concerning the consequences of specific views on the law.[56] In practice, the availability of time and resources for interdisciplinary research can therefore constrain the possibility of contextualisation of comparative legal research.

Keeping these particularities in mind, we will consider an example in order to clarify the role of interdisciplinary insights in comparative legal analysis and the challenges of interdisciplinary incorporation. This example concerns the developing trend of the judicial use of comparative law.

3 An Assessment of Interdisciplinary Incorporation: The Example of Judicial Dialogue

The need and challenge of contextualisation in comparative legal analysis has manifested itself in a poignant manner in legal practice, in particular with regard to the judicial use of comparative law. This practice of judicial citation to foreign law is considered to form part of the broader phenomenon of 'transjudicial communication'.[57] This section focuses on the question of the incorporation of interdisciplinary insights in judicial reasoning which makes use of comparative legal analysis. Firstly, two different accounts regarding the theoretical understanding of interdisciplinary incorporation in comparative judicial reasoning are presented (Section 3.1). Secondly, an analysis of examples from case law in light of these theoretical accounts clarifies how courts have dealt with the use of interdisciplinary insights in comparative analyses conducted in specific difficult cases (Section 3.2). Based on this analysis, an intermediary conclusion is presented (Section 3.3).

3.1 Interdisciplinary Incorporation: Two Accounts of the Judicial Use of Foreign Law[58]

The use of contextualised comparative information in the legal reasoning of courts entails two general aspects. Firstly, comparative law should be used in a legitimate manner in judicial reasoning. With regard to Western legal systems, this means that the reasoning of judgments should meet the demands of the liberal-democratic normative framework for legal interpretation and judicial decision-making.[59] Secondly, limitations to the possibility of legal transplants should be acknowledged in comparative legal reasoning.[60] These requirements form part of the methodology regarding the use of comparative law in judicial decision-making. Still, there is no general agreement in legal scholarship concerning the exact methodology used by courts. This section investigates two different views which legal theorists have presented regarding the role and method of contextualisation in comparative judicial reasoning. These views can be considered as complementing one another. However, they choose different points of focus. One view emphasises the comparison of legal arguments in the judicial use of comparative law (Section 3.1.1). Another view presents the comparison of policy choices as most significant (Section 3.1.2).

3.1.1 Bell: Focus on the Comparison of Legal Arguments

John Bell has constructed an explanation of judicial citations of foreign law from the perspective of legal argumentation. He argues that arguments based on foreign legal ideas are used as supporting reasons for judicial decisions, which add weight to a justification based on a combination of arguments.[61] According to Bell, comparative legal analysis is useful for decisions on legal issues on which the domestic law provides competing statements. Arguments from comparative law then have a certain weight in the accumulation of arguments. In this regard, Bell explains:

> The model of legal reasoning I have in mind is one that depends on a combination of reasons, each of which may be insufficient to justify the decision in its own right, but, taken together, they provide support for the decision. The analogy is with individual threads of fibre. On its own, a single thread cannot hold up a weight, but twisted in combination with other threads, it forms a cord which can carry a substantial weight.[62]

Bell argues that an argument from foreign law functions as a thread in the rope of legal reasoning. It 'adds lustre

56. Vranken, above n. 34, at 1733.
57. A.M. Slaughter, 'A Typology of Transjudicial Communication', 29 *University of Richmond Law Review* 99 (1994).
58. With thanks to Bald de Vries and Kees Quist for bringing the divergence between these views to my attention.
59. Compare F. Schauer, 'Authority and Authorities', 94 *Virginia Law Review* 1931 (2008).
60. *See inter alia* A. Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd edn. (1993); P. Legrand, 'The Impossibility of "Legal Transplants"', 4 *Maastricht Journal of European and Comparative Law* 111 (1997).
61. J. Bell, 'The Argumentative Status of Foreign Legal Arguments', 8 *Utrecht Law Review* 8, at 10 (2012, nr. 2).
62. *Ibid.*

to an argument already available in the host legal system'.[63] He describes the incorporation of the foreign legal argument as a process of 'cross-fertilisation', meaning that:

> an external stimulus promotes an evolution within the receiving legal system. The evolution involves an internal adaptation by the receiving legal system in its own way. The new development is a distinctive but organic product of that system rather than a bolt-on.[64]

This cross-fertilisation is possible if three criteria are met. Firstly, the legal problem in the domestic system must have an equivalent in the foreign legal system. The legal position of children in context of same-sex marriages, for example, can only be studied in legal systems which allow same-sex marriages. Secondly, the argument from foreign law can only have weight in the legal reasoning of a domestic case if it is consistent with the legal principles of the domestic legal system. Finally, the prestige of the foreign legal system, in the eyes of the domestic judges and in the domestic society, influences the weight which is given to arguments from foreign law.[65]

Bell's analysis seems to corroborate with the ideas of 'featherweight comparison' but also with those of 'lightweight comparison', described above.[66] His analysis highlights the non-systematic nature of judicial comparisons and the relatively limited concern with interdisciplinary contextualisation. Firstly, Bell focuses on the transplanting of legal arguments from one legal system into another. In this regard, non-legal aspects, for example, concerning the political or societal values of the compared legal systems, provide the background to the comparison of legal concepts. However, the comparison focuses on the use of arguments relating to foreign legal concepts in judicial reasoning concerning similar domestic concepts. In this respect, the main focus of judges concerns the construction of a legal argument which 'fits' with the domestic legal system. Secondly, Bell emphasises the inspirational nature of judicial comparisons, in which foreign legal sources 'help us to explore solutions that are out of the box from a domestic law point of view'.[67] Corresponding with the aims of law reform and transnational harmonisation, judges can be expected to look for comparative solutions where foreign laws might provide 'better' arguments or where it is desirable for the domestic law to be in line with transnational legal development. In this respect, Bell argues that comparative law adds force to arguments based on domestic law '(t)o the extent that the social and political situation of the foreign jurisdiction are similar to that of the domestic law, *i.e.* are in some sense engaged in a common enterprise at some level of generality'.[68] In this view, it appears that the judicial use of comparative law should focus on reaching more similar results between legal systems and that general similarities between national contexts are sufficient to make the comparative analysis worthwhile.

3.1.2 Adams and Mak: Focus on the Comparison of Policy Choices

In another analysis, non-legal aspects take a more prominent place in the judicial use of foreign law. Maurice Adams and I have argued that judicial reasoning based on comparative law primarily addresses policy choices, involving ethical principles, societal interests, and politics.[69] In this view, comparative legal analysis by courts will generally focus on the legal interpretation of a specific legal concept in connection with the policy choices which underlie this legal interpretation.[70] This perspective corroborates with my research regarding the views and approaches of judges regarding the use of comparative law in judicial decision-making. This research has clarified that judges in national highest courts consider 'that the guiding influence of comparative legal materials does not push them to follow the legal solutions developed in another legal system'.[71] They consider that the particularities of national legal systems and individual cases require that a solution is developed which fits these particularities. An interviewed Canadian Supreme Court Justice observed that in the framework of comparative legal analysis, it is useful to learn about the social values which formed the context of the decision-making of foreign courts.[72]

The necessity of studying policy choices related to foreign law is underlined by a judgment in which a contextual study of this kind was absent. The English case of *White v. Jones* concerned the question whether a solicitor could be held liable in tort law for neglecting to change a will in time, as a result of which the intended beneficiaries suffered the loss of not receiving the inheritance.[73] In this case, Lord Goff presented a legal analysis based on German law to support the argumentation that the claim of the beneficiaries should be accepted. However, this argument based on the analogy with German law stands in a difficult relation to the English law of obligations, which aims to limit the amount of claims in tort law. The incongruence between the policy choices underlying the English and German legal systems could explain the criticism and incomprehension of *White v. Jones* voiced by English legal experts. The judgment is considered an exception, and the transplant

63. *Ibid.*, at 11.
64. J. Bell, 'Mechanisms for Cross-fertilisation of Administrative Law in Europe', in J. Beatson and T. Tridimas (eds.), *New Directions in European Public Law* (1998) 147, at 147.
65. Bell, above n. 61, at 17.
66. *See* above, Section 2.2.3.
67. Bell, above n. 61, at 17.
68. *Ibid.*, at 18, citing J. Waldron, 'Treating Like Cases Alike in the World: The Theoretical Basis of the Demand for Legal Unity', in S. Muller and S. Richards (eds.), *Highest Courts and Globalisation* (2010), at 99.
69. M. Adams and E. Mak, 'Buitenlands recht in nationale rechtspleging: onder welke voorwaarden is dat feitelijk nuttig en mogelijk?', 86 *Nederlands Juristenblad* 2912, at 2916 (2011).
70. *Ibid.*
71. Mak, above n. 9, at 202.
72. *Ibid.*, at 186.
73. *White and another v. Jones and others* [1995] UKHL 5.

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from German law could turn out to be a 'legal irritant' which does not stand the test of time.[74]

In accordance with the theoretical analysis made by Jane Stapleton, Maurice Adams and I argue that the use of foreign law is most useful with regard to the weighing of arguments related to policy choices.[75] Stapleton's analysis concerning tort law holds that (i) the motive underlying legislation or a judgment usually can be traced back to a policy choice; (ii) this policy choice is translated into a legally relevant duty of care; and (iii) this legal norm needs to be incorporated into the system of existing legal rules.[76] In this view, the use of comparative legal analysis has the potential to provide useful insights in fields of law in which policy choices fulfil a more significant role than arguments related to the system of the law. Examples are economic law, human rights law, and legal issues concerning bio-ethics.[77] The weight given to the insights from the comparative analysis remains dependent on its relation to the local context.

This view meets the ideas of 'featherweight comparison' and 'lightweight comparison', in the sense that the comparative legal analysis will most often not be systematic. However, the attention given to the political and social background of foreign legal systems, as expressed in policy choices and interdisciplinary studies informing these choices, takes a dimension which corresponds more with the 'heavier' types of comparative legal analysis.[78] The analysis of case law in the next section aims to bring further clarification regarding the actual practices of national highest courts.

3.2 Examples from Case Law

This section explores the judicial use of comparative law in light of the two theoretical views presented in the previous section and the methodological considerations outlined in Section 2. The use of interdisciplinary insights in comparative legal analysis by courts is investigated here in relation to three examples, regarding the acknowledgement of 'wrongful life' claims, the extradition of citizens to a legal system which applies the death penalty, and the assessment of criminal responsibility in case of wilful transmission of HIV infection. All three examples were mentioned in interviews with judges conducted for my research on the changing role of highest national courts in the globalised legal context.[79] The interviewed judges considered that the judgments in these cases provided emblematic examples of judicial approaches to the use of comparative law. Moreover, the selected cases concern legal issues which are closely connected with contextual aspects regarding moral and societal views in national legal systems as well as with empirical questions. Although the analysis in this section does not allow for drawing general conclusions, the selection of these specific examples makes it possible to obtain a better understanding of the role of contextual aspects in the legal reasoning and methodological choices of highest courts regarding the use of comparative law.

3.2.1 'Wrongful Life'

A first clear example of the context-dependent nature of judgments of courts in different countries is provided by an overview of judgments in 'wrongful life' claims. These cases concern the claims for damages in the name of a severely handicapped child born as a result of an incorrect diagnosis during the mother's pregnancy, based on which the pregnancy has not been terminated. Research by Ivo Giesen clarifies how courts in different jurisdictions have examined foreign case law in their process of decision-making in this type of case.[80]

The case law of the Dutch Supreme Court (Hoge Raad) provides a pertinent example in this regard. This Court is one of the few courts in the world which has allowed a claim for damages on the basis of wrongful life. The Hoge Raad's deliberations in the case of *Baby Kelly* were informed by an extensive comparative legal analysis presented by Advocate-General Hartkamp in his advisory opinion to the Court.[81] Although the Court as a convention does not refer to comparative legal sources in its judgments, it is certain that the judges have taken the Advocate General's analysis into account in their deliberations.[82] This analysis extensively discussed available case law from Germany, France, and the United Kingdom and mentioned further examples from Belgium, Australia, the United States, and Israel.[83] The comparative legal study seems to have been informed by the Advocate General's knowledge of and access to foreign case law as well as by academic literature and the materials presented by counsel.[84] The overview of foreign case law focussed on the interpretation of the relevant provisions of tort law, mentioning the considerations given by foreign courts to moral arguments and national policies of tort law.[85] However, the Advocate-General did not discuss differences between legal concepts, such as the meaning of 'duty of care' in the common law system of the United Kingdom. Also, political and societal debate in the examined jurisdictions was only taken into account to a limited extent.[86] Moreover, the Advocate-General did not refer to the outcomes of the comparative legal analysis in his advice regarding the adequate solution of the case of *Baby Kelly* on the basis of Dutch tort law.[87]

74. Adams and Mak, above n. 69, at 2917.
75. J. Stapleton, 'Benefits of Comparative Tort Reasoning: Lost in Translation', 1 *Journal of Tort Law*, at 2 and 44 (2007, nr. 3, article 6).
76. *Ibid.*
77. Adams and Mak, above n. 69, at 2918.
78. *See* above, Section 2.2.3.
79. Mak, above n. 9.
80. I. Giesen, 'The Use and Influence of Comparative Law in "Wrongful Life" Cases', 8 *Utrecht Law Review* 35 (2012, nr. 2).
81. *Baby Kelly* HR 18 March 2005, NJ 206, 606.
82. Giesen, above n. 80, at 46.
83. HR 18 March 2005, NJ 206, 606, conclusion of Advocate-General Hartkamp, at 23-32.
84. *Ibid.*, at 24.
85. *See for example ibid.*, at 30 (concerning English case law).
86. *See for example ibid.*, at 31 (reference to the adoption of the 'Anti-Perruche Act' in France, which formed a legislative response to the awarding of damages by the Cour de cassation in a 'wrongful life' case).
87. *Ibid.*, at 33-58.

Giesen has observed that the 'wrongful life' judgments of courts around the world diverge. As an explanation for this divergence between judicial decisions, he offers the following argument:

> that comparative law is not capable of providing a definite answer to the question of which arguments are the most valid, most convincing and decisive, at least not in tort law issues of the magnitude of wrongful life claims. It is instead the weight which a certain argument receives in a certain *cultural setting* or *background*, in a certain environment drenched in ages of promoting specific legal policies that seems to decide the matter. Hence, it is what I call the *politics of a tort law system* that governs the outcomes and the solutions reached in these sorts of cases.[88]

Seen from this perspective, differences between judgments of national highest courts in different jurisdictions on similar legal issues relate to differences between national policies. However, the tort law policies of other jurisdictions are not necessarily studied in the judicial analysis of foreign legal arguments. Indeed, the methodology of comparative legal analysis used by highest courts in wrongful life cases seems to consist mostly of a 'featherweight comparison', in which foreign case law is studied in a non-systematic way as a source of legal arguments which can be used either for or against the judgment in the domestic case. The domestic perspective is central to this analysis. In this respect, practices of highest courts in wrongful life cases correspond with Bell's view in their emphasis on the relative weight of comparative legal arguments. However, the use of comparative law in these cases seems less aimed at the development of 'universal' solutions than Bell supposes.

The example of wrongful life cases clarifies that policies, as well as other contextual elements, are not always explicitly referred to in comparative legal analysis for the benefit of judicial decision-making. A second example provides a different view with regard to case law addressing fundamental principles of criminal and constitutional law.

3.2.2 Extradition and Possible Capital Punishment

In this example, the Supreme Court of Canada considered facts and policies connected to foreign legal systems, in particular the United States, in order to construct a point of reference for the interpretation of the domestic law. The case *United States v. Burns* concerned the requested extradition of two Canadians to the United States, where these persons could be sentenced to death. In this case, the Supreme Court of Canada looked at international opinion and at the experiences of other states.[89] The Canadian court eventually decided that it was unconstitutional under the Charter of Rights and Freedoms to extradite the persons in question if no assurances were given that the death sentence would not be imposed or carried out.[90] This decision was reached partly on the basis of international sources. It overturned earlier judgments of the Canadian Supreme Court, in which the extradition of US residents was not prevented.[91]

The *Burns* judgment cites international experience and the policies in other countries, which have also abolished the death penalty. It appears that these references to like-minded systems are used to strengthen the Court's decision to overturn its previous case law. In order to support its judgment even more, the Court emphasises the isolated position of the US states in which the death penalty is still imposed. In this respect, an empirical connotation can be identified in this quantitative assessment concerning the legal systems which apply the death penalty. The Court's reasoning is as follows:

> International experience, particularly in the past decade, has shown the death penalty to raise many complex problems of both a philosophical and pragmatic nature. While there remains the fundamental issue of whether the state can ever be justified in taking the life of a human being within its power, the present debate goes beyond arguments over the effectiveness of deterrence and the appropriateness of vengeance and retribution. It strikes at the very ability of the criminal justice system to obtain a uniformly correct result even where death hangs in the balance.
>
> International experience thus confirms the validity of concerns expressed in the Canadian Parliament about capital punishment. It also shows that a rule requiring that assurances be obtained prior to extradition in death penalty cases not only accords with Canada's principled advocacy on the international level, but is also consistent with the practice of other countries with whom Canada generally invites comparison, apart from the retentionist jurisdictions in the United States.[92]

Interestingly, foreign factual experience concerning potential wrongful convictions was invoked in the *Burns* judgment as one of the arguments justifying the Court's reversal of its *Kindler* and *Ng* jurisprudence, in which extradition to the United States had been allowed. In this respect, the judgment not only relied on a comparative analysis of legal rules and underlying policies. It also took into account arguments with an empirical connotation, which require a non-legal approach.[93] The Supreme Court of Canada reasoned:

> The outcome of this appeal turns on an appreciation of the principles of fundamental justice, which in turn are derived from the basic tenets of our legal system. These basic tenets have not changed since 1991 when *Kindler* and *Ng* were decided, but their

88. Giesen, above n. 80, at 37.
89. *United States v. Burns* [2001] 1 SCR 283.
90. *Ibid.*, at 143-44.
91. *Kindler v. Canada (Minister of Justice)* [1991] 2 SCR 779; *Reference re Ng Extradition (Canada)* [1991] 2 SCR 858.
92. [2001] 1 SCR 283, at 127-28.
93. *See* above, Section 2.2.2.

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application in particular cases (the 'balancing process') must take note of factual developments in Canada and in relevant foreign jurisdictions. When principles of fundamental justice as established and understood in Canada are applied to these factual developments, many of which are of far-reaching importance in death penalty cases, a balance which tilted in favour of extradition without assurances in *Kindler* and *Ng* now tilts against the constitutionality of such an outcome. For these reasons, the appeal is dismissed.[94]

Three observations can be made with regard to this judgment. Firstly, the approach of the Supreme Court of Canada in this case seems to align more with the view of Adams and me than with the view of Bell concerning the use of comparative law in judicial reasoning. Indeed, the comparative aspect of the case did not so much concern the judicial interpretation of a legal concept in different systems, but rather the developed practices (or policies) of governments concerning extradition. Secondly, the empirical elements included in the Court's considerations were not backed up with references to available studies from non-legal disciplines (for example, studies in sociology or political science). In this sense, the Court's approach qualifies as a 'featherweight comparison', lacking both a systematic analysis of foreign law and a thorough contextual analysis of foreign systems on the basis of interdisciplinary insights. Finally, the comparison between the legal systems of Canada and the United States concerns an intra-cultural comparison of legal systems belonging to the common law family, which implies that a firm common ground for legal comparison existed.

3.2.3 Criminal Responsibility for HIV Infection

A third example of comparative legal research in judicial decision-making can be found in the Hoge Raad's case law regarding the doctrine of conditional intent (*voorwaardelijk opzet*). Legal questions about the interpretation of this doctrine arose in cases concerning the alleged attempt to commit manslaughter through the wilful transmission of HIV infection.[95] Concerning the application of this doctrine in new circumstances, the judges of the Criminal Law Chamber have sought inspiration in German law, and in the HIV cases also French, Austrian, Canadian, and Australian sources were brought to the attention of the judges by the Advocate-General.[96] Regarding the HIV cases, a balancing act was required between the policy preference to keep these cases outside of the criminal law process, on the one hand, and the legal acceptance of a broader conception of 'conditional intent', on the other hand. The judgment indicates that the German approach to this question was influential on the decision-making of the Hoge Raad, but in the end, a different solution was chosen for the Netherlands.

Indeed, the judgment in *HIV-IV* reveals that the Hoge Raad gave weight to the policy preferences expressed by the Dutch government. The Hoge Raad took into account the reserve which needs to be adopted in accepting criminal liability for endangering behaviour like that which had occurred in this case. As a reason for this reserve, the Court mentioned public health interests regarding the particular situation of the danger of HIV contamination. The Court explicitly referred to the views of the involved ministers.[97]

Again, some observations can be made. Firstly, the comparative legal analysis focused on national policies underlying a similar legal concept. Also, the German interpretation of 'conditional intent' was not cited by the Hoge Raad and therefore was not used to strengthen the judicial reasoning. In this sense, the judicial use of comparative law seems to fit better with the view of Adams and me than with the view of Bell. Secondly, the Court referred to statistical analyses concerning the probability of HIV infection in circumstances similar to those of the case. Here, the legal question's empirical connotation required that such information was consulted, regardless of the inclusion of a comparative analysis in the Court's reasoning.[98] Finally, the example of the HIV cases clarifies that the Hoge Raad focuses on comparisons with the legal sources of other Continental European legal systems, in particular its neighbour Germany, although some sources from common law systems are considered as well. These examples indicate that the Court prefers intra-cultural comparisons. The prominence of German law in comparative legal analysis suggests that the judges of the Hoge Raad favour comparisons at the third level identified by Van Hoecke and Warrington, where 'concrete comparison of statutory and judicial rules of behaviour can be fruitful, because the context, the legal culture, is very similar ... whereas the conceptual framework and legal language are also to a large extent the same'.[99]

3.3 Intermediary Conclusion

The presented examples of comparative legal analysis in judicial decision-making connect with the second aim, identified above,[100] for conducting comparative legal research, that is, the use of comparative legal analysis as a source of inspiration for national legal practice. Fitting with this aim, the courts in the examined cases primarily use the methodological approach of 'featherweight comparison'. However, in some instances, the study of foreign case law is somewhat more contextualised and includes consideration of the legal cultures of other jurisdictions and of relevant factual information. Inter-

94. [2001] 1 SCR 283, at 144.
95. *HIV-I* HR 25 March 2003, NJ 2003, 552; *HIV-II* HR 24 June 2003, NJ 2003, 555; *HIV-III* HR 18 January 2005, NJ 2005, 154; *HIV-IV* HR 20 February 2007, NJ 2007, 313.
96. *See for example HIV-IV* HR 20 February 2007, NJ 2007, 313, conclusion of Advocate-General Bleichrodt, at 3.7.7, in which German and Swiss law are analysed.
97. *See* HR 20 February 2007, NJ 2007, 313, at 4.4, which cites Kamerstukken II 2004-2005, 29 800 VI, nr. 157, at 5-9.
98. *See* above, Section 2.2.2.
99. Van Hoecke and Warrington, above n. 3, at 533.
100. *See* above, Section 2.2.3.

disciplinary insights are sometimes taken into account regarding legal questions with an empirical connotation, but this type of analysis is not necessarily connected with a comparative approach. The examples corroborate the idea that courts will not transplant foreign legal solutions into the domestic law. Finally, the courts seem to focus primarily on comparisons with legal systems belonging to the same legal family or legal culture.

The examples discussed in this section have provided insight into the judicial use of comparative law and the characteristics of comparative legal reasoning. Based on this analysis, some further observations can be made concerning the role and method of interdisciplinary incorporation in all types of comparative legal research.

4 Comparative Legal Methodology: Lessons from Judicial Decision-Making

Which lessons does the judicial use of comparative law hold for comparative legal research generally, in particular concerning the incorporation of interdisciplinary insights in legal analysis? In order to answer this question, this section will first address the conditions relating to the aim and role of comparative legal analysis in judging (Section 4.1) and next to the methodology of comparative legal analysis in this context (Section 4.2).

4.1 Aim and Role of Comparative Legal Analysis

The analysis in the previous section has confirmed that comparative legal analysis in judicial decision-making is conducted with a particular aim, *that is*, the search for inspiration from foreign legal arguments for the deciding of domestic cases. The analysis has further clarified that the approach of judges, mostly a 'featherweight comparison', is geared to this aim. The aim of comparative legal scholarship was described above as the obtaining of knowledge through a thorough and contextual comparison of two or more legal systems. The methodology of comparative legal analysis is essentially similar for both judging and scholarship, to the extent that legal interpretation and the better understanding of domestic legal concepts are involved. However, a relevant point to consider is that choices made regarding the use of comparative legal analysis differ on the basis of underlying motives and approaches of judges when compared to legal scholars.

Judges have several motives for conducting comparative research and for selecting specific foreign legal systems in this research. These motives concern the search for inspiration for the deciding of a difficult legal question, often combined with the public importance of the case. Furthermore, judges are interested in learning about 'best practices' developed by their foreign peers and they want to coordinate the development of domestic case law with legal development at the transnational level.[101] Still, judges do not form a homogeneous group. Indeed, judges in national supreme courts and constitutional courts hold different views concerning the legitimacy and usefulness of the use of comparative law in judicial decision-making.[102] Some judges have reservations regarding the use of comparative law in judicial decision-making, whereas other judges have a more open attitude.[103] Reservations can concern the authoritative value of foreign legal arguments or scepticism regarding the guidance which can be derived from comparative law. Judges with a more open attitude are not necessarily in favour of striving for convergence with the laws of other countries or with international law. Indeed, and befitting the balanced nature of the judicial function, the majority of the judges have a nuanced approach regarding the use of non-binding foreign law in judicial decision-making. These judges are of the opinion that it is sometimes useful to engage with foreign law.[104] For all judges, the time-consuming nature of comparative legal research might be a reason for abstaining from an inquiry into foreign legal sources.[105] In sum, factors taken into account in judicial choices include the perceived usefulness of comparative law in the deciding of a specific case and the available time and resources for comparative legal analysis.

The judicial use of comparative law might come to resemble legal scholarship more if a 'heavier' method of comparison were developed. In this respect, Jeremy Waldron has presented a more principled argument for the judicial study of foreign law. He has advanced a principle of equal treatment of parties in similar cases occurring in different jurisdictions.[106] John Bell has correctly pointed out that the acceptance of such a principle implies agreement on 'a more substantial function' of the law, such as the protection of human rights or the promotion of human well-being.[107] In Waldron's analysis, the achievement of equal treatment demands of courts to do two things: (i) to compare their methods of decision-making with those of courts in foreign jurisdictions and draw lessons from this comparison and (ii) to compare the content of judgments and draw insights for the deciding of domestic cases.[108] However, available studies of judicial practices, as well as the examples from case law discussed in this article, suggest that courts currently do not apply this more thorough method of legal comparison.

4.2 Methodology of Comparative Legal Analysis

Regarding the incorporation of non-legal insights, comparative legal analysis in judicial decision-making encounters the 'common' incorporation problems of legal scholarship, including arbitrariness of the selection

101. Mak, above n. 9, at 201.
102. *Ibid.*, at 227-30.
103. Compare V. Jackson, *Constitutional Engagement in a Transnational Era* (2009).
104. Mak, above n. 9, at 229-30.
105. *Ibid.*, at 232-33.
106. Waldron, above n. 68.
107. Bell, above n. 61, at 14.
108. *Ibid.*

and interpretation of court cases, possibly related to implicit ideological or political views; incorrect ideas about social reality and human psychology; or subjective reasoning.[109] Lessons transpire, in this regard, from an analysis of the methodological considerations of judges concerning the inclusion of comparative legal sources in the reasoning of judgments and concerning the selection of sources.

Firstly, a relevant difference exists between common law courts and Continental European courts with regard to the style of judicial reasoning. For reasons of tradition and the requirement of a unanimous decision, judgments in civil law systems, such as The Netherlands and France, tend to be relatively short. In this light, the citation of foreign law would be exceptional. Indeed, some judges are of the opinion that the citation of foreign law might weaken the reasoning of a judgment because of possible criticism of the highest court's choices, for example, with regard to the selection of examined jurisdictions and the authority of arguments found through the legal comparison.[110] The citation of foreign legal materials is more easily accepted in common law courts, which stand in the tradition of law development through case law and which permit individual judges to issue their own opinion on cases. Judges in common law systems will cite all arguments which they consider to be persuasive, based on the idea that the judge owes a duty to counsel to explain why their arguments are not accepted.[111] A question of concern amongst judges in these courts is the question of whether a presentation of comparative legal arguments in the court's reasoning should consist of a 'full' discussion of all materials found or whether the court is allowed to mention only those foreign references which support its own decision. British judges have indicated that they do not find the latter approach problematic, while some American judges have criticised the use of foreign law if it consists of 'cherry picking'.[112] Still, these judges seem to agree on the point that the discussion of foreign law in the judicial deliberations should be as comprehensive as possible.

Concerning methodology, secondly, the selection of legal systems for the comparison is also significant. Selection is inherent to comparative law, since 'nobody can compare everything in the world of laws'.[113] In this regard, considerations of judges are similar to those of legal scholars. Firstly, legal tradition plays a role. The genealogical relation between common law systems makes it more natural for the highest courts in these systems, for example, in Canada and the United States, to look to each other for inspiration than to legal systems which do not share this background. The exchange between courts in these jurisdictions, furthermore, is made easier by their shared language. Highest courts in Continental European civil law systems, by contrast, most often study foreign sources which originated in other civil law jurisdictions. The Dutch courts, for example, consider that the French and German influences in the Dutch legal system provide reasons for looking to these systems first when engaging in a comparative legal study. Besides legal tradition and language, judges also take into account the prestige of specific foreign courts when selecting case law for a legal comparison.[114] Finally, practical constraints, such as knowledge of foreign systems and their background and the time available for comparative research, are significant. Concerning knowledge of foreign law, legal scholars have more opportunities to develop a body of knowledge. However, a considerable number of judges in supreme courts and constitutional courts have a background in academia and can build on knowledge obtained during this previous career. Regarding time constraints, judges are under greater pressure than legal scholars.

In sum, this analysis of judicial views and methodological choices clarifies that judges relate their approaches regarding the use of foreign law mostly to the requirements and methods of legal research generally. Non-legal aspects, such as historical connections and the political and societal context of foreign legal systems, are considered in order to collect materials which can form the basis for a useful comparative analysis. However, the attention given to the analysis of foreign law and non-legal aspects in the deciding of cases is limited, because of the nature of the comparative legal analysis and time constraints affecting the judicial work.

5 Concluding Remarks

This article has analysed how contextual aspects of foreign law can be taken into account in comparative legal research. A theoretical analysis of the inherent interdisciplinary nature of comparative law was followed by an illustration of the role and method of interdisciplinary incorporation in comparative legal analysis conducted by Western highest courts. This analysis provides a clarification with regard to three aspects of comparative legal methodology encompassing interdisciplinary elements:

1. What is compared in comparative legal research and to what extent do similarities and differences exist in this regard between legal scholars and judges? The analysis in this article revealed that a meaningful comparison of legal rules and case law from different jurisdictions can only be achieved if relevant aspects of the historical, political, economic, and social context of the compared legal systems are taken into account. In this regard, comparative legal analysis

109. See other contributions to this special issue.

110. Mak, above n. 9, at 231.

111. A. Touffait and A. Tunc, 'Pour une motivation plus explicite des décisions de justice notamment de celles de la Cour de cassation', 72 *Revue trimestrielle de droit civil* 491 (1974).

112. *See for example* 'Judge John Roberts Confirmation Hearings', available at <www.gpo.gov>, last accessed 4 November 2015.

113. Siems, above n. 2, at 6.

114. Mak, above n. 9, at 206.

requires the study of contextual insights provided by non-legal academic disciplines. The relevance of context is illustrated clearly by the developed practices of courts regarding the use of comparative law. In these judicial practices, the study of policy choices underlying foreign case law plays a significant role. For legal scholars, this experience from legal practice underlines the importance of sufficient contextualisation of comparative research in order to draw conclusions for the benefit of concrete cases as well as broader political and societal debate. Indeed, there is a connection here between legal scholarship and judging. Legal scholars can assist judicial decision-making by providing judges with information about the laws and case law of foreign jurisdictions. In this respect, comparative legal research conducted by scholars contributes to the soundness of comparative legal analysis in judicial decision-making.

2. Why do legal scholars and judges use comparative legal analysis? Comparative legal analysis can have different aims, connected with a 'scale' of methods ranging from 'featherweight' to 'heavyweight' legal comparison. Along this scale, interdisciplinary incorporation becomes increasingly important in the comparative legal analysis. The article clarified that knowledge building in legal scholarship generally provides most reason and opportunity for the discussion of insights from non-legal disciplines. At the other end of the spectrum, comparative legal analysis as a source of inspiration for judicial decision-making or law reform is connected with a smaller basis of legitimacy and with fewer resources for the conducting of a systematic and contextualised analysis. When considering the use of comparative law in legal practice, it is important to take into account the individual approaches of those involved in the application or reform of laws. In this respect, the article clarified that the individual approaches of judges have an influence on the extent to which comparative legal analysis, and interdisciplinary aspects connected with this analysis, play a role in judicial deliberations and the reasoning of judgments. Judges with an 'open' attitude concerning the use of comparative legal analysis emphasise the usefulness in finding inspiration for domestic decision-making, even though the study of foreign law cannot provide solutions for domestic cases. These judges will engage in comparative legal analysis more often than judges with a 'closed' attitude, even if this analysis is time-consuming and not absolutely necessary for the solution of the domestic case.
3. In which ways can legal scholarship make sense of the use of interdisciplinary elements in comparative legal analysis, in particular: how can legal scholars analyse the use of comparative law by judges? The analysis in this article used legal theory and referred to research in the fields of comparative law and socio-legal studies to provide answers to the research question and sub-question. The analysis suggests that scholars have an important role in the further contextualisation of comparative legal research regarding specific legal issues, both through legal-doctrinal analysis and through socio-legal comparative analysis.[115] Regarding the study of the judicial use of comparative legal analysis, the method of qualitative interviewing seems suitable for an analysis of the societal and psychological background of the examined judicial practices. In particular, this approach enables the collection of information on the use of comparative legal analysis even in courts where explicit citations of foreign judgments are rare. Moreover, interviews can give insight into the motives of judges regarding the use of comparative legal analysis. Future comparative and socio-legal research will contribute to a growing body of academic literature, which includes comparative legal research of judicial citations to foreign law in jurisdictions in Central and Eastern Europe;[116] analyses of the exchange of legal ideas and experiences in transnational judicial networks;[117] and quantitative research, revealing patterns of judicial citations to foreign law.[118] The further development of interdisciplinary research on judicial citations serves a broad aim, as it could provide valuable results for a better understanding of the development of the law under the effects of globalisation.[119]

In sum, awareness of the interdisciplinary aspect of comparative legal analysis, as well as further debate and research on legal methodology, can help scholars and judges to avoid being pulled down by the 'under toad' of incorrect use of the comparative legal method.

115. Compare the distinction made above, n. 19.
116. M. Bobek, *Comparative Reasoning in European Supreme Courts* (2013).
117. M. Claes and M. de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks', 8 *Utrecht Law Review* 100 (2012, nr. 2); E. Lazega, 'Mapping Judicial Dialogue across National Borders: An Exploratory Network Study of Learning from Lobbying among European Intellectual Property Judges', 8 *Utrecht Law Review* 115 (2012, nr. 2).
118. M. Gelter and M. Siems, 'Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations between Ten of Europe's Highest Courts', 8 *Utrecht Law Review* 88 (2012, nr. 2); Groppi and Ponthoreau, above n. 6.
119. J. Bell, 'Researching Globalisation: Lessons from Judicial Citations', 3 *Cambridge Journal of International and Comparative Law* 961 (2014).

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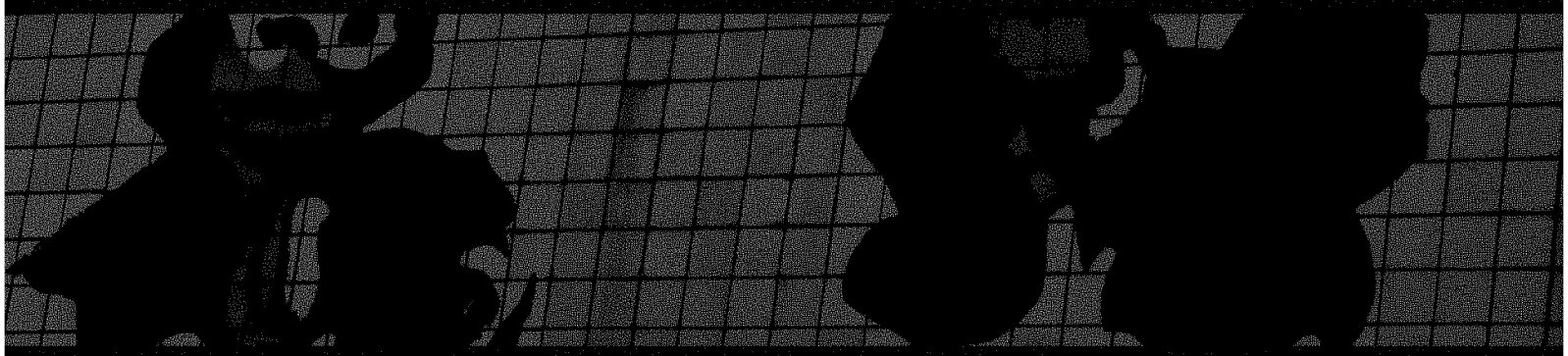

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The Incorporation Problem in Interdisciplinary Legal Research