# The Incorporation Problem in Interdisciplinary Legal Research, Part 2: Case Studies

**Sanne Taekema & Wibren van der Burg***

As our previous issue 8:2, this issue of *Erasmus Law Review* addresses the problem of incorporating insights from non-legal disciplines into legal research. The discussion of that problem in the introduction to issue 8:2 is therefore also the starting point for the current issue, and for a full understanding of the questions underlying the contributions to this issue, we refer the reader to that earlier introduction.[1] Whereas the articles in issue 8:2 focused on more general and theoretical questions with regard to the incorporation problem, this issue contains a number of case studies. The first four articles reflect on concrete research projects conducted by legal researchers in which they include a form of interdisciplinarity. The final article takes a different approach, by using Ph.D. theses, scholarly articles, and Law Reform Commission reports, analyzing whether and how legal researchers do interdisciplinary research.

There are particular insights to be gained from a case study approach to the incorporation problem. The basic idea underlying the wish to include case studies here is that we need careful consideration of how incorporation works in the practice of legal research as test cases for the theoretical claims. Moreover, one of the main points of departure for our approach is that we need to assess the necessity of interdisciplinary legal research in light of the research question of the research at hand. If this idea holds, it is to be expected that there will be a great variety in modes of interdisciplinarity, depending on the precise topic and set-up of the research presented. This is certainly true of the current issue.

In addition to the particular research question, it is the broader embedding of that question in a particular approach to the field that seems of paramount importance. Some fields of research in which legal scholars engage are areas in which the boundaries between disciplines have become fluid. Researching problems in such areas, therefore, almost as a matter of course, involves elements from different disciplines. The articles by Annie de Roo and Andria Naudé Fourie provide examples.

Annie de Roo describes four multidisciplinary projects in which she has been involved. The central theme connecting all projects was human conflict strategies and governance. She discusses in rich detail various aspects of executing broad projects alike these. When analysing how legal practice and scholarship have incorporated the insights from conflict management studies, she suggests that these insights are frequently 'cannibalised' in legal doctrinal research, as only those findings are incorporated that can be translated into doctrinal legal concepts. In addition, she advocates a 'reverse incorporation': empirical conflict management studies might profit from taking legal doctrinal research more seriously as, exactly because of its normative stance, it has something crucial to add to the empirical data.

Andria Naudé Fourie gives an account of how legal doctrinal insights figure in quantitative empirical research on international accountability mechanisms at development banks. These mechanisms, most prominently the complaint procedure at the World Bank Inspection Panel, need to be studied from an interdisciplinary angle. In order to facilitate such research she has made a database of cases generated by these mechanisms. In the article, she shows how legal doctrinal methods have figured in her design and construction of the database and in the analysis of the cases. Employing legal doctrinal concepts thus furthers understanding of accountability mechanisms that are concerned with the intersection of economic, social, environmental, and legal concerns. In turn, the study of such mechanisms on the basis of a comprehensive database of cases shows patterns of legal development in a context that blurs the boundaries between formal law and informal normativity.

The articles of Henrard and Kloosterhuis present two ways of engaging directly with the need of how to integrate findings from another discipline: Henrard's is an internal approach in which a doctrinal argument encounters its limits and requires input from other disciplines, whereas the more external approach by Kloosterhuis is based on the hypothesis that argumentation theory can provide a fruitful alternative explanation that can be used in doctrinal research.

Henrard's subject is the protection of minorities' rights by the European Court of Human Rights. She argues that the Court in several respects fails to properly balance all relevant interests and variables. One cause of this may be lack of knowledge, the other concerns about its own political legitimacy. The lack of knowledge could be remedied by relying on non-legal disciplines. Moreover, she argues that the more explicit and transparent inclusion of other disciplines could also have

* Sanne Taekema and Wibren van der Burg are Professor of Jurisprudence and Professor of Legal Philosophy and Jurisprudence, respectively, at the Erasmus School of Law in Rotterdam.

1. S. Taekema and W. van der Burg, 'The Incorporation Problem in Interdisciplinary Legal Research, Part 1: Theoretical Discussions', 8(2) *Erasmus Law Review* 39-42 (2015), doi: 10.5553/ELR.000050.

indirect beneficial effects for the political legitimacy of the Court.

Kloosterhuis focuses on the criminal act of insulting. He argues that there are various difficulties in interpreting the Dutch statutory norms about insulting; because of the vagueness, Dutch case law is uncertain and has even absurd consequences. According to Kloosterhuis, a standard doctrinal approach to insulting is inadequate to address these difficulties. Speech act theory, however, can provide a more precise understanding of the concept of insulting.

The final article includes a different type of case study, namely a descriptive analysis of whether and how legal researchers do interdisciplinary research. Terry Hutchinson focuses on one specific type of research, namely research directed to law reform. She makes an extensive quantitative analysis of Australian Ph.D. theses and articles written for Australian law journals. The conclusion is that most Ph.D. theses and law articles contain recommendations for reform and that there is a frequent use of interdisciplinary methods – even if doctrinal methods remain at the core of most studies. Furthermore, she discusses the work of the Australian Law Reform Commission, an institution that might be expected to include various types of non-disciplinary materials. However, she has to conclude that their reports do not provide much information about the extent to which non-doctrinal materials have been incorporated in the recommendations.



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# A Case for Reverse Incorporation of Academic Legal Scholarship into Conflict Management Studies

**Annie de Roo***

**Abstract**

The article takes as its point of departure some of the author's multidisciplinary projects. Special attention is given to the question of whether the disciplines united in the various research team members already constituted a kind of 'inter-discipline', through which a single object was studied. The issue of how the disciplinary orientations of the research team members occasionally clashed, on methodological issues, is also addressed.

The outcomes of these and similar multidisciplinary research projects are followed back into legal practice and academic legal scholarship to uncover whether an incorporation problem indeed exists. Here, special attention will be given to policy recommendations and notably proposals for new legislation. After all, according to Van Dijck et al., the typical role model for legal researchers working from an internal perspective on the law is the legislator.

The author concludes by making a somewhat bold case for reverse incorporation, that is, the need for (traditional) academic legal research to become an integral part of a more encompassing (inter-)discipline, referred to here as 'conflict management studies'. Key factors that will contribute to the rise of such a broad (inter-)discipline are the changes that currently permeate legal practice (the target audience of traditional legal research) and the changes in the overall financing of academic research itself (with special reference to the Netherlands).

**Keywords:** legislator, legal research, academic research, conflict management studies, inter-discipline

## 1 Introduction

The central question running through this *Erasmus Law Review* special issue is: 'How can we translate and incorporate the various non-legal disciplines and their findings into the language of legal doctrine?' Adequate evaluation of positive law requires at least some critical distance regarding the law and inclusion of insights from other relevant disciplines. Yet at the same time, such (partially) external insights are not easily incorporated into the internal perspective of doctrinal legal analysis.

* Erasmus School of Law, Erasmus University Rotterdam.

In their introductory contribution to this issue, Sanne Taekema and Wibren van der Burg have argued that the opposition between legal doctrinal research and interdisciplinary research must be transcended.

At the 2014 symposium that constituted the precursor of this special issue, I was asked to address this incorporation problem on the basis of one or more concrete case studies. In view of my involvement in several multidisciplinary research projects, I have taken the liberty to take four of these projects as the basis for my analysis. This choice has enabled me to rethink, as an insider, whether such an incorporation problem has indeed surfaced and if so, when and how. In doing so, I will make an effort to tie my own experiences in with ongoing discussions and observations reported by others in academic literature.

At the outset, I should clarify that my track record in academic research has developed mainly in the domain of comparative law and from there into the comparative analysis of dispute resolution methods. Thus in my research, solutions offered through (domestic) law always had to be juxtaposed, either to foreign legal solutions or to solutions achieved through strategies other than 'juridification' and litigation in a court of law. There were, therefore, always two axes of comparison on the horizon.

Differences and similarities observed through such juxtapositions require explanations or at least an effort thereto. As scientific explanation cannot be generated from within an *internal* legal research perspective, it is not surprising that comparative law and comparative dispute resolution are fields where *external* perspectives on law are traditionally brought in, through disciplines such as political history, sociology, conflict psychology, game theory, and economics.[1] My former head of department in comparative law even devoted her inaugural lecture to the need for multidisciplinary research in teams and quoted the following ironical observation made by Feldbrugge:

> When lawyers as a side-line indulge in what they consider scientific work, their method is usually to take up a subject, read and think about it, and hope vaguely that all this will result in conclusions which are in some way interesting, useful, surprising etc. The

1. On the distinction between the internal and external method, *see*, inter alia, R. Dworkin, *Law's Empire* (1986).



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> choice of a subject is dictated by personal taste (of the author himself, his publisher, his boss etc.) and there are almost no rules concerning research methods, except the one which says that the more legal provisions, cases and other material you read, the better the research.[2]

On a personal note: studying legal rules just for the sake of those rules and their coherence within a legal system has never truly caught my fascination. I have always been more interested in the real world, notably in what drives key actors to press for rules and what makes the addressees, involved in a conflict, decide to go for a rule-based strategy or not to end the conflict. In the real world, resorting to law is just one out of many ways to address conflicts.

Hereafter, in part 2, I will first describe the gist of four multidisciplinary projects I was involved in. Special attention will be given to the question of whether the disciplines united in the various research team members already constituted a kind of 'inter-discipline', through which a single object was studied. The issue of how the disciplinary orientations of the research team members occasionally clashed, on methodological issues, will also be addressed. At any rate, the outcomes of these multidisciplinary projects were largely based on insights from the empirical sciences. The central theme connecting all projects was human conflict strategies and governance. The conflict strategies always encompassed authoritative judicial intervention as opposed to informal conflict and problem resolution, procured by disputants autonomously (including mediation). The governance levels ranged from the state level (in projects 1 and 2) to corporate and family levels (projects 3 and 4).



It makes sense to move beyond the four projects next, in part 3 (building blocks of a human conflict inter-discipline), to gain a more comprehensive overview of the development of research *generally*, at the crossroads of judicial and autonomous conflict resolution. Although in recent times empirical insights from various disciplines seem to have become hijacked for governmental austerity agendas, truly useful insights can still be distilled.

As a next step (part 4), an attempt is made to uncover whether a problem of incorporating such empirical findings into legal doctrine indeed exists. Here, special attention will be given to policy recommendations and notably proposals for new legislation. After all, according to Van Dijck et al., the typical role model for legal researchers working from an *internal* perspective on the law is the legislator.[3] Whenever this legislator role model is adopted, Taekema and Van der Burg speak of legal doctrinal research in a broad sense.

As the four projects were all commissioned by the Netherlands' government, the incorporation issue will necessarily be analysed in regard to Dutch law and doctrinal research only. In regard to my home jurisdiction, I come to the conclusion that the insights generated by the empirical sciences (broadly referred to as 'conflict management studies') are essentially 'cannibalised' in legal doctrinal research and publications: only those findings are incorporated that can be translated into doctrinal legal concepts.

I will conclude my contribution (part 5) by making a somewhat bold case for *reverse* incorporation, that is, the need for (traditional) academic legal research to become an integral part of the more encompassing (inter-)discipline referred to as 'conflict management studies'. Key factors that will contribute to the rise of such a broad (inter-)discipline are the changes that currently permeate legal practice (the target audience of traditional legal research) and the changes in the overall financing of academic research itself (with special reference to the Netherlands). Arguably, such reverse incorporation goes one step further than, for instance, Sullivan's view that legal doctrinal research itself is interdisciplinary and in that particular sense distinctive.[4] That view leans heavily on a one-way infusion of empirical insights into autonomous legal research, whereas I believe there are good reasons to – conversely – impart insights from the law into at least those branches of the empirical sciences that concern themselves with human conflict.

Law with its concern for equal protection may be instrumental in completing the quarter-turn rotation that I plead, away from the austerity bias in empirical studies towards restoration of a true vista on human conflict resolution.

## 2 Some Multidisciplinary Projects Reconsidered

Four projects are considered here, on a two-by-two basis.

### 2.1 Bench Marking and Court-Referred Mediation

The first two projects focused on the administration of justice in different European legal systems and the role therein of mediation. It may be helpful to view the handling of litigation by courts as a provision of state-funded 'judicial' services that can be studied from the supply side but also from the demand side. The first project, *Bench Marking – An international comparison of the mechanisms and performance of the judiciary system*, concentrated on the supply side.[5] It had been commissioned by the Netherlands Council for the Judiciary to a team of economists and comparative lawyers. The targeted audience of this research was, in a sense, the Treasury.

2. F.J.M. Feldbrugge, 'Sociological Research Methods and Comparative Law', in M. Rotondi (ed.), *Inchieste di Diritto Comparato*, Vol. 2: Aims and Methods of Comparative Law (1973), at 215.
3. G. van Dijck, S. van Gulijk & M. Prinsen, 'Wat doet de juridische onderzoeker?', 31 *Recht der Werkelijkheid* 1, at 44ff. (2010).
4. K.M. Sullivan, 'Foreword: Interdisciplinarity', *Michigan Law Review*, at 1217-1226 (2007).
5. J. Blank, M. van der Ende, B. van Hulst & R. Jagtenberg, *Bench Marking in an International Perspective. An International Comparison of the Mechanisms and Performance of the Judiciary System* (2004).

Are there any objective standards by which the Treasury can decide whether more or less resources should be invested in the judiciary, lacking a genuine market mechanism for judicial services? The answer that presents itself is by comparing the input/output ratio of the Dutch judicial system to the input/output ratios for the judiciary in neighbouring countries. 'Input' was operationalised as financial resources invested in salaries and equipment and 'output' as number of cases decided and processing time. What we are looking at here is, in other words, the productivity, or business efficiency, of the courts. At this point, legal academics and practitioners may wonder: aren't these data at a much too aggregated level? Many intermediate factors of a technical-legal nature will be co-determinant of, for instance, the number of judgments produced. It became indeed the role of the legal academics and practitioners to qualify the results delivered through the dominant method of quantitative economic analysis in this project, one such intermediary factor being the availability and use of informal mechanisms such as mediation.

This takes us to the second project, *the Practice of Court-referred Mediation in Countries neighbouring the Netherlands*.[6] This time, the focus was primarily on the demand for judicial services, albeit that a central issue was how this demand could be manipulated, by granting the courts power to mandatorily refer litigants to mediation or, at the other extreme, by leaving it up entirely to the parties to opt for mediation voluntarily, whenever litigation was considered. Naturally, we were also interested in any arrangements representing shades of grey in between these black and white extremes. This project was commissioned by the Netherlands Ministry of Justice, and it ran parallel to a purely domestic investigation, monitoring the first nationwide experiments with court-referred mediation in this country. In the Dutch experiment, the mediation option was explained to litigants by letter or orally by the judge, but in the end, it was for the parties to decide whether to choose mediation or to continue with their litigation in court. During the experiment, mediation was also available free of charge for litigants. The Ministry was interested, however, to what extent the number of mediated settlements would rise or fall if parties would be more or less pressed into mediation and/or when they would have to pay for the services of a mediator themselves. Manipulating these variables within a first national experiment would make the domestic research design too complicated, but as it was well known that neighbouring countries had various costs arrangements in place while operating by varying degrees of compulsion, a comparative (European) format was again resorted too. The other disciplines represented in this project were sociology of law and policy administration: most of the available empirical studies in the other European countries (that our project sought to synthesise) can be characterised as sociolegal research, while the overall monitoring of the project was shared between legal academics and government officials trained in policy administration.

### 2.2 Costs and Opportunities and Multiproblem Families

The focus of the third and the fourth project was not on the *state* level of governance, but on the *corporate* level and on the *family* level, respectively. Both these projects were domestic in outlook and concentrated on the different pathways for dealing with developing conflicts and on the amounts of escalation and costs arising along these various pathways. Project 3, *Costs and Opportunities: an Inquiry into Individual Labour Conflicts within the Dutch Police Force*, was commissioned by an agency representing both the employees and the employer of the Netherlands police, *i.e.* the police trade unions, and (at that time) the Ministry of the Interior.[7]

The aim was to uncover what disputants themselves perceived as the ultimate cause of the conflicts at work they had become involved in and to ascertain the relative frequency of formal (rule-based) and informal (negotiation-based) approaches to end the conflict. The obvious formal approach is by imposing orders (the employer) and appealing against such orders through the civil servant courts (the employee); informal approaches would include direct negotiation as well as mediation. Last but not least, the costs to be associated with these approaches were to be assessed. The research team consisted of legal scholars and economists, and the target audience was the said agency. Both agency partners, *i.e.* the government employer and the unions, were interested to see what organisational costs and personal costs were involved in each approach and, if necessary, to put this as a key HRM issue on the national agenda.

Whereas policemen are, on average, reasonably well educated and conversant with the law, the opposite tends to be true for the population in the fourth project: the members of multiproblem families. This project, *Socio-economic Returns on Family Group Conferencing for Dutch Multi-Problem Families*, was commissioned by the non-profit foundation that facilitates family group conferences in the Netherlands, the EKC (*Eigen Kracht Centrale*).[8] Where a family is in trouble (*e.g.* poverty, educational failure, youth delinquency, housing problems), the members of the family network themselves can be activated to solve (part of) these problems autonomously, without outside intervention by professionals (psychologists, the judiciary issuing supervision orders). To this end, the conferences are convened with EKC assistance. Other researchers had already established that the *quality* of solutions achieved through the family group approach did not differ much from outcomes achieved through professional interventions. In our project,



6. A. de Roo and R. Jagtenberg, *De praktijk van mediation in ons omringende landen* (2003). Presently the ministry is referred to as the Ministry of Security and Justice.

7. R. Jagtenberg, A. de Roo, J. Blank & B. van Hulst, *Kosten en kansen. Een onderzoek naar individuele arbeidsconflicten binnen de Nederlandse politie* (2006).

8. A. de Roo and R. Jagtenberg, 'Socio-Economic Returns on FGC for Dutch Multi-Problems Families', in R. Clarijs and Th. Malmberg (eds.), *The Quiet Revolution* (2012), at 149-60.



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we had to find out about the *costs* to be associated with the autonomous approach as opposed to an interventionist approach. Again the methodological device of conflict development pathways was used, and again the research team consisted of economists and legal scholars. The target audience was the community of youth care professionals and the responsible government ministries, the purpose being to make them aware of the cost implications of each choice (autonomy or intervention) in their decision-making process.

### 2.3 Clashes between Disciplines

I now come to the question of whether the disciplines represented by the research team members already constituted a kind of 'inter-discipline' and how the disciplinary orientations of the research team members occasionally clashed, on methodological issues.

Staying in line with the symposium discussions, I will define an inter-discipline as a joint enterprise fuelled by different vested academic disciplines (such as law, economics, psychology), where there is a single research object, a common target audience, and a single underlying rationale for doing the research, whereby use is made of various discipline-specific methods cumulatively; upon mutual agreement, one particular method may have been selected as the dominant (or primary) method. A once-only project carried out this way does not establish a new inter-discipline yet. Only when a novel particular combination of disciplines and methods is used *time and again* to study a single object (usually because peers will have accepted the combination as adding significantly to scientific knowledge) then we may speak of an (acknowledged and accepted) inter-discipline.



In this sense, law and economics is such an inter-discipline, whereby legal rules are the object and the micro-economic toolbox constitutes the dominant method. Are research projects 1, 3, and 4 (*Bench Marking*, *Costs and Opportunities*, and *Multi-problem Families*) for that reason to be characterised as law and economics projects? I would say no.

As to *Bench Marking*, the emphasis is not on the allocative efficiency of legal rules as the end product of legal systems, but on the productive efficiency of the key actors producing such rules (whatever their contents). This emphasis has allowed more legal scholarship and practical experience to play a role, in interpreting the quantitative data and formulating conclusions. Both disciplines being allowed to play a role, (friendly) 'clashes' or rather corrections by the legal researchers occurred both in regard to the research design and in regard to the interpretation of outcomes. Thus it became clear soon that it would not be so hard to find key data such as the number of judges per 100.000 inhabitants and the number of cases concluded per 1,000 inhabitants. As legal scholars, bearing in mind that there are numerous aspects of national legal cultures involved as intermediate variables contributing to the input/output figures, variables that could turn the whole exercise into an 'apples and oranges' comparison, a methodological 'case' was made (and 'won') to plot the legal systems under survey along some key legal features ('descriptors') likely to be co-determinant of the output data.[9] Although it turned out to be virtually impossible to ascertain the precise impact of all these intermediate variables on the input and output figures, at least these figures were now related to their larger context and warned the reader to handle the key data found as merely indicative and requiring careful interpretation. For example, courts in Poland appeared to be much more productive (in terms of cases decided per judge) than courts in the Netherlands. Here the insights of the legal scholars and notably the legal practitioners in the project supervisory committee (*e.g.* a member of a European association of judges) were crucial in identifying a relationship between court performance and the availability of informal dispute resolution schemes (ADR). A plausible interpretation of the figures that presented itself then was that in countries with many ADR filter mechanisms, such as the Netherlands, the simple disputes are filtered out, so that the *more complicated* cases remain to be solved by the courts; and these remaining complex cases will take much more time to decide, hence less cases decided per judge. Whereas courts in a country that lacks ADR filters, like Poland, can retain large numbers of relatively simple cases that will easily push up total output figures, giving the impression of great efficiency – an interesting example of how misleading quantitative data and pure economic productivity analysis may be.

Could project 3, *Costs and Opportunities*, be characterised then as materialising the inter-discipline of law and economics? Again, the answer should be no. In this project, the methods used by the economists largely bordered on accountancy, pricing particular services and interventions, and procuring the quantitative analysis. The same applies to project 4, on *Multi-problem Families*. Here, however, an interesting clash surfaced during an on-the-side conference involving researchers specialised in the field of professional youth care interventions versus family group self-help. The focal point was the randomised controlled trial (RCT) method. The RCT method is regarded as the 'golden standard' in pharmaceutical research to test new medical drugs. Patients are randomly selected for an experimental group (that receives the new drug) and a control group (receiving a placebo). Now some experimental psychologists argued that this method must also be deployed to test professional youth care interventions *and* even to test the effectiveness of families resorting to their own networks for assistance with a variety of pedagogical problems. However, in regard to the latter, Dutch law prescribes that resorting to one's own family network for making a sound plan is a fundamental right, at least in those cases where judicial intervention through issuance of a court supervision order (*ondertoezichtstelling*) is pending. Only where the EKC-supported family network itself cannot come up with a sound plan, minors

9. J. Blank et al., above n. 5, p. 20ff.

can be subjected to (court imposed) professional youth care interventions.

The clash of methods between the 'hard core' psychologists and the legal researchers translates as: should the support activities by the family network members – lay persons, on the whole – be conceived of as 'intervention techniques' at all *or* as addressees of the law exercising their legal rights? And if one were to compare the effectiveness of both approaches (professional interventions versus family group self-help) just the same, does not the status of a right prevent randomisation here? Conversely, the RCT hardliner might say that any experiment involving the EKC-supported experimental group and a control group will in that case be (statistically) biased.

Finally, project 2 (Court-referred Mediation) did not involve economic analysis; this was rather a meta-analysis of a number of domestic sociolegal studies from across Europe on the practices of court referrals. A key finding of this analysis was that more compulsion exerted on litigants to take their case to mediation will result in a smaller percentage of referred cases being settled successfully. This finding led to some (friendly) 'clashes' with supervisory committee members with a background in public policy administration. For example, the 'public administrators' opined that percentages only give one side of the picture, whereas absolute numbers may be more informative from a policy-making point of view. More concrete: take a sample of 1,000 pending court cases. If a voluntary referral scheme leads to 2% referrals, whereby 75% of these referred cases are settled successfully, this means that in the end, 15 cases are taken out from the court dockets. If a mandatory referral scheme leads (obviously) to 100% referrals and 15% referred cases being settled successfully, that gives 150 cases taken out from the docket. This is ten times as much. The 'policy administrators' emphasised that for the development of a budgeting policy, the absolute numbers would make it interesting to consider the mandatory approach. From the legal researcher's point of view, however, the *percentages* were more important, as these reveal that in mandatory referral schemes, 85% of all litigants may have left the mediation room with a feeling that they have been forced to waste their precious time; and these likely frustrated litigants may give rise to growing negative publicity surrounding mediation, as demonstrated by historical surveys.[10] Hence, it seems, public policy administration engenders a short-to- medium-term perspective, emphasising government expenditure. By contrast, law engenders a long-term perspective, emphasising that the desire to embrace mediation too firmly (to generate savings) may withhold too many too long from court access; thus, too firm an embrace may 'kill the baby'.

10. A. de Roo and R. Jagtenberg, *Settling Labour Disputes in Europe* (1994), at 148ff., discussing some French longitudinal surveys in particular.

### 2.4 Synergy between Disciplines: Common Contours Shining Through

At first sight, the conclusion seems warranted that these projects, although involving various disciplines, do not evidence any particular inter-discipline at work. At closer inspection, that may be too rash a conclusion. Projects 2, 3, and 4 took place against a common background of diverse approaches towards settling conflicts and problems: approaches based on party autonomy and approaches based on the authoritative intervention of an outsider. Moreover, in projects 2 and 3, the autonomous approaches converged on mediation and the authoritative intervention on adjudication. In project 1, the emphasis was on adjudication, but mediation (and other ADR mechanisms) necessarily came to the fore here too, in order to interpret figures accurately. Moreover, in projects 3 and 4, where the views of parties directly involved could be analysed, it appeared that conflicts were also ignored or avoided or one of the parties just gave in. Obviously, this whole range of options is always present in the background, whenever one tries to research the true role of judicial intervention in its proper context. In addition, one comes to realise that in order to explain the specific choice between mediation (or negotiation-based strategies generally) and adjudication, more needs to be known about the strengths and limitations of these approaches and about any (hidden) interdependencies between these. All these aspects shine through as contours of an inter-discipline in the making, wherever the true role of adjudication is the object of research. An inter-discipline *in the making*, not a *vested* inter-discipline as yet, because it is, I believe, not sufficiently clear yet *which* combination of methods emanating from *which* disciplines will appear as the most workable, consistent, and promising.

Any further discussion requires at least a brief introduction first to existing research into the range of conflict approaches, their characteristics, and their interdependence.

## 3 Building Blocks of a Human Conflict Inter-Discipline

So far some clashes and synergy between disciplines were encountered within the four projects.

The disciplines combined within these four projects do not represent all disciplines featured in research on the range of human conflict strategies, notably in publications on the distinction between strategies involving *judicial* intervention versus *autonomous* conflict resolution.

It makes sense to take a few steps back now, in order to gain a more comprehensive overview of the development of research *generally*, at the crossroads of judicial and autonomous conflict resolution.

A summary reconstruction of disciplines that have contributed to this field during the past 85 years suggests




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that early empirical insights generated by purely scientific motives have become increasingly 'hijacked' for practical application, especially since the rise of the modern mediation movement. This does not need to come as a surprise: research outcomes promoting autonomous resolution at the expense of judicial intervention were welcome in the light of austerity packages that have come to dominate the public sector (including the judicial system) across the Western world since the rise of Thatcherism and Reaganomics.

It is exactly this austerity bias in the amalgam of disciplines promoting autonomous over judicial conflict settlement that calls for a revaluation of the discipline of law. As pointed out in the second project I was involved in (Court-referred Mediation), the very concept of rule of law and equal protection under the law may thus come under pressure. This would be particularly detrimental to one-shotters and (other) disadvantaged addressees of the law.

A reorientation is necessary here, giving pride of place to insights that have become underexposed or which have newly emerged from critical countercurrents within some of the empirical disciplines discussed. Some of these useful insights are touched upon towards the end of part 3.

A *communis opinio* on what constitutes the range of human conflict strategies has been generated from within ethology and conflict psychology. Walter Bradford Cannon first described the so-called fight-or-flight response to a perceived attack.[11] His work was built upon and refined in regard to complex human conflict situations, inter alia by Blake and Mouton and notably Dean Pruitt, and eventually led to what has become known as the 'conflict management grid'.[12] Within this grid, most authors today distinguish four main strategies that people facing a conflict will choose from, that is, a strategy of avoiding, yielding, solving, or confronting.[13] 'Confronting' is about trying to get one's way one-sidedly, overriding one's opponent. This strategy encompasses litigation in a court of law as a mild variety and the use of brute force as a remnant of fight. 'Solving' implies that parties discuss together the real causes of their problem and try to negotiate a mutually acceptable solution, often by each of them taking something and giving something else in return.[14]



### 3.1 Practical Application: The Mediation Movement

In relations between sovereign states, negotiation is traditionally the primary strategy resorted to, as the use of military force increasingly meets criticism in public opinion, whereas law is, as yet, a rudimentary edifice in this area. In the 1950s, the US State Department commissioned Harvard researchers to find out whether its diplomats could be turned into more effective negotiators. The behavioural research that took place there combined cognitive and conflict psychology with (mathematical) game theory analysis.[15] The insights that were gradually gained through experiments and analysis led to the recognition that negotiation was not merely an art to be practised by the talented but also has the potential to become a *science*. Roger Fisher and William Ury's work on effective negotiation in itself became the basis of the professional body of expert knowledge for modern mediators.[16]

Mediation represents one step up in the range of conflict management strategies from negotiation (solving) to litigation (confronting) and is usually understood as a process whereby a neutral assists disputants to find a way out of deadlocked negotiations. From that perspective, modern mediation is a derivative of effective or 'Harvard-style' negotiation. Such effective negotiation is based on a return to the underlying (possibly common) *interests* of the parties. Interests cannot be served well if the cognitive abilities of parties are derailed by strong emotions; 'negative misattribution' (attributing an evil motive to whatever conduct the other party engages in), 'reactive devaluation' (a party immediately distrusts an offer because their adversary made it), and 'judgmental overconfidence' (having too high expectations about one's prospects) are well-charted biases that will likely constitute impediments for constructive interest-based negotiations. Interests cannot be served either if parties adopt fixed positions in the usual course of conflict escalation. Such positions notably include *legal* positions, firmly taken to defend one's interests. But (legal) positions are likely to start a life of their own. The modern mediator has come to be regarded as being able to impart, in a well-structured process, more effective negotiation skills onto parties that found themselves mired in a dispute. This approach also carries the promise of empowerment of disputants; not only diplomats but - more importantly - also common people, individuals, entangled in any kind of dispute, ranging from a problematic divorce or a dismissal to a business partner defaulting on a contract, may be turned into competent and effective negotiators, through hands-on experience under the guidance of a qualified mediator.

In the aforesaid areas, a comprehensive legal framework tends to be present. This takes us to the domain of law, to sociolegal studies, and to public policy administration. In such areas as discussed, litigation in a state-funded court always constitutes an option. In the 1980s, in the USA initially (with the advent of Reaganomics), scholars appeared on stage, highlighting the need to curb public expenditure on the courts, by relieving the

11. W. Cannon, *Bodily Changes in Pain, Hunger, Fear and Rage* (1929).
12. R. Blake and J. Mouton, *The Managerial Grid: Key Orientations for Achieving Production through People* (1964).
13. Dean Pruitt and his colleagues particularly. Inter alia: D. Pruitt, 'Strategic Choice in Negotiation', in W. Breslin and J.Z. Rubin (eds.), *Negotiation Theory and Practice* (1991), at 42-72. Pruitt uses 'inaction' instead of 'avoiding' and 'contending' instead of 'confronting'.
14. There is a linear relationship between negotiation, mediation, arbitration, and litigation in that these methods imply an ever-decreasing amount of control on the part of disputants.
15. Game theory plays a significant role in the work of H. Raiffa, *The Art and Science of Negotiation* (1982).
16. R. Fisher and W. Ury, *Getting to Yes. Negotiating Agreement without Giving in* (1981), and later editions.

courts from the burden of their allegedly excessive caseloads. Manning was one of those authors who pointed at society becoming ever more litigious in his provocative article 'Hyper lexis'.[17] Such publications sparked off a debate with empirical sociologists like Marc Galanter and William Felstiner, who argued, inter alia, that too little was known as yet about the baseline of (legal) disputes, the causes of disputes, and the obstacles that addressees of the law had to overcome to have a case registered in a law court, to make any generalisations about litigiousness.[18] Meanwhile, policymakers pursuing an agenda of budgetary restraint teamed up with the newly emerging profession of modern mediators, who had absorbed the Harvard insights and were looking for opportunities to put these into practice (and preferably make a living). Through the work of Frank Sander, who coined the notion of the 'multi-door courthouse', the phenomenon of court-annexed mediation began to develop, whereby judges would refer litigants to an external, qualified mediator to see whether their problem could not be solved that way, instead of having the case lingering through the court docket.[19] Court-annexed or court-referred mediation also rapidly spread across Europe in the 1990s and early 2000s.[20] Critical sociologists have maintained that there is not a genuine demand for the services of mediators rather that this is a supplier-driven development.

At any rate, since policymakers were won to the idea that judges, as public authorities, were to refer litigants to the private sector (mediators are essentially self-employed), surveys mapping customer satisfaction were commissioned, and the need for professional-ethical requirements for mediators was put on policy agenda's across Europe. Gradually more studies appeared, mostly commissioned by government authorities, calculating the costs involved in state-funded litigation, whereby mediation became increasingly seen as a smart economising tool. In official documents, mediation was presented primarily as an additional option to achieve 'justice' for many. It is noteworthy that in many documents, the concept of 'access to court' became replaced by 'access to justice'.

### 3.2 The Austerity Bias

Overlooking this field, what seems to emerge is a patchwork of connections between disciplines, referred to here as conflict management studies. Thereby, only the range of conflict options originally identified by ethology and refined by conflict psychologists appear as having been inspired by purely scientific motives, that is, curiosity, without a desire to put the accumulated knowledge to immediate practical use. Harvard negotiation research (based on conflict psychology and game theory) was carried out for practical application (initially in diplomacy) although it certainly has been conducive to scientific knowledge accumulation that is empirical findings that can be tested (also experimentally) by others in the scientific community. The same applies to most of the sociolegal studies into court-referred mediation. This particular amalgam of disciplines appears to be sustained in a kind of symbiosis, incentivised by governments and – where the courts are concerned – by (disguised) austerity motives in particular.

Were the critical sociologists right then with their conclusion that mediation is simply supply driven? I believe that goes too far. Although one may be distrustful of the motives that have come to underlie the campaigns for mediation, there is considerable evidence that disputants who have tried mediation are quite satisfied and prepared to resort to mediation again in future disputes. Also, mediations that are in no way connected to the courts are growing in number. In that sense, mediation and notably the underlying psychological insights and empirical underpinnings definitely have something to add to the whole spectrum of conflict resolution strategies. In my view as a legal scholar, however, the current symbiosis of disciplines is tilted too heavily towards the austerity motive. To grow out into a genuine inter-discipline, it will be necessary that aspects of conflict strategies that have remained underexposed so far (exactly due to the austerity focus) are taken on board yet. Thereby, strategies such as 'avoidance' and 'yielding' will pose a real challenge to legal researchers. The same applies to the whole issue of costs. Are there costs involved in avoidance or yielding? And costs for whom? This aspect may be adequately tackled within economics – thanks to new schools of thought that are developing – exactly to address these underexposed, if not hidden, aspects of reality.[21] In the wake of the financial crisis, a reorientation can also be observed within the domain of policy administration and political science, where the need for proper checks and balances is reasserted again.[22] I believe that by integrating these new orientations in research, the current bias in the amalgam of disciplines may be redressed, and research will become what it should be, *i.e.* aimed at observing, understanding, and possibly explaining the *whole* of reality. Such a quarter-turn rotation away from the austerity agenda will make conflict management studies a coherent and sustainable inter-discipline that will prove extremely valuable to legal research. Before going into that, I will first indicate my personal assessment of the usefulness of insights currently generated by mediation-focussed research (as this is as yet the conflict strategy most closely connected to the domain of law); this assessment will be followed by an analysis of how the current



17. B. Manning, 'Hyperlexis: Our National Disease', *Northwestern University Law Review*, at 767ff. (1977).
18. W.L. Felstiner, R.L. Abel & A. Sarat, 'The Emergence and Transformation of Disputes. Naming, Blaming, Claiming', in K. Schuyt, K. Groenendijk & B. Sloot (eds.), (15) *Law & Society Review* (1980); K. Schuyt, K. Groenendijk & B. Sloot, *De weg naar het recht* (1976).
19. F.E.A. Sander, 'Varieties of Dispute Processing', in A.L. Levin and R.R. Wheeler (eds.), *The Pound Conference: Perspectives on Justice in the Future* (1979).
20. De Roo and Jagtenberg, above n. 6.
21. An important role is played here by the London-based New Economics Foundation, confessing to 'economics as if people and the planet mattered'.
22. In the Netherlands, e.g. the 2011 RMO report *Tegenkracht organiseren*, downloadable from the RMO website.


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insights have been incorporated (or not) in academic legal research – the core theme of the symposium.

### 3.3 Useful Insights: A Personal Assessment

#### *1 The Perspective of the Disputant*

Pruitt's conflict management grid and Felstiner's conflict transformation pyramid help us in understanding the disputant's perspective. It is important to realise that for disputants, litigation is often only an option of last resort. Which preliminary choices does a disputant make when facing a (legal) problem? Which quality does a disputant regard essential in a 'neutral', and how will this co-determine his or her strategy? How does a disputant react to early professional interventions? How do conflicts (de-)escalate? When are they really solved, and at what cost to the disputant? Here, legal practice and legal academia can catch sight of the hinterland of the legal services 'market', on which they both thrive. The discussion on court-referred mediation particularly has been conducive to various fundamental studies being undertaken in the Netherlands, such as the Dispute Resolution Delta (*Geschilbeslechtingsdelta*).[23] In this project, which is still continuing and expanding, stock has been taken of what makes disputants decide for one or the other strategy. In doing this, the 'Delta' constitutes a more sophisticated and elaborated version of the dispute resolution pyramid model developed by Felstiner and his colleagues (which distinguishes between just three filters from the baseline upwards, *i.e.* disputants' ability of naming, blaming, and claiming).



#### *2 The Notion of Interests*

The 'interests' notion is not wholly absent in the law – in substantive law, for example, in the relativity requirement for tort liability or the abuse of right doctrine, in procedural law in the requirement of standing. But the ambit of the 'interests' notion as used in Harvard negotiation theory is much wider. Disputants who have walled themselves into a legal position may lose sight of their underlying interests. This becomes even more likely once a lawyer takes over, because the lawyer will urge the disputant to reduce his reality, that is, to discard feelings (that the disputant would love to vent) and to discard all those facts that do not support a legal position to be taken in court.[24] Keeping the parties focused on their interests as in mediation may indeed deliver solutions that serve both parties' interests in an optimal fashion, though not necessarily in all cases.

#### *3 The Role of Professional Neutrals, How These Are Financed and What Their Interests Are*

The debate on pros and cons of mediation in comparison with in-court adjudication has led researchers to touch upon the sensitive – but important - topic of professional self-interest. The critics of mediation have never ceased to point at the mediator's need to make a living and to do about everything to secure a steady influx of cases.[25] The continuous surveys on mediator performance, customer satisfaction, and ethical requirements as monitored by supervisory bodies have eventually reverberated; it seems, into the domain of the judiciary as well. Although mediators as an emerging profession are still under more scrutiny than judges as an established profession, judicial strategic behaviour does no longer escape the attention of researchers.[26] As one British scholar summarised: 'The problem is that judges have too many cases, and mediators have too few.'[27] Not only considerations of caseload and (fixed) income play a role: the personal feelings of judges about mediation and about their own professional role likewise appear to play a role in their willingness to refer litigants to mediation or to do the opposite. This has been an interesting insight in project 2 particularly, where we were confronted with erratically jumping patterns of court referrals, notably in France; investigating these more in depth, evidence was retrieved about the decisive role of the personal enthusiasm (or otherwise) of individual judges – despite a uniform regulatory regime.[28] And then there are the financial incentives and constraints for publicly funded judges and for self-employed mediators. Put briefly: judges will be tempted to attune their output to fit their fixed salary or budget, by minimising labour-intensive work on cases; mediators will try to secure output any way they can so as to maximise their income. So both professions may be prone to strategic behaviour.[29]

#### *4 Costs and Returns for Various Groups of Stakeholders*

Disputants inter se, disputants and a mediator, or disputants and a judge may be regarded as the actors who are directly involved in the activity of dispute resolution. In an economic sense, the activity could be regarded as a 'transaction' that may give rise to positive or negative 'externalities': other people further afield may benefit from or may be harmed by the approach taken by those directly involved. This may be society as a whole, and it may also be a corporate entity, an organisation as a whole, such as (returning to project 3 for a moment) the Netherlands police force. Daniel Dana has been among the pioneers to design tools for calculating

23. B.C.J. van Velthoven and M. ter Voert, *Geschilbeslechtingsdelta 2003* (2004). Also: Hazel Genn, *Paths to Justice* (1999).
24. A. de Roo and R. Jagtenberg, 'The Relevance of Truth, the Case of *Mediation* vs. *Litigation*', in R. van Rhee & A. Uzelac (eds.), *Truth and Efficiency in Civil Litigation* (2012), at 1-20.
25. N.J. Huls, 'De aanbodeconomie van ADR; mediation kritisch beschouwd', (9) *Justitiële Verkenningen*, at 99-107 (2000).
26. R. Jagtenberg and A. de Roo, 'Mediation and the Concepts of Accountability, Accessibility and Efficiency', in R. van Rhee and A. Uzelac (eds.), *Access to Justice and the Judiciary* (2009), at 149-71.
27. R. Ingleby, 'Court-Sponsored Mediation; the Case against Mandatory Participation', *Modern Law Review*, at 441-51 (1993).
28. H. Touzard, M. Bastounis & I. Benharda-Piget, *Les représentations socials du règlement des litiges. Le cas des modes alternatifs* (avril 2001).
29. On the judiciary, *see* A. Kronman, *The Lost Lawyer. Failing Ideals of the Legal Profession* (1995); on mediators: B. Baarsma, *Blijft mediation de eeuwige belofte of wordt het een volwassen markt?* (2011).

the costs of escalating organisational conflict.[30] In project 3, we have built upon Dana's findings, developing his model into different directions, inter alia, so as to include the costs for individual employees. In regard to projects 1, 2, and 4, it would be extremely relevant to chart where costs and returns would arise elsewhere in society. In project 4, for example, enhancing the problem-solving power of family networks could be conducive to a growth in 'social capital'.[31] Newly engineered research methods such as social return on investment (SROI) analysis make it possible to monetise 'value' effects of actions for stakeholders elsewhere in society, in a fairly reliable manner, thus enabling to deal with the 'whose costs?' question less one-sidedly and more comprehensively.[32] In regard to projects 1 and 2, where the choice is between adjudication in the public domain and negotiation in a private conference room, many more aspects could thus be brought to bear, such as the social returns generated by a well-functioning judiciary.[33] The words of warning that Yale law school president Anthony Kronman already expressed in the 1990s against the one-sidedness of 'managerial judging' may then finally receive a satisfactory answer. Kronman observed that managerial judging is essentially a program of economic reform, premised on the belief that a reallocation of judicial effort from the courtroom to the conference table can mitigate the inefficiencies of the queue-based system of adjudication and thereby increase the amount of justice that the courts are able to produce with the resources committed to them. But, Kronman wonders, is it really clear *what exactly* a judge seeks to maximise (in comparison to – for example – a manufacturer of pencils)? The 'commensurating drive' of (orthodox) economics, *i.e.* to translate all inputs with different qualities into the single property of costing money, may seriously distort this strive for increased efficiency. In conflicts over fundamental values, it may be better exactly *not* to wrench these out of the perspective in which they are viewed by the parties.[34]

30. Annie de Roo, 'Interview with Dr. Daniel Dana; The Inventor of Financial Cost of Organizational Conflict and the Advocate of Self-Mediation', 3 *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement*, at 6-16 (2008).
31. R. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (2000).
32. J. Nicholls et al., *A Guide to Social Return on Investment* (2012).
33. A.H. van Delden, *Wat is de rechter waard?* Rechtspraaklezing (2006).
34. Kronman, above n. 29, at pp. 338-40. Reference is also made to R. Dworkin, 'Is Wealth a Value?', 9 *Journal of Legal Studies*, at 191 ff. (1980); D. Scheele, Doelmatigheid in de rechtshuishouding; een rechtseconomische anlyse (2006).

# 4 The Incorporation of Findings in Legal Scholarship, Legal Practice, and Legislation

From here, it is a small step into legal practice and legal academic scholarship to take stock of how the insights and findings of the current amalgam of research into alternative modes of dispute resolution (tilted as it is towards austerity agenda's) have been incorporated or not.

## 4.1 The Incorporation in Legal Practice

Since legal practice largely constitutes the object as well as the audience for doctrinal academic legal research, it makes sense to start this investigation into the incorporation issue here. In so doing, I will have to confine myself to the Netherlands, since the research projects had been commissioned by the Netherlands' government for valorisation in this country.[35] The nationwide experiments that took place during the first decade of this century have resulted in the incorporation of mediation facilities in all courts, except the Supreme Court. This reflects recognition of at least the next adjacent mode of dispute resolution, *i.e.* negotiation-based mediation, as a valid alternative for a number of disputants. This 'institutional' incorporation, in turn, has led to some further incorporation of findings and ideas in the daily practice of judges and of lawyers in private practice (*advocatuur*). This is important, because one can have a facility, but a facility will be used only if it is alive in the minds of its potential users. Apart from the disputants themselves, one could say that the key actors in referrals are judges and, at an earlier stage, the lawyers engaged by disputants. Among the judiciary, some selective incorporation can be observed. The insight that (sometimes) qualitatively better solutions can be achieved through mediation has been instrumental for some Dutch courts to embark on multi-annual experiments with a so-called conflict diagnosis model, developed largely by psychologist Martin Euwema.[36] The experiment fits in with a newly developed concept, *conflictbeslechting op maat*, that is, tailor-made dispute resolution. The underlying idea is, obviously, that it is possible to diagnose which dispute strategy is best in which case: mediation or adjudication. This experiment takes place at the moment parties have submitted their case to court. Cooperation in this experiment is voluntary for judges and in that sense self-selective: judges who are indifferent or even opposed to mediation will not take part anyway. At any rate, one could argue, with refer-

35. For an international overview, reference is made to A. de Roo and R. Jagtenberg, 'Professional(s as) Mediators: Emerging Markets and the Quality of Legal Protection', in A. Uzelac and C.H. van Rhee (eds.), *The Landscape of the Legal Professions in Europe and the USA: Continuity and Change* (2011), at 235-54.
36. M. Pel and S. Verberk (eds.), *De pilots 'Conflictoplossing op maat'. Reflectie op resultaten en ideeën voor de toekomst* (2009).




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ence to the dispute resolution pyramid concept, that the courtroom is already many steps away from the very baseline where the conflict arose for the first time.

In the lower regions of the dispute resolution pyramid, however, incorporation can be observed too, notably among lawyers. Lawyers must be aware that, if they pursue their client's case in court, judges may raise mediation as an option that might be considered. As an enterprising professional, lawyers have to anticipate that question, and so, they will have to discuss mediation as an option long before with their client, so as not to be taken by surprise in court. It is less relevant, I think, to dwell on the possible motives for lawyers to raise the mediation option directly with their clients; whether they genuinely believe this may be a better avenue, whether they feel it can be used as defensive marketing, or whether mediation could fit in a 'appearing reasonable' strategy: in all instances, mediation and the underlying insights from conflict psychology are finding their way down the lower regions of the dispute resolution pyramid.[37] My colleagues and I have coined this phenomenon as 'the shadow of the referral', a designation that builds on Robert Mnookin's famous concept of 'the shadow of the law'.[38]

One may wonder whether still lower down in the dispute resolution pyramid, also in-house counsels, that is, corporate lawyers and government lawyers, have incorporated the findings generated by the amalgam of disciplines described above. From the agendas of relevant professional associations, various reports, and experiments, it appears that there is at least a growing awareness of the need to consider more alternative methods, which each may have their rationale. Interestingly, however, the larger the corporation or government body, the less such an entity appears to be inclined to acknowledge the potential benefits of independent mediators. There is a clear tendency for such 'big players' to either deploy their own in-house mediators or merely to incorporate the insights and negotiation skills into their own HRM training programs, thus turning these into the functional capabilities required from their staff.[39]



### 4.2 The Incorporation in Academic Legal Scholarship

Again, I will confine myself to the Netherlands here. Moreover, even within this single jurisdiction, it will be obvious that a thorough analysis of all academic legal research is physically impossible. A simple illustration: compiling the 2009 evaluation report on legal research in the Netherlands (the Koers Committee report *Kwaliteit & Diversiteit*) took a whole year.[40] I will instead concentrate on the *Grosskommentar par excellence* for Dutch private law, the Asser series, and on the best known handbooks on the law of civil procedure. At this point, the international ELR readership may be tempted to scrutinise their domestic doctrinal works in a similar vein.

With regard to the Netherlands, it is interesting to read in the Koers Committee report that a clear shift can be observed from mono-disciplinary to multidisciplinary research, that there is more attention for methodological issues than a decade before, and that legal research is increasingly financed through external research funds for which researchers have to compete with each other.

Turning to the Asser series first: in this voluminous series, only one volume addresses the plurality of dispute resolution methods in some detail, that is, the 2005 *Algemeen Deel*, the 'General part' of the series, edited by Jan Vranken, Professor of Law at Tilburg University and Advocate-General with the Netherlands Supreme Court.[41] The issue of comparing modes of dispute resolution features in a chapter entitled 'the move away from the state-funded judge' (*Weg van de overheidsrechter*). It is noteworthy that Vranken had already been involved as one of three leading legal scholars in a project on fundamental reassessment of civil procedure (*de Fundamentele Herbezinning*), a project that also aimed to integrate relevant sociolegal findings and insights from psychology.[42]

In the Asser series volume, Vranken characterises mediation as 'the most radical' of all other alternatives to adjudication, in 'its exclusive focus on the individual', and solving the individual's conflict by addressing underlying personal interests, including human emotion. However, Vranken continues, this also seems a weakness of mediation; it is too much inward looking and lacking in transparency. This is worrying because at the same time there may be a connection with law, notably where legal rules constitute a standard for objectivity that a mediator may bring in to circumvent negative misattribution. Where the law comes in, mediation should be much better regulated, according to Vranken, if only to guarantee that each disputant is granted equal opportunities. The bottom line is, according to Vranken, that it is questionable whether one can safely assume, as mediation does, that average human beings are able to oversee their own problems and to take rational steps.

37. A further consideration pro mediation might be its finality: various surveys that found a much better compliance record for mediated settlements once achieved than for court verdicts. *See* L. Combrink-Kuiters et al., *Ruimte voor mediation*, WODC Onderzoek en Beleid, nr. 210, (2003).
38. R. Mnookin and L. Kornhauser, 'Bargaining in the Shadow of the Law', *Yale Law Journal*, at 88 ff. (1979); Courts may render judgments in only a fraction of all meritorious cases that emerge at the baseline of society. But the effect of those judgments will be much wider and also set the parameters for those disputants who follow the strategy of negotiation or mediation.
39. De Roo and Jagtenberg, above n. 35. Also D.B. Lipsky and R.L. Seeber, 'In Search of Control: the Corporate Embrace of ADR', *University of Pennsylvania Journal of Labour and Employment Law*, at 133-57 (1998).
40. A.W. Koers et al., *Kwaliteit en Diversiteit: Rechtswetenschappelijk Onderzoek in Nederland – Rapport van de Evaluatiecommissie Rechtswetenschappelijk Onderzoek*, Amsterdam: VU, 2009 (432 pages).
41. J.B.M. Vranken, *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht. Algemeen Deel – Een Vervolg* (2005).
42. M. Barendrecht and A. Klijn, *Balanceren en Vernieuwen, Een Kaart voor Sociaal-Wetenschappelijke Kennis voor de Fundamentele Herbezinning Procesrecht* (2004).

In view of legal standards possibly playing a role when it comes to infusing objectivity in the mediation process, Vranken thus concludes that mediation should become the object of more (legal) regulation. To some extent, as I will come to illustrate below, this desideratum has been taken on board in the draft bill on mediation that has been introduced by former MP Van der Steur, presently the Minister of Security and Justice.

First, however, two authoritative handbooks on civil procedural law are to be reviewed on the incorporation issue. Hugenholtz-Heemskerk (2012 edition, 350 pages) devote half a page to mediation in a chapter entitled: 'arbitration and expert determination' (*arbitrage en bindend advies*).[43] This is curious, as arbitration and determination constitute methods whereby a decision is being *imposed* to end the conflict. Viewed against the basic range of dispute resolution methods, these are rather shades of grey within the confrontational strategy, *casu quo* litigation. The chapter on mediation has a very introductory character and focuses on the courts as agents of referral of intending litigants. The source material in the footnotes consists almost exclusively of commentaries written by authors with a background in law. Likewise the well-known handbook by Snijders and his colleagues (2011 edition, over 600 pages).[44] Here about three pages are devoted to mediation in a chapter entitled 'private means of recourse to law' (*private rechtsgangen*). Again, this is curious as mediation, and negotiation-based strategies generally are not modes of recourse to the law. Again, the source material incorporated in the footnotes consists almost exclusively of commentaries written by lawyers. In addition, Snijders et al. have included some Supreme Court judgments on mediation, in relation to court procedure. For completeness sake: neither Snijders and his colleagues nor Hugenholtz-Heemskerk have separate entries on (direct) negotiation, as the most pure variety of a 'problem solving' strategy.

The conclusion seems justified that other modes of dispute resolution as exposed in conflict management studies are essentially 'cannibalised' in publications that adopt an internal perspective on the law, *i.e.* doctrinal legal academic writing. The available information is fundamentally reduced and translated into the perspective and language of the law, so as to make it fit the law's disciplinary straightjacket.

Authors who attempt to adopt an external perspective albeit for just a moment (like Vranken) appear to be inclined to resort to regulation, in order to make mediation concordant with the law. It is interesting to note that Vranken did not mention any need for direct negotiation to be regulated.

Finally, it is noticeable that hitherto, only one professorial chair on dispute resolution methods has been established within a law faculty thus far (*i.e.* the Free University of Amsterdam); at closer inspection, however, it appears that the focus of that chair is on intervention by expert witnesses in court procedures. A more comprehensive program that was established some years ago at another university (Utrecht) has been largely dismantled already, due to major budgetary cutbacks.

### 4.3 The Legislator Role and the Role of the Legislator

Understood in its broad meaning, doctrinal academic legal research includes the formulation of recommendations for legislation, *i.e.* the researcher assuming a 'legislator role'. In regard to project 2, discussions took place in the years following the nationwide experiments mentioned above as to how to structure court-referred mediation in the Netherlands.

It soon became clear that certain quarters were pushing for a more mandatory referral scheme, to be introduced in Dutch law. Elsewhere in Europe, mandatory referral had already been introduced, notably in Italy. In the Netherlands, the former MP Van der Steur initially sought inspiration in Italy for his proposals on mediation legislation. Actually, Mr. Van der Steur's proposals concern three different subjects (contained in three different bills): one bill seeks to regulate the profession of mediator.[45] In the wake of a 2008 European Directive seeking to establish a professional privilege for mediators, without however regulating the professional requirements for mediators, the first bill aims to create a legally protected professional title: *registermediator* or *RegM* (registered mediator). A *RegM* will have to comply with strict professional requirements, inter alia a minimum of legal knowledge and a minimum of practical experience, in order to be registered in a new system under the aegis of the Minister of Justice. Professional privilege will only accrue to *RegM*s; courts may only refer litigants to *RegM*s; and *RegM*s will be given the power to liaise directly with the courts when a legal issue arises during mediation or whenever parties seek to have their settlement being made enforceable. So far, the desideratum expressed by Vranken has received a follow-up, it seems. The second Van der Steur bill aims to 'anchor' mediation firmly in civil procedure.[46] To this end, the bill ties mediation in with the legal process in various ways. It provides that in the writ of summons, the claimant will have to explain why mediation has not been attempted. The judge may then decide to refer the case to mediation yet, if in his opinion the case would lend itself to mediation. Moreover, disputes will be *presumed* to be suitable for mediation whenever they involve a 'relational' aspect; this includes at any rate all contractual disputes. The third Van der Steur bill contains comparable provisions for administrative law procedure, albeit that there the government party will have to clarify whether it sees mediation as an option.[47]

It is interesting to see that the second bill attempts to make mediation less voluntary, in the context of court procedure. In so doing, my impression is that the really



43. W.H. Heemskerk, *Hoofdlijnen van het Nederlands Burgerlijk Procesrecht* (23rd edn) (2012), at 223ff.
44. H.J. Snijders et al., *Nederlands Burgerlijk Procesrecht* (5th edn) (2011).
45. Wetsvoorstel (Bill) nr. 33722.
46. Wetsvoorstel (Bill) nr. 33723.
47. Wetsvoorstel (Bill) nr. 33727.


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important findings and insights from conflict management studies have not been incorporated or have been incorporated only selectively.

The primary criticism that my colleagues and I have expressed in various publications is that the dispute resolution pyramid model illustrates a bias among policymakers in Ministries of Justice and now even in Parliament.[48] They are entirely focused on the issue of how to signpost a very small group away from the courtroom to a mediation conference room. This is the small group of intending litigants who have made a number of choices already underway, from the pyramid baseline all the way up, and who have now finally reached the courts. The Dutch Dispute Resolution Delta survey estimates that this group constitutes less than 4% of all disputants who have become involved in a legal dispute. But then, governmental policymakers will argue that they simply do not have a mandate for addressing the lower regions of the dispute pyramid. That point has been made at several occasions. In regard to the Van der Steur legislative proposals particularly, my colleagues and I also found, drawing upon the disputant perspective again, that policymakers arguing in favour of mandatory referral love to highlight frivolous cases that obviously do not 'belong' in a court. But how about the cases that *do* 'belong' in court but never got there and perhaps never got there because the litigants were *persuaded* to drop a potentially interesting legal argument for a private settlement negotiated somewhere in a conference room, thus for perverse reasons (intimidation, lack of resources)? This aspect should also be borne in mind by the legislator: Are we sufficiently aware of the danger of compulsion, which may prevent issues to come out into the open that should indeed have been made public?



The crucial question then becomes: *who* decides on *what* basis *which* issues in *which* disputes exactly lend themselves for adjudication and which for private negotiation (whether or not with the assistance of a mediator)? It is important to underline that an evidence-based framework for assessing the appropriateness of different conflict strategies accurately is simply still lacking.

These observations by my colleagues and myself have been taken on board by the Netherlands Council of State (*Raad van State*).[49] Yet it remains to be seen whether the proposals will be amended, in view of such mere scientific considerations. There is still the tilting towards the austerity agenda that can be uncovered behind the proposals, possibly enhanced by some lobbyism from certain segments within the mediator community.

48. A. de Roo and R. Jagtenberg, 'Quasi-vrijwillige Mediation; Enkele Kanttekeningen bij de Initiatiefwetsvoorstellen Mediation', 17(2) *Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement*, at 35ff. (2013).

49. Raad van State, Advies W03.13.0323, 0324 en 0325/II, d.d. 22 November 2013.

# 5 The Case for 'Reverse Incorporation'

The conclusion so far must be that doctrinal academic legal research has hardly incorporated the empirical foundation of conflict management studies full scale. Only some findings pertaining to mediation, as the alternative directly adjacent to adjudication, have found their way into legal literature but only to the extent that *courts* may refer litigants to mediation, and then still, only the legal intricacies were on the minds of legal doctrinal authors. Vranken expressed a need for regulation as he held mediation to be too narrow in outlook; that is to say too much focussed on the feelings and perceptions of the individual and caring too little about inequality compensation. This is intriguing as the advocates of mediation would exactly find the *legal* approach to be too narrow, reducing the complexity of human conflict to make it fit within a legal straightjacket while hardly caring at all about the individual disputant. In my view, this quandary cannot be solved unless and until the disciplines relevant to conflict resolution have developed a better understanding for each other *and* some of the selective orientations *within* each of these disciplines will have been addressed. Most of all, the disguised tilt towards the austerity agenda must be eliminated from the current amalgam of disciplines, in order to give it a purely scientific, consistent, and sustainable basis that will allow it to develop into a genuine interdiscipline ('conflict management studies'). I will hint at some of these selective orientations and misunderstandings first and sketch what sort of questions I think should be on the research agenda of a genuine inter-discipline for the next ten years. I will then conclude this article with some reflections as to how doctrinal legal research could find a proper place within this new interdiscipline.

## 5.1 Getting Things Straight and Restoring the Vista

Let us start this short impression within the discipline of law, quoting Owen Fiss, from his 1981 landmark contribution to the ADR debate, 'Against Settlement':[50]

'The social function of the lawsuit is to explicate and give force to the values embodied in authoritative legal texts; in case of settlements, society gets less than what appears, and for a price it does not know it is paying.'

There are at least two points to be made here. First, in much litigation, neither the facts are self-evident nor is the law unequivocally clear; think, for example, of those frequent cases where both parties have acted negligently. This aspect is also missed in the economic analysis of law. Viewing legal rules as an institutional framework for the market, economists seem to presuppose that cases and rules are always crystal clear. Negotiations in the shadow of the law are therefore disqualified as a 'you

50. O. Fiss, 'Against Settlement', 93 *The Yale Law Journal* (1984).

quit first game', that may disincentivise efficiency.[51] It is often a fact of life, however, that disputants are justifiably struggling how to offset the uncertain outcome of litigation against the certainty of a settlement. Are the psychologists, who have played such a dominant role in furthering modern mediation, right then? The insight that mechanisms in our brain may prevent us from a constructive approach in conflict situations is highly valuable, but conflicts are not *only* about cognitive deficiencies. Many (and probably most) conflicts are also about conflicting tangible interests that may be so important that laws have been made to protect these. Hence, sometimes the psychologists' perspective may be too 'micro' indeed. Harm may be caused not only to an easily impressed disputant but also to an organisation or society at large if cognition is overemphasised. Back to Owen Fiss then and the concept of externalities? But how does law and economics deal with vertical relationships, that is, where the law bestows power to particular functionaries and makes such functionaries practically invulnerable? In the present era of financial crisis, cases come to the fore almost on a daily basis where political or business leaders found the law on their side when their subordinated opponents sought to blow the whistle about negative externalities arising elsewhere in society. Is this the law that Owen Fiss seeks to uphold? There is some psychology involved in here too.[52] Quoting from an interview I had with Daniel Dana in 2008, on the absence of rational systemic approaches to deal with organisational conflict: 'Who really cares about costs? It is discouraging that seemingly no one cares. You would expect shareholders to care. But I don't think they will, because the personal embarrassment when attention is drawn to a conflict is a higher personal priority in the moment than the longer term financial consequences of the conflict experienced.'

Open conflict, in other words, is taboo. This takes us to the full-scale range of conflict management approaches, notably the options of avoiding and yielding, and the costs these may entail; these are all notorious blind spots in legal research. I would say that multidisciplinary research on conflicts should be redirected to these aspects; such research would materialise the breakaway from the austerity agenda, which is set by those in power defining which costs are to be regarded as costs; at the same time, such reorientation may yield significant social returns. In the slightly longer run, it may be instrumental in setting the amalgam of disciplines 'upright' again, allowing it to develop critical thrust for the way forward in conflict knowledge.

### 5.2 In Conclusion: How Would Legal Research Fit into This New Inter-Discipline?

A key feature of the new inter-discipline in the making is the disputant perspective. This perspective does not rule out that, *in addition*, the judicial or legislator perspective can be adopted, but the disputant perspective is crucial if one is to get the complete picture of conflict strategies available.

Interestingly, lawyers in private practice are more accustomed to connect the disputant perspective to the judicial perspective. As Susskind has argued in his provocative essay 'The End of Lawyers?', in order to survive, it is only becoming more and more important for lawyers to take cognisance of the disputant, that is, their client's perspective.[53] The legal services market is becoming extremely competitive, and information technology *and* ADR are increasingly making inroads on traditional legal work.

Since legal practice is the object and also the target audience of doctrinal legal research, this cannot remain without consequences. It may force academic doctrinal researchers not only to think more outside the legal box but also, and paradoxically perhaps, to think even more from a lawyer's client perspective. After all, published court reports hardly ever tell us what the dispute was really about; in continental European countries, the succinctness of those reports may even have cut out a wealth of legal arguments that were actually used inside the court room, under the pressure of judicial performance indicators (the tilt towards austerity) that require a swift result that lend itself for accounting purposes. To be sure, the need to sit next to the client/disputant, as it were, will likely impose some methodological challenges. Ideally, also this kind of research should extend over different jurisdictions, selected not only on the basis of traditional cultures but also of expected differences in economic pressure on the judiciary.[54]

Doctrinal legal research will also be incentivised to move up this way, that is, adopting the disputant's perspective, by the changing structure of academic research itself. It may be sobering to learn that Europe's primary financier of academic research today, the European Research Council (ERC), distinguishes between only three main branches of research: (1) physical sciences and engineering (44% budget share), life sciences (medicine, biology) (39% budget share), and social sciences and humanities (17% budget share). Law is not even recognised as a subdomain of research in its own right, but always linked to one or more specific sub-branches of the social sciences. The upshot is that legal researchers will have to demonstrate what exactly they are adding to solve the problems of the real world, and this requires the cooperation with empirical disciplines, *tout court*. To conclude on a recurring theme in this article: not only is the behaviour of lawyers, judges, and mediators influenced by the financial structure in which they work, the same applies to legal academics!

51. For example, the economic analysis of the provisions on 'hardship' in the Principles of European Contract Law and the Draft Common Frame of Reference; F. Chirico and P. Larouche, *Economic Analysis of the DCFR* (2010).
52. And psychiatry as well: R. Babiak and R. Hare, *Snakes in Suits* (2008).
53. R. Susskind, *The End of Lawyers?* (2008).
54. There are strong indications that the legal parameters for the profession of lawyers has changed in correlation to a more liberal or more protectionist outlook of the economy, in the past. For a comparative insight, see R. Jagtenberg and A. de Roo, 'Internationalisation of Legal Services and Markets in Europe and Asia', *Japon in Extenso*, Poitiers, no. 47-48, at 36 ff. (mars-juin 1998).




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The point I want to make however goes beyond the mere *necessity* for doctrinal legal researchers to subsume their research under a broader interdisciplinary heading; I find it also *desirable* for both legal and for empirical researchers that such a reverse incorporation materialises, ironically perhaps to countervail some tendencies towards one-sidedness that can be observed within empirical research focussed on human conflict. As discussed above in paragraph 2.3 (clashes between disciplines), my own experience is that legal doctrinal research, exactly because of its normative stance, has something crucial to add to the 'naked data' that are collected through the restrained prisms of distinct empirical subdisciplines, particularly where empirical studies are tilted by the austerity motive – think of the misguided conclusions based on mere productivity data of courts or the absolute quantity of compulsory settlements. After all: the 'ought' of the law is in itself a part of the real world too.



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# Expounding the Place of Legal Doctrinal Methods in Legal-Interdisciplinary Research

## Experiences with Studying the Practice of Independent Accountability Mechanisms at Multilateral Development Banks

**Andria Naudé Fourie***

**Abstract**

There is a distinct place for legal doctrinal methods in legal-interdisciplinary research methodologies, but there is value to be had in expounding that *place* – in developing a deeper understanding, for instance, of what legal doctrinal analysis has to offer, wherein lies its limitations, and how it could work in concert with methods and theories from disciplinary areas other than law. This article offers such perspectives, based on experiences with an 'advanced' legal-interdisciplinary methodology, which facilitates a long-term study of the growing body of practice generated by citizen-driven, independent accountability mechanisms (IAMs) that are institutionally affiliated with multilateral development banks. The article demonstrates how legal doctrinal methods have contributed towards the design and development of a multi-purpose IAM-practice database. This database constitutes the analytical platform of the research project and also facilitates the integration of various types of research questions, methods and theories.

**Keywords:** legal doctrinal methods, legal interdisciplinarity, multilateral development banks, interdependent accountability mechanisms, database

## 1 Introduction

There is a distinct place for legal doctrinal methods in legal-interdisciplinary research methodologies, but there is value to be had in expounding that *place* – in developing a deeper understanding, for instance, of what legal doctrinal analysis has to offer, wherein lies its limitations, and how it could work in concert with methods and theories from disciplinary areas other than law.

Such insights might strengthen our efforts to design *'advanced' legal-interdisciplinary research methodologies*,[1] in particular, and to deploy such methodologies in *transnational regulatory governance* research contexts[2] where the *need for* and *place of* legal normativity are often contested – or as Orford puts it, where law, 'as a source of constraints on the abuses of hegemonic power' finds itself at 'the limits of modern political organization'.[3]

This article aims to contribute to the development of such insights. The perspectives offered here are based on the author's experiences with designing and deploying an advanced legal-interdisciplinary methodology underlying a long-term research project. The project studies the growing body of practice generated by *citizen-driven, independent accountability mechanisms* (IAMs) that are institutionally affiliated with multilateral development banks (MDBs), such as the World Bank's



* Research Associate, Erasmus University Rotterdam, School of Law.

1. *See* M. Siems, 'The Taxonomy of Interdisciplinary Legal Research: Finding a Way Out of the Desert', 7 *Journal of Commonwealth Law and Legal Education* 5 (2009), describing 'advanced' legal-interdisciplinary research methodologies as approaches that address both 'legal and non-legal questions' and integrate '"scientific" methods' as well as non-legal theory 'into legal thinking'.

2. Referring to a 'concept [that] has become a widely used analytical perspective for describing the conduct of world affairs in many disciplines' and that has become known by different designations and associated with different definitions, including 'global governance' (*see* A. Von Bogdandy, P. Dann & M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', in A. Von Bogdandy, R. Wolfrum, J. Von Bernstorff, P. Dann & M. Goldmann (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010) 3, at 7), 'global regulatory governance' (*see* Kingsbury, below n. 15), and 'post-national governance' (*see* N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010), at 4-6). As defined here, transnational regulatory governance refers to governance and regulation 'beyond the State' – because it concerns the 'activities, institutions, actors or processes that cross at least one national border', and typically involves 'actors other than national governments'. (*See* T. Hale and D. Held, 'Editors' Introduction: Mapping Changes in Transnational Governance', in T. Hale and D. (eds.), *Handbook of Transnational Governance* (2011) 1, at 5.)

3. *See* A. Orford, 'A Jurisprudence of the Limit', in A. Orford (ed.), *International Law and Its Others* (2006) 1, at 1-31. On the recognition of the need for legal normativity as basis for the construction of legal systems, *see e.g.* J. Brunnée and S. Toope, *Legitimacy and Legality in International Law* (2010), at 7-55.



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Inspection Panel.[4] The article focuses on the place occupied by legal doctrinal analysis regarding a particular aspect of the research methodology, namely: the design and development of a *multi-purpose IAM-practice database* ('IAM-practice database' or 'database').[5]

Section 2 of the article contextualises this discussion by situating IAMs in the particular transnational regulatory governance context in which they operate – that is, the *transnational development context*. Section 3 provides an overview of the research project and its underlying methodology, while emphasising aspects related to the IAM-practice database.

Section 4 explains the role of legal doctrinal analysis with respect to the design and development of the IAM-practice database. Section 5 concludes the discussion by reflecting on the significance of the experiences shared in this article – not only for the design and deployment of advanced legal-interdisciplinary research methodologies but also for deepening our understanding of the place of law in transnational regulatory governance contexts.

Before proceeding with this discussion, however, it is necessary to clarify a few assumptions and explain the core concepts underlying this article.

### 1.1 Clarifying Basic Assumptions and Core Concepts

This article assumes that its primary audience is legal scholars engaged (or interested) in conducting legal-interdisciplinary research, although the experiences shared here can certainly be of broader interest. This assumption, however, has implications for the content included in this article and, especially, how it is presented.

For instance, the article further assumes that legal scholars are generally unfamiliar with the terminology, methods and theories employed in the disciplinary areas involved in database design and development; hence, the 'technical' aspects of the discussion are kept to a minimum whereas the focus falls on the principles underlying the design and development of the database in question.

In fact, an important lesson derived from the experiences shared in this article is that deep technical skills are not a prerequisite for legal scholars to engage in the type of research described here. And this is not only because technical aspects can be delegated or outsourced to competent individuals. The lesson, instead, is that an intermediate level of proficiency with standard software such as MS Excel as well as a sound understanding of the principles behind key theoretical concepts and analytical tools employed in an area such as IT project management,[6] for instance, can be decidedly effective – not to mention, cost efficient.

The article also assumes that legal scholars (including many of those specialising in public international law) are not as familiar with the wide range of independent accountability mechanisms operating at the international (or transnational) level than they are with international, regional, and national judicial institutions; nor are they as familiar with the development-lending operations of MDBs than they typically are with the operations of international institutions such as the United Nations.[7] Hence, Section 2 provides more background detail than what might typically be expected in an article focusing on methodology.

As to the meaning of *legal doctrinal research* or *scholarship*, this article considers its activities as including the 'study, description, explanation and analysis' of the '(conflicting) underlying values, presuppositions and principles' contained in 'current positive law'.[8] The principle purpose of legal doctrinal research, moreover, is usually to provide explicit normative comment ('how things should be') in order to formulate 'needed proposals for improvement'.[9] Whereas *legal doctrinal analysis* employs, in essence, the same analytical and conceptual tools – *methods* – that 'abundantly' serve 'judges', namely: 'textual analysis', 'practical argumentation' as well as principled or structured 'reasoning'.[10]



4. On the World Bank's Inspection Panel, *see* <http://go.worldbank.org/7RCPYOF0C0>. Other IAMs included in the project's scope are the IFC and MIGA's Compliance Advisory Ombudsman (<http://www.cao-ombudsman.org/>), the AfDB's Independent Review Mechanism (<http://www.afdb.org/en/about-us/structure/independent-review-mechanism/>), the ADB's Accountability Mechanism (<http://www.adb.org/site/accountability-mechanism/main>), the IADB's Independent Consultation and Investigation Mechanism (<http://www.iadb.org/en/mici/independent-consultation-and-investigation-mechanism-icim,1752.html>) *and* the EBRD's Project Complaints Mechanism (<http://www.ebrd.com/pages/project/pcm.shtml>) (all websites, last visited 31 October 2015).
5. *Also note*, examples of legal-interdisciplinary approaches in public international law remain sparse – *e.g.* there is only one contribution on 'law' in *The Oxford Handbook of Interdisciplinarity* (*see* M. Averill, 'Law,' in R. Frodeman, J.T. Klein & C. Mithcham (eds.), *The Oxford Handbook of Interdisciplinarity* (2010), at 522); whereas the *American International Law Journal*'s 'Symposium on Method in International Law' contains only one contribution that employs a 'purposefully interdisciplinary approach' (*see* 3 *American Journal of International Law*, at 291 (1999)); *and* in *Research Methods for Law*, the only contribution related to international legal research focuses primarily on state actors and the conventional sources of international law, whereas no mention is made of the role of legal-interdisciplinary approaches in this contribution (*see* S. Hall, 'Researching International Law', in M. McConville and W. Hong Chui (eds.), *Research Methods for Law* (2007), at 181.
6. *See e.g.* J.L. Brewer and K.C. Dittman, *Methods of IT Project Management*, 2nd edn. (2008); *and* Project Management Institute, *A Guide to the Project Management Body of Knowledge*, 5th edn. (2013).
7. I am not alone in making this observation – *see e.g.* D.D. Bradlow and D. Hunter (eds.), *International Financial Institutions and International Law* (2010), remarking (at xxviii-xxix) that it is 'striking how little attention has been paid to the international legal issues relating to the operations of the International Monitory Fund, the World Bank Group, and the regional development banks ...'.
8. J. Vranken, 'Exciting Times for Legal Scholarship', 2 *Recht en Methode in Onderzoek en Onderwijs* 42, at 43 (2012).
9. *Id.*
10. *Id.*, at 43-4. *Also see* Taekema's comment at note 126.

*Current positive law*, in turn, refers to legal norms[11] – but these norms can be 'written and unwritten' and can originate from formal and informal norm-creation processes.[12] Insofar as *public international law* is concerned, its norms are often captured in atypical 'forms of written sources such as reports, documents, explanations, protocols, and papers', and also have 'more unwritten' – and informal – 'law that othe[r]' areas of law.[13]

In other words, while the article recognises the 'conventional' sources of 'current positive [public international] law' (as set out in Article 38(1) of the Statute of the International Court of Justice),[14] it also considers the wide array of 'concoctions' of 'formal and informal instruments' as being part of 'current' – and emerging – 'positive law'.[15] Grounded in an 'interactional account' of public international law (as reflected, notably, in the scholarship of Brunnée and Toope),[16] the IAM-practice research project is specifically interested in the norms that emerge from the 'contested terrain in the no-man's land between international law and politics', and also in the actors involved in the application and enforcement of these norms.[17]

*Interdisciplinarity* describes research approaches that facilitate 'the appropriate combination of knowledge from many different specialities' – whereas 'knowledge' might refer to either theory or methods, or to both.[18] This article views the primary purpose of an interdisciplinary approach (or, the principle motivating factor for employing such an approach) as 'problem solving in the real world'.[19] Interdisciplinary approaches, despite their challenges, are well equipped to facilitate inquiry that can 'shed new light on … actual problem[s]'.[20] Therefore, the research methodology that forms the subject of this discussion fits within the broader 'transdisciplinary research' (TR) school of thought, which 'aims at better fitting academic knowledge production to societal needs for solving, mitigating, or preventing problems'.[21] TR is concerned with developing and employing theory and analytical methods that might aid interdisciplinary researchers in

> grasp[ing] the relevant complexity of a problem, taking into account the diversity of both everyday and academic perceptions of problems, linking abstract and case-specific knowledge, and developing descriptive, normative and practical knowledge for the common interest.[22]

*Legal interdisciplinarity*, finally, describes a range of different approaches that obtain 'input' from disciplines other than law, but where such 'input' 'serves', in essence, 'as a necessary contribution to … legal argu-



11. *I.e.* as opposed to non-legal or social norms. *Also note*, this article employs Toope's argument that '[t]he category of 'norm' is inclusive and general. A norm may be vague or specific – it may mean a widespread social practice, a social prescription, a legal principle articulated to shape the evolution of a regime, or a precise legal rule. The common core of the concept of 'norm' is that the desideratum contained in the norm is intended to influence human conduct. Note the word 'influence': norms do not necessarily determine human action. They help to shape behaviour, but they rarely if ever dictate it. Since norms operate in many different ways, they relate to the concepts of formality and informality differentially as well. Norms can be formal rules of law, but they can also be informal social guides to proper conduct.' *See* S. Toope, 'Formality and Informality', in D. Bodanksy, J. Brunnée & E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (2007) 107, at 107.
12. *See* Vranken, above n. 8, at 43. On the distinction between 'formal' and 'informal' norms and of the significance of this distinction in international law, *see e.g.* Toope, above n. 11, at 107 (arguing that 'norms can be informal and precise as well as informal and vague'; which is to say, 'formality' is not an appropriate test for the existence of non-existence of law'). For a contrasting view on the importance of formality in public international law, *see in general* J. D'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (2011).
13. *See* Vranken, above n. 8, at 43.
14. *I.e.* 'international conventions', 'international custom', 'the general principles of law recognised by civilised nations', and (as 'subsidiary means' for establishing the 'rules of law', 'judicial decisions', and 'the teachings of the most highly qualified publicists of the various nations'. For a discussion of the conventional sources of public international law, *see e.g.* M.N. Shaw, *International Law*, 6th edn. (2008), at 70-127.
15. B. Kingsbury, 'Global Administrative Law in the Institutional Practice of Global Regulatory Governance', in H. Cissé, D.D. Bradlow & B. Kingsbury (eds.), *The World Bank Legal Review: International Financial Institutions and Global Legal Governance* (2012), e-Book.
16. *See* J. Brunnée and Toope, *Legitimacy and Legality in International Law: An Interactional Account* (2010). The authors explain (*Id.*, at 5-55) that their 'international account of international law' has been based in the jurisprudence of Lon Fuller as well as in constructivist thinking employed in the area of international relations. The authors argue (*Id.*, at 22-4) that law is 'best viewed' as involving 'continuing challenge rather than as a finished project' since it is 'formed and maintained through continuing struggles of social practice' and 'is the work of its everyday participants', who engage in 'a continuous effort to construct and sustain a common institutional framework to meet the exigencies of social life in accordance with certain ideals'. Moreover, legal norms can be distinguished from non-legal or social norms by employing 'criteria' that assess their relative degrees of 'legality' and 'obligation' (*Id.*).
17. Toope, above n. 11, at 107. *Also see* C. Chinkin, 'Normative Development in the International Legal System', in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000) 21, at 23 (n. 13): '[T]here is a "brave new world of international law" where "transnational actors, sources of law, allocation of decision function and modes of regulation have all mutated into fascinating hybrid forms. International Law now comprises a complex blend of customary, positive, declarative and soft law".' Chinkin notes, however: 'Current debates about the forms and functions of international law-making are a continuation of long-standing tensions between those who assert the paramountcy of state consent and those who urge limitations on state action in favour of international regulation.' (*Id.*, at 21). For an overview of the major arguments in these jurisprudential debates, *see e.g.* B. Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law', 19 *Michigan Journal of International Law* 345, at 348-67 (1997-1998); *and* I. Scobbie, 'Wicked Heresies or Legitimate Perspectives? Theory and International Law,' in M.D. Evans (ed.), *International Law*, 2nd edn. (2006) 83, at 83-156.
18. G. Brewer, 'The Challenges of Interdisciplinarity', 32 *Policy Sciences* 327 (1999), at 328; *and see* Siems, above *at* n. 1.
19. *See* G. Hirsch Hadorn, C. Pohl, & G. Bammer, 'Solving Problems through Transdisciplinary Research', in R. Frodeman, J.T. Klein & C. Mithcham (eds.), *The Oxford Handbook of Interdisciplinarity* (2010) 431, at 431.
20. *See* Brewer, above n. 18, at 328. The author adds (at *Id.*): 'In notably effective efforts, the combination of disciplines adds value: the total is more interesting than the sum of the individual contributions or parts'.
21. Hirsch Hadorn *et al.*, above n. 19, at 431.
22. *Id.*


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ments'.[23] Different legal-interdisciplinary approaches have been conceptualised as a continuum that envisages relative degrees of integration between 'law' and 'non-legal disciplines'. The legal-interdisciplinary methodology described in this article might be described as 'auxiliary',[24] 'intermediate'[25] – or, positioned towards the middle-range of the continuum. However, as a research methodology facilitating *long-term* interdisciplinary inquiry (here, described as 10 years or more), it could also be argued that the methodology is progressively moving towards the 'integration' end of the spectrum, as the research project increasingly considered questions that are not strictly 'related to or affected by the law'.[26]

## 2 Independent Accountability Mechanisms at Multilateral Development Banks, in Transnational Regulatory Governance Context

The development-lending operations of multilateral development banks are described as a form of transnational regulatory governance for a number of reasons – a few of which will be highlighted here. For example, MDB development-lending operations[27] involve a wide range of state and non-state actors – including individuals ('project-affected people')[28] – participating (in various capacities) in the activities, governance structures, and processes surrounding development projects financed (or co-financed) by MDBs. These activities, structures, and processes, in turn, cut across the international, regional, national as well as sub-national ('local') levels. In addition, MDB development-lending operations involve various (intersecting) normative systems that are both legal and non-legal ('social') in nature,[29] which also operate at (and, as some argue, *across*) the international, regional, national, and sub-national ('local') levels.[30]

Different forms of transnational regulatory governance, moreover, share core characteristics. These include, for example, a shift from formal to informal governance and regulatory arrangements, structures, and processes – which means that the distinction between what is considered 'formal' and 'informal' often becomes ambiguous.[31] In addition, conventional systems of categorisation that have long been employed to differentiate between, for instance, different types of actors and functions ('public' *versus* 'private' sector), levels of governance ('international' *versus* 'national'), and types of normative systems (non-legal ('social') *versus* 'legal'), tend to lose their functional value when employed in transnational regulatory governance contexts.[32] As a result of this 'flattening of the difference between various categories', 'a multitude of formal and informal connections [are] taking the place of what once were relatively clear rules and categories'.[33]

Characteristics such as these have various consequences. Of particular significance from a political-legal perspec-



23. *See e.g.* B. van Klink and S. Taekema (eds.), *Law and Method: Interdisciplinary Research into Law* (2011), at 10-13. The authors present a 'dynamic model of interdisciplinarity' that can be described in terms of a continuum – at one end, 'heuristic' approaches, followed by 'auxiliary' and 'comparative' approaches, 'perspectivist' and, at the other end of the spectrum, 'integrated' approaches.
24. *Id.*
25. *See e.g.* D.W. Vick, 'Interdisciplinarity and the Discipline of Law', 31 *Journal of Law and Society* 163 (2004), at 184-5: '[a]t one end is research that attempts to answer what are essentially doctrinal questions about legal rules or proposed law reforms by using, in part, information gained from other disciplines' whereas '[a]t the opposite end [...] would be research that merges the questions asked and assumptions made by different disciplines so completely that potentially an entirely new discipline could emerge.' An 'intermediate approach', which this research methodology is arguably an example of, 'appl[ies] the method or theoretical constructs of a different discipline to legal materials or aspects of a legal system in order to study social phenomena related to or affected by the law' (Id.). For a description of this research methodology in terms of Siems' 'taxonomy', *see* Siems, above n. 1.
26. *See* Vick, above n. 25, at 184-5; *and see* van Klink and Taekema, above n. 23, at 13 (arguing that 'integrated' legal-interdisciplinary approaches are 'categorized by the fact that the research process itself contains elements from [law and non-legal] disciplines and the researcher welds together the concepts and methods from each or applies a more general methodological approach to both'.)
27. *Note*: MDB development-lending operations include the activities involved in a typical 'project cycle' of MDB-financed development projects, situated in MDB borrower-member states. An MDB project cycle usually consists of the following stages: project identification, project design and appraisal, approval and financing, project implementation, closure and post-implementation review. *See e.g.* the World Bank's project cycle, available at: <http://go.worldbank.org/DT9OOK71V0> (last visited 30 October 2015). Examples of prominent MDBs include the World Bank Group (IBRD, IDA, IFC, MIGA, and ICSID), the Inter-American Development Bank (IABD), Asian Development Bank (ADB), European Bank for Reconstruction and Development (EBRD), and the African Development Bank (AfDB). For examples of different forms of transnational regulatory governance, *see in general* T. Hale and D. Held (eds.), *Handbook of Transnational Governance* (2011); *and* K.E. Davis, A. Fisher, B. Kingsbury & S. Engle Merry (eds.), *Governance by Indicators: Global Power through Quantification and Rankings* (2012).
28. *I.e.* a term of art used in MDB development-lending operations, referring to individuals affected by the design and implementation of an MDB-financed development project. *Note*, this impact might be *positive*, where these individuals stand to benefit from the project (in which case they would also be referred to as 'project beneficiaries'); or *negative*, where the project is (likely) to result in adverse environmental, economical or social effects within the project area.
29. *And see* above n. 11.
30. On the phenomenon of intersecting normative systems in an emerging 'postnational' legal and political order, *see in general* Krisch, above n. 2.
31. *See* Von Bogdandy *et al.*, above n. 2, at 7 and 9. For criticism of the 'growing use of non-formal law-ascertainment criteria', *see* D'Aspremont, above n. 12, at 221-3.
32. Krisch, above n. 2, at 4.
33. *Id.*

tive, for example, are the resulting challenges of identifying 'unilateral' or 'non-authoritative acts'.[34] In the context of MDB development-lending operations – where 'public authority'[35] or power is exercised by international organisations (the MDBs), MDB-donor and borrower states, as well as by the public and private sector (and, on occasion, civil society) entities acting as project implementing agencies – the challenges involving the identification of 'non-authoritative' acts and the attribution of accountability (not to mention, of legal liability and responsibility),[36] are exacerbated by the fact that MDBs have steadily increased the scope of their development agendas over the past decades.[37]

Moreover, as Klabbers points out, the exercise of public authority by a wide range of actors 'can also take on all sorts of legal and quasi-legal forms'.[38] And, while this 'process of 'legal pluralization' is underway in various manifestations (diffusion of actors as well as forms)', it is also 'accompanied by a broader normative pluralization' – which results in a situation where 'it is no longer immediately evident (presuming it ever was) that legal authority is the sort of authority to strive for'.[39] Hence, as Kingsbury comments, '[l]aw contributes appreciably, but generally only in limited ways, alongside political, economic, social, and historical factors

> ... in explaining why certain institutions exist in the global administrative space with particular memberships and structures, why these have the mandates and decision rules they do, and why other institutions, mandates, or rules do not exist.[40]

Or, as Orford argues, 'a renewed public interest in cosmopolitan legality' transpired 'at the same moment as a perceived crisis of relevance [of] existing international law and institutions'.[41] In other words, the 'questions to which international law is expected to offer an answer' – including the accountability, legal liability, and responsibility of international organisations – 'are some of the most important, vital and intriguing questions of our time'; yet, there is a persistent perception that 'international law as a discipline has lost its capacity to provide a compelling understanding of what is at stake when these questions arise'.[42] This conundrum compels international legal scholars, aided by the theories and methods from non-legal disciplines, to 'think about what happens to law at the limits of modern political organization'.[43]

### 2.1 MDB Responses to Concerns about Accountability: The Operational Policies and Citizen-Driven IAMs

Over the past few decades, MDBs, with the World Bank Group blazing the trail, have responded to concerns about their accountability in a number of ways.[44]

Notably, MDBs have established internal normative frameworks to guide their development-lending operations. These *operational policy frameworks* incorporate informal *best practices* (norms that are recommended but not obligatory) as well as formal *operational policies and procedures* (norms that are compulsory for MDB management and staff, and, to the extent that these norms are incorporated in the credit/loan agreement, also for borrowers).[45] A critical part of these operational policy frameworks includes the *safeguard policies*, which are



34. Von Bogdandy *et al.*, above n. 2, at 4.
35. Von Bogdandy *et al.*, above n. 2, at 5 (arguing that 'any kind of governance activity by international institutions,' 'be it administrative or intergovernmental, should be considered as an exercise of international public authority *if* it determines individuals, private associations, enterprises, states, or other public institutions'. (Emphasis in original.)
36. On the distinction between these concepts, *see e.g.* the conceptual work of the International Law Association (ILA) on the accountability of international organisations (IOs). The ILA describes different *forms* (*e.g.* political, legal, administrative, financial) and *levels* of IO-accountability, *i.e.*: first level: various 'forms of internal and external scrutiny and monitoring, irrespective of potential and subsequent liability and/or responsibility'; second level: 'tortious liability for injurious consequences arising out of acts or omissions not involving a breach of any rule of international and/or institutional law'; and third level: 'responsibility arising out of acts or omissions which do constitute a breach of a rule of international and/or institutional law.' (*See* International Law Association, Report of the Seventy First Conference, Berlin (2004), available at: <http://www.ila-hq.org/en/publications/order-reports.cfm>, at 5-6 (last visited 31 October 2015)). *Note*, IAM-practice would constitute an example of 'first level accountability' that combines various forms of accountability.
37. *See e.g. in general* J.W. Head, 'For Richer or for Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks', 52 *The University of Kansas Law Review*, 241 (2003-2004); *and* D.D. Bradlow and C. Grossman, 'Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF', 17 *Human Rights Quarterly* 411 (1995).
38. J. Klabbers, 'Setting the Scene', in J. Klabbers, A. Peters, & G. Ulfstein, *The Constitutionalization of International Law* (2009) 12, at 12-4.
39. *Id.*
40. *See* Kingsbury, above n. 15.
41. *See* Orford, above n. 3.
42. *Id.*
43. *Id.*
44. *Note*, another prominent response not discussed here concerns reforms of MDB governance structures – in this regard, *see e.g.* N. Woods, 'Making the IMF and the World Bank More Accountable', 77 *International Affairs* 1, 83 (2001); Head, above n. 37; *and see* D.D. Bradlow, 'The Reform of the Governance of the IFIs: A Critical Assessment', in H. Cissé, D.D. Bradlow & B. Kingsbury (eds.), *The World Bank Legal Review: International Financial Institutions and Global Legal Governance* (2011), e-Book.
45. For a comparative overview and analysis of World Bank (IDA and IBRD) and IFC operational policies, *see e.g.* D. Bradlow and A. Naudé Fourie, 'The Operational Policies of the World Bank and the International Finance Corporation Creating Law-Making and Law-Governed Institutions?', 10 *International Organizations Law Review* 3 (2014), at 3-80. For a discussion of how the MDBs incorporate their operational policies as 'conditionalities' in the credit/loan agreement, *see e.g.* L. Boisson de Chazournes, 'Policy Guidance and Compliance: The World Bank Operational Standards', in D. Shelton (ed.), *Commitment and Compliance* (2000) 281, at 289-90. *Note*, a credit/loan agreement entered between an MDB and a borrower member *state* is an international agreement (between an international organisation and a state), governed by international law – *see e.g.* D.D. Bradlow, 'International Law and the Operations of the International Financial Institutions', in D.D. Bradlow and D.B. Hunter (eds.), *International Financial Institutions and International Law* (2010) 1, at 11; *and see* D.A. Wirth, 'Commentary: Compliance with Non-Binding Norms of Trade and Finance', in D. Shelton (ed.), *Commitment and Compliance* (2000) 330, at 334.


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aimed specifically at managing environmental, social, and economic risks.[46]

The 'legal nature' of these operational policy frameworks remains a point of contention. Generally speaking, internal ('institutional') stakeholders argue that operational policies and procedures are internal documents with no legal features,[47] while external ('public') stakeholders assert that these norms are becoming or have become a 'form of particularly potent institutional law'.[48] Bradlow and Hunter conclude, for example, that the MDBs' operational policies and procedures 'at least' establish

> a soft '*lex speciali*' to govern their own operations in regard to their Member States. As [the MDBs] implement this soft law, it has the potential to raise expectations among the stakeholders in these operations who begin to expect the [MDBs] to comply with this soft law in their operation and to anticipate that they can hold the [MDBs] to account if they fail to comply with them ... .[49]

A second response, which is of particular significance for this discussion, concerns the establishment of independent accountability mechanisms. These bodies are mandated to enforce the relevant operational policy frameworks and, through their functions of fact-finding, problem-solving, compliance review, policy advice, and monitoring, to strengthen the MDBs' management and governance structures.[50]



What makes these bodies unique, however, is the fact that they are *citizen-driven* – that is, they are mandated (usually, by the MDB's Board of Executive Directors) to receive claims *directly* from project-affected people and/or their authorised (civil society) representatives, concerning claims of actual or potential harm suffered as a result of the MDB's non-compliance with the relevant operational policy framework.[51]

In other words, the IAMs also provide affected individuals with an avenue of recourse as well as (at least) the potential for redress.[52] Before the establishment of the World Bank's Inspection Panel in 1993,[53] project-affected people, who are in a 'non-contractual relationship' with MDBs, had no form of recourse or redress *against MDBs* in instances where they have allegedly suffered actual or potential harm due to *MDB actions or inactions*.[54] The establishment of IAMs placed individuals – for the first time in the history of public international law – in a 'legally relevant relationship' *vis-à-vis* an international organisation.[55]

That being said, the 'non-judicial' *versus* 'quasi-judicial' nature of these bodies remains a point of contention – and is also related to debate about the legal nature of the MDBs' operational policy frameworks.[56] The MDBs typically emphasise the non-judicial nature of these

46. For a discussion of the 'evolution' of the World Bank's safeguard policies as the embodiment of the Bank's 'environmental and socially sustainable mandate,' *see* D. Freestone, *The World Bank and Sustainable Development* (2013), at 9-16, *and* 63-71.
47. *See e.g.* I.F.I. Shihata, *The World Bank Inspection Panel: In Practice* (2000), at 41-9; *and see* S. Schlemmer-Schulte, 'The World Bank Inspection Panel: A Record of the First International Accountability Mechanism and Its Role for Human Rights', 6 *Human Rights Brief* 1, at 1 (1999).
48. *See* J. Alvarez, *International Organizations as Law-Makers* (2005), at 235.
49. *See* Bradlow, above n. 45, at 26; Wirth, above n. 45, at 333-7; *and see* L. Boisson de Chazournes, 'The World Bank Inspection Panel: About Public Participation and Dispute Settlement', in T. Treves, M. Frigessi di Rattalma, A. Tanzi, A. Fodella, C. Pitea & C. Ragni (eds.), *Civil Society, International Courts and Compliance Bodies* (2005) 187, at 191-2. For a discussion of the inclusion of international legal standards in the IFC's operational policies, *see e.g.* D. Bradlow and M. Chapman, 'Public Participation and the Private Sector: The Role of Multilateral Development Banks and the Evolving Legal Standards', 4 *Erasmus Law Review* 89 (2011).
50. For a discussion of the entire range of internal accountability mechanisms at the World Bank, *see e.g.* Shihata, above, n. 47, at 8-15.
51. *See e.g.* Inspection Panel Resolution (1993). Resolution No. IBRD 93-10/Resolution No. IDA 93-6, *The World Bank Inspection Panel*, 22 September 1993, para. 12. The World Bank's operational policy framework forms the Panel's only basis for review, and '[f]or purposes of this Resolution, 'operational policies and procedures' consist of the Bank's [binding] Operational Policies, Bank Procedures and Operational Directives, and similar documents issued before these series were started, and does not include [non-binding] Guidelines and Best Practices and similar documents or statements'. All World Bank operational policies and procedures are available at: <http://www.worldbank.org/opmanual/> (last visited 31 October 2015).
52. *Note*, IAM-procedures can also be triggered from within the MDB (*e.g.* by an Executive Board member, or by the MDB president); however, IAM-practice consists *almost entirely* of claims filed by external parties.
53. For a history of the Inspection Panel's establishment, the first IAM of this kind, and which establishment led to similar developments at other MDBs, *see e.g.* Shihata, above, n. 47. For a comparative functional overview of prominent IAMs at MDBs, *see e.g.* D. Bradlow and A. Naudé Fourie, 'Independent Accountability Mechanisms at International and Regional Development Banks', in T.N. Hale and D. Held (eds.), *Handbook of Innovations in Transnational Governance* (2011), at 122.
54. *Note*, this situation is the result of structural deficiencies in the international legal system that are not easily remedied, *i.e.*: the (qualified) immunity of international institutions before domestic courts; limitations of legal standing before international judicial tribunals; and prevailing ambiguity about the international legal obligations of international organisations. In this regard, *see e.g.* D.D. Bradlow and D.B. Hunter (eds.), *International Financial Institutions and International Law* (2010), at xxv-xxix and 387-97. For a critical analysis of the immunity of international institutions before domestic courts, *see e.g.* A. Reinisch, *International Organization before National Courts* (2008). On the limitations of the international legal system in providing legal recourse and redress to individuals in a non-contractual relationship with international institutions, *see in general* J. Wouters, E. Brems, S. Smis & P. Schmitt (eds.), *Accountability for Human Rights Violations by International Organisations* (2010).
55. *See* E. Hey, 'The World Bank Inspection Panel: Towards the Recognition of a New Legally Relevant Relationship in International Law', 2 *The Hofstra Law & Policy Symposium* 61 (1997), at 61.
56. MDBs are concerned that claims filed at the IAMs might be used as a basis for challenging their qualified immunity before domestic courts – as had occurred in at least one (unsuccessful) instance in the institutional history of the World Bank Inspection Panel – *see e.g.* Shihata's comments about the *Argentina/Paraguay: Yacyretá* case, above n. 47, at 122-4; *and see* Shihata's argument (*Id.*, at 234) that 'a violation by the Bank of its policy, even if established by the [Inspection] Panel is not necessarily a violation of applicable law that entails liability for ensuing damages; and ... since the Panel is not a court of law, its findings on Bank violations cannot be taken ipso facto as a conclusive evidence against the Bank in [domestic] judicial proceedings'. *Note*, Ibrahim Shihata was a former World Bank Vice President and Group Legal Counsel.

mechanisms,[57] whereas academic commentators (including this author) tend to view IAMs as 'hybrid' mechanisms with certain court-like features.[58]

As the growing number of different IAMs investigated a slowly but steadily increasing number of cases,[59] researchers in the areas of public international law and political science underlined the potential for normative development – emanating from the 'dispute resolution triad' formed by the claimants, MDB management (the 'respondents'), and the IAM (with the MDB's Board of Executive Directors usually acting as final arbiter).[60] Studying the practice of IAMs, therefore, could yield significant insights as to the content and scope of the international legal responsibilities of MDBs, which remain an ambiguous area.[61]

It could also help to clarify the place of law in transnational regulatory governance contexts because, while the contribution of *legal* normativity may have been limited in the past, as Kingsbury argues, 'the roles of law are of rapidly growing in importance' since 'the stakes involved in [transnational regulatory governance] regimes are high.'[62] Indeed, '[n]ew understandings of law and its roles are emerging'[63] in part because international organisations 'have increasingly sought to shore up their legitimacy, and to enhance the effectiveness of their regulatory activities, by applying to (and between) themselves procedural norms,' including 'transparency, participation, reasoned decision making, ... legality, and [the establish[ment] [of] mechanisms of review and accountability'.[64]

## 3 The Research Project and Its Underlying Methodology

The *IAM-practice research project* ('project'), therefore, set off by addressing legal questions.[65] The project's initial 'dynamic hypothesis'[66] argued that there is a *functional equivalence between judicial institutions executing mandates of judicial review and citizen-driven IAMs at MDBs executing mandates of fact-finding and compliance review*.

This dynamic hypothesis provides the first hint of the place legal doctrinal methods came to occupy in the project's research methodology. If IAMs, reviewing the actions and omissions of MDBs against the normative framework constituted by the operational policies and procedures, are likened to courts executing mandates of judicial review, it would make sense to employ the same interpretative techniques and schemes used by judges and employed in 'legal [doctrinal] scholarship'.[67]

But the need for employing a legal-*interdisciplinary* approach also became clear during the early stages of the project. In fact, this need was illustrated quite forcibly by a cursory analysis of IAM-practice material, which demonstrates, for instance, that MDB development-lending operations cut across various disciplinary areas and practice domains. Moreover, the notion of 'accountability' is multifaceted and different disciplines tend to

57. *See e.g.* Schlemmer-Schulte, above n. 47, arguing that the 'implementation of the Bank's policy standards in projects does not result in substantive rights that individuals in borrowing countries may claim against the Bank, nor does the Inspection Panel represent a legal remedy mechanism through which positions described in the Bank's policies or rights referred to in the Resolution could be enforced against the Bank'. *Note*, the author was Senior Counsel and Associate General Counsel/Special Advisor to the Senior Vice President and General Counsel of the World Bank, between 1995 and 2002. *Also see* M. Hansungule, 'Access to Panel – The Notion of Affected Party, Issues of Collective and Material Interest', in G. Alfredsson and R. Ring (eds.), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (2001) 143, commenting (at 150) that while the Panel is clearly 'not a court of law and not even like a court of law', it is nevertheless significant that the Panel as well as 'Bank officials frequently like to stress this point as if to prove that it is in fact a kind of a court of law. The fact that it is not a court of law or like a court is sometimes denied so often by Bank staff as to suggest that this was in fact the idea behind its establishment'.

58. *See e.g.* L. Boisson de Chazournes, 'Compliance with Operational Standards – The Contribution of the World Bank Inspection Panel', in G. Alfredsson and R. Ring (eds.), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (2001) 67, at 83-4; B. Kingsbury, 'Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples', in G.S. Goodwin-Gill and S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999) 323, at 332; K. Nathan, 'The World Bank Inspection Panel: Court or Quango?', 12 *Journal of International Arbitration* 135, at 137-8; *and see in general* A. Naudé Fourie, *The World Bank Inspection Panel and Quasi-Judicial Oversight: In Search of the 'Judicial Spirit' in Public International Law* (2009). For a discussion of how IAMs fit into Romano's 'taxonomy' of international rule of law bodies, *see* C.P.R. Romano, 'A Taxonomy of International Rule of Law Institutions', 2 *Journal of International Dispute Settlement* 241, at 247 (2011). *But also see* M. Van Putten, *Policing the Banks: Accountability Mechanisms for the Financial Sector* (2008), at xxiii. Van Putten (a non-lawyer and former Inspection Panel member) considers the fact that 'most studies about accountability mechanisms, compliance mechanisms, and review panels – and more specifically the Inspection Panel – have been done by lawyers', as both 'a hindrance and challenge'. (*Id.*)

59. For a statistical overview of cases filed at different IAM, *see e.g.* A. Naudé Fourie, *The World Bank Inspection Panel Casebook* (2014), at 604.

60. *See in general* Kingsbury, above n. 58; *see* Bradlow and Naudé Fourie, above n. 45, at 59-62; Bradlow and Hunter, above n. 54, at 395-6; *and see* E. Suzuki and S. Nanwani, 'Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks', 27 *Michigan Journal of International Law* 177 (2005-2006), at 225. On normative development occurring as a 'by-product' of 'triadic dispute resolution', *see in general* M. Shapiro and A. Stone Sweet, *On Law, Politics, and Judicialization* (2002).

61. *See* Bradlow and Hunter, above, n. 54, at xxv-xxix and 387-97.

62. *See* Kingsbury, above n. 15.

63. *Id.*

64. *Id.*

65. *Note*, the project started in 2005 as a masters-level dissertation, expanded into a doctoral research project in 2007, and continued as a post-doctoral research project during 2009-2015.

66. A 'dynamic hypothesis', which is informed by theory and observations drawn from practice, 'supports and informs' inquiry; but it does not treat theory 'as an illusive, sacred Truth'. (*See* M. Shields and N. Rangarajan, *A Playbook for Research Methods: Integrating Conceptual Frameworks and Project Management* (2013), at 1-11.) In this project, various dynamic hypotheses have been reflected as conceptual models (as illustrated in Section 3) that serve as 'useful tool[s] that organiz[e] inquiry connecting problem and data'. (*Id.*, at 23-4.)

67. *See* Vranken, above n. 8, at 43-4.





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emphasise different aspects thereof.[68] Hence, the project concluded that the issue of 'MDB-accountability' needs to be addressed by means of a legal-interdisciplinary approach. As the ILA argues, IO-accountability is 'not a notion which, for the sake of its operationality, is or has to be viewed as monolithic, calling for uniform and indiscriminate application'.[69] Simply put, 'such rigidity would not survive the complexities of international reality'.[70] Instead, our efforts to conceptualise and operationalise the accountability of international organisations have to maintain the 'delicate balance'

> between preserving the necessary autonomy in decision-making for ... [international institutions] and responding to the need, both in the sphere of international law and international relations, to have these actors accountable for their acts and omissions.[71]

As the research project proceeded, it became increasingly clear that IAM-practice provides a unique window onto MDB development-lending operations that might also facilitate inquiry into matters that are not 'entirely legal', or that are merely 'law related'. For instance, IAM-practice demonstrates the complex dynamics between MDBs, borrowers, and project implementing agencies; the intricate trade-off decisions involved in 'balancing' economic, social, and environmental interests in order to realise the sustainable development objectives; as well as the tension among institutional performance areas aimed at meeting commercial objectives and those aimed at public objectives, including the avoidance and mitigation of social and environmental 'harm' or material adverse effects.

Interdisciplinary researchers are familiar with the challenges involving *integration* – that is, how do you *fit* different types of methods, theories, and research questions into a methodology so that it is not only coherent, but also so that its different components work together in such a way that the total can indeed be more – and 'more interesting' – than the sum of its parts?[72]

In this project, two (closely related) mechanisms facilitate such integration: conceptual models[73] (discussed in Section 4) and the *IAM-practice database* ('database'), which will be introduced in the remainder of this section.

### 3.1 The IAM-Practice Database

The IAM-practice database[74] provides the project's analytical platform. It consists of five components, containing different types of data:[75]

1. A comparative *institutional* and *functional overview* of IAM-mandates, functions, compositions, operating processes and procedures, as well as MDB operational policies. This component facilitates contextualisation, which is a critical analytical component during the initial stages of interdisciplinary and comparative research projects.[76]
2. A *quantitative overview*, which supports descriptive statistical analyses of various quantifiable aspects – concerning, for instance, MDB development-lending operations and claims filed at the IAMs.[77]
3. A *descriptive IAM-case overview*, which provides a structured summary of all individual claims ('cases') filed at the IAMs – setting out key aspects

68. *See e.g.* R. Mulgan, 'Accountability': An Ever-expanding Concept?', 78 *Public Administration* 555, at 555 (2000); *and see* J. Fox, 'Introduction: Framing the Inspection Panel', in D. Clark, J. Fox & K. Treakle (eds.), *Demanding Accountability: Civil-Society Claims and the World Bank Inspection Panel* (2003) xi, at xii, arguing that accountability is an 'inherently relational' concept and its 'meaning [therefore] varies greatly depending on the actors involved (for example, contractual, corporate, and political accountability are all quite different).' As for '[t]he standards themselves', that is, 'what counts as compliance', Fox argues that both 'the scope and meaning of *public* accountability more generally, are all contested and shaped through political conflict.' (*Id.*, emphasis in original.)
69. International Law Association, *Report of the Sixty Eighth Conference, Taipei* (1998), available at: <http://www.ila-hq.org/en/publications/order-reports.cfm>, at 15-7 (last visited 31 October 2015). *Also see* Bradlow and Hunter, above n. 54, at 81.
70. *Id.*
71. International Law Association, *Report of the Seventy First Conference, Berlin*, (2004), available at: <http://www.ila-hq.org/en/publications/order-reports.cfm>, at 5-6 (last visited 31 October 2015). On IO-accountability as a multifaceted concept, *also see e.g.* E. Brown Weiss, 'On Being Accountable in a Kaleidoscopic World', 104 *American Society of International Law Proceedings* 477, at 480 (2010).
72. *See* Brewer, above n. 20. On challenges involving legal-interdisciplinary approaches, *see e.g.* Vick, above n. 25, at 185; *and see in general* Siems, above n. 1. *Also see* Hirsch Hadorn *et al.*, above n. 19, at 443-8.
73. Conceptual models employed in legal scholarship have been described as 'neutral reference system[s] in the form of concepts' or 'abstract models derived in an inductive process from specific instances of real-existing law' (*see* O. Brand, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies', 32 *Brooklyn Journal of International Law* 405, at 436 (2007); *and* in other research contexts it has been described as 'system[s] of concepts, assumptions, expectations, beliefs, and theories that suppor[t] and informs your research' (*see* J. Maxwell, 'Designing a Qualitative Study', in L. Bickman and D. Rog (eds.), *The Sage Handbook of Applied Social Research Methods* (2009), at 222); or, as 'the way ideas are organized to achieve a research project's purpose' (*see* Shields and Rangarajan, above n. 66, at 24).
74. *Database*, as defined here, refers to a repository of various types of information ('data') that is organised in such a way so as to ensure 'ease and speed of search and retrieval' (*see* <http://www.thefreedictionary.com/database> (last visited 31 October 2015)).
75. *Data* is defined here as different types of '[f]acts that can be analyzed or used in an effort to gain knowledge or make decisions' (*see* <http://www.thefreedictionary.com/data> (last visited 31 October 2015)).
76. *Note*, the data included in this component has been collected and configured by comparative (constitutional) law and legal doctrinal methods. On the importance of contextualisation in comparative legal studies, *see e.g.* A. Peters and H. Schwenke, 'Comparative Law beyond Post-Modernism', 49 *International and Comparative Law Quarterly* 800, at 801-802 (2000); *and see* T. Koopmans, *Courts and Political Institutions: A Comparative View* (2003), at 96-7. On the role of contextualisation in developing an understanding of the 'relevant complexity of a problem' in interdisciplinary or 'transdisciplinary problem-oriented' research, *see* Hirsch Hadorn *et al.*, above n. 19, at 441.
77. *Note*, the data included in this component has been collected and configured by means of descriptive (as opposed to predictive or inferential) statistical methods. Descriptive statistics 'summarize the information in a collection of data', whereas inferential statistics 'provide predictions about a population, based on data from a sample of that population'. *See* A. Agresti and B. Finlay, *Statistical Methods for the Social Sciences* (2009), at 4. For examples of how this data has been employed, *see* Naudé Fourie, above n. 58, at 566-604.

of the case and covering each stage of the IAM-process.[78]

4. An *indexed overview*, consisting of recurring words and phrases in IAM-practice material (such as 'environmental impact assessment', 'indigenous people', 'poverty reduction', and 'hydro-electric power facility').[79]
5. A *qualitative overview*, consisting of recurring themes, problems – *issues* – extracted from IAM-practice material (such as the 'definition of indigenous people', the meaning of 'free and informed participation of indigenous peoples', the 'identification and quantification of project-affected people', and the 'diligent consideration of design alternatives'.

With the exception of component (2), which contains numeric data, the data in components (1), (3), (4), and (5) are *text*, sourced from: (1) MDB project documentation that is in the public domain;[80] (2) MDB operational policies;[81] and (3) IAM-practice material.[82] What further distinguishes component (5) is the fact that it involves a significant degree of interpretation. Hence, as Section 3 will discuss in more detail, legal doctrinal analysis played a prominent role in collecting and configuring the data contained in the *issue overview* (component (5)).

Furthermore, components (1), (2), (3), and (4) reflect a 'data-driven' (or, 'bottom-up') approach – meaning, the database design has been influenced by the structure, format, and content of the data; whereas data collection and configuration involved the systematic processing of all data, recording only what has been identified.

A data-driven approach might therefore be compared to the proverbial search through a haystack – without, however, being given detailed instructions to find a needle, but simply to record all findings and place ('configure') them in appropriate data categories and sub-categories (*e.g.* 'hay' ['short', 'medium', and 'long stubs'], 'needles', and 'insects' ['ants', 'crickets', and 'grasshoppers']).

Component (5), by contrast, reflects a 'hypothesis-driven' (or, 'top-down') approach – meaning, a particular dynamic hypothesis (which, in terms of this project has, as noted, been expressed as various conceptual models)[83] informed the database design and facilitated the data collection and configuration process.

To extend the earlier metaphor: the dynamic hypothesis would inform and direct the inquiry to look for 'needles in particle areas of the hay stack', whereas legal doctrinal methods, as will be discussed in the remainder of the article, would assist with the identification and categorisation ('coding') of collected data.[84] In other words, by employing legal doctrinal analysis, a 'thin piece of bent metal with one fairly sharp end' might be located in the haystack and, although the object would not conform to 'conventional needle-design', it could still be recorded under a relevant category that reflects its functional equivalence.

# 4 The Place of Legal Doctrinal Analysis in Designing and Developing the IAM-Practice Database

Legal doctrinal analysis occupied a place of prominence during the IAM-practice database's design and development stages – notably, with respect to the *issue overview component* (5), which also forms the focus of the discussion in this section.



## 4.1 Designing the Database: Legal Doctrinal Analysis Supporting Conceptualisation

The database design stage consists of the following activities: identifying potential *data sources*; analysing the *data format and content* in the identified sources to gain an understanding of how the data might support different types of analyses; designing the *data collection* process (*i.e.* determining what data would be extracted from the identified sources, and how the data will be extracted); designing the *data categorisation* or *coding* process (*i.e.* deciding how the data will be categorised or sorted within the database);[85] designing the *data configuration* process (*i.e.* determining how the data will be recorded, identifying the relationships between data sets and deciding how these relationships will be reflected within the database;[86] and designing the *data testing* pro-

78. For examples of how this data has been employed, *see in general* Naudé Fourie, above n. 58.
79. *Note*, the data collection process involved in this component have been partly automated; however, because of inconsistencies in the way terminology is used across the different IAMs and MDBs, and also due to the continuous institutional evolution of the IAMs, data has mostly involved 'human indexing' techniques. On the differences between 'human' and 'automated' indexing, *see e.g.* J.D. Anderson and J. Perez-Carballo, 'The Nature of Indexing: How Humans and Machines Analyze Messages and Texts for Retrieval', 37 *Information Processing and Management* 231 (2001).
80. *See e.g.* the World Bank's project repository, at: <http://www.worldbank.org/projects> (last visited 31 October 2015).
81. *See e.g.* the EBRD's operational policies at: <http://www.ebrd.com/what-we-do/strategies-and-policies.html> (last visited 31 October 2015).
82. *See e.g.* the IFC/MIGA's Compliance Advisory Ombudsman's cases at: <http://www.cao-ombudsman.org/cases/> (last visited 31 October 2015).
83. *See e.g.* Figure 1, below.
84. *See* n. 85, below.
85. To this end, the project employs 'issue classification' methods such as 'analytic coding', which involves the process of classifying and categorizing data – *see e.g.* C. Glesne, *Becoming Qualitative Researchers* (2011), at 194-9.
86. *Id.*


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cess (*i.e.* determining what approach will be followed to ensure data quality).[87]

Because the *issue component* of the database is hypothesis-driven, the dynamic hypothesis plays a fundamental role during the database design stage – especially with regard to designing the data collection, categorisation, and configuration processes. In order to do so, however, the dynamic hypothesis has to be further conceptualised.

For instance, the project's core dynamic hypothesis concerns, as noted, the *functional equivalence between courts executing a mandate of judicial review and IAMs executing a mandate of fact-finding and compliance review*. However, the hypothesis would require a lower level of abstraction concerning the nature of such 'functional equivalence' in order for it to 'drive' the activities of the database design and development stages. Subsequently, the project developed various conceptual models focusing on the *nature* of (quasi-) judicial review ('what it entails' and, importantly, 'how it is performed'), the *outcomes* in which it results or to which it contributes, and the *dynamics* between the (quasi-) judicial review body and the 'political organs' (in national constitutional systems: legislature, and executive; in the context of MDBs: MDB management, and Executive Boards of Directors).[88]

The development of these conceptual models was facilitated by non-legal methods such as the modelling techniques employed in systems thinking and systems dynamics[89] – in combination, however, with legal doctrinal and comparative constitutional methods. The project employed these methods to analyse landmark cases in a number of national and supranational constitutional systems, as well as the dynamics between judicial and political institutions;[90] and, to analyse a subset of IAM-practice material.

Figure 1 provides an illustration of one of the conceptual models developed in this manner. The model posits that (quasi-) judicial institutions assert and expand their *de facto* independence and authority *vis-à-vis* political institutions; but not indefinitely, as their actions are bound to trigger factors limiting further assertion and expansion (*i.e.* limiting 'growth') – such as 'backlash' from political institutions. On the other hand, the prolonged stagnation or contraction of (quasi-) judicial independence and authority are also bound to trigger factors limiting further stagnation or retraction (*i.e.* limiting 'decline') – such as 'backlash' from external actors questioning the (quasi-) judicial institution's credibility. In this way, (quasi-) judicial institutions tend to fluctuate between periods of *activism* and *restraint*, but their survival ultimately requires expansion – albeit incremental expansion – along the *general line of progression*.[91]

The project employed another type of conceptual tool, the 'issue tree' – again, in combination with legal doctrinal and comparative constitutional analysis – to move the conceptual model to even lower levels of abstraction (thus, reflecting increasing degrees of detail and complexity). An excerpt from the issue tree underlying the (quasi-) judicial review model is illustrated by Figure 2.

Ultimately, the detailed issue tree underlying the (quasi-) judicial review model formed the basis for the design of the issue-view component of the IAM-practice database, with each 'branch' of the issue tree representing a distinct data category (or issue 'code').[92]

For example, the model conceptualises that (quasi-) judicial institutions assert and expand their authority/power *vis-à-vis* political institutions by developing and employing 'doctrines', principled approaches, or interpretative schemes – such as the margin of appreciation doctrine developed by the European Court of Human Rights.[93] Where the (quasi-) judicial institution draw this 'margin' in a particular case can either restrict or expand political authority; however, the fact that it is the *(quasi-) judicial institution* that reviews and affirms where the margin should be drawn in particular instances illustrates that it is a form of 'judicialization' (here defined as the *assertion, expansion of (quasi-) judicial authority vis-à-vis political institutions*).[94]

Legal doctrinal analysis of MDB operational policy frameworks and the initial data-subset of IAM-practice material revealed that several operational policy provisions provided for significant degrees of 'professional judgement' or 'managerial discretion' in the application

87. The project employs an approach that has been derived from 'evolutionary prototyping models' developed in the context of information technology (IT) design and implementation projects – *see e.g.* J.L. Brewer and K.C. Dittman, *Methods of IT Project Management*, 2nd edn. (2008), e-Book: 'Evolutionary prototyping models are initiated with initial planning and risk assessment, followed by the development of a prototype, evaluation of the prototype – and iteration of this cycle as often as required'.

88. *See e.g.* Naudé Fourie, above n. 58, at 33-56, 131-56 and 323-8. *And see in general* A. Naudé Fourie, 'The World Bank Inspection Panel's Normative Potential: A Critical Assessment, and A Restatement', LIX *Netherlands International Law Review* 199 (2012).

89. *E.g.* 'causal-loop diagrams', 'systems archetypes', and 'behavior-over-time' graphs – *see in general* J.D. Sterman, *Business Dynamics: Systems Thinking and Modeling for a Complex World* (2000); *and* V. Anderson and L. Johnson, *Systems Thinking Basics: From Concepts to Casual Loops* (1997).

90. *See* Naudé Fourie, above n. 58, at 59-159.

91. *Note*, this reasoning is an example of the 'limits to success' systems archetype – *see e.g.* Sterman, above n. 89, at 111-13; *and see* Anderson and Johnson, above n. 89, at 59.

92. *Note*, the issue-view component of the IAM-practice database currently lists over 200 different 'issue-codes' or issue descriptors.

93. *See e.g. Handyside* v. *United Kingdom*, ECHR (1976), 1 EHRR 737. *Also see* Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002); *and* Y. Shani, 'Toward a General Margin of Appreciation Doctrine in International Law?', 16 *European Journal of International Law* 907 (2005).

94. *See e.g.* Kingsbury, above n. 58, at 332 (arguing that IAMs such as the Inspection Panel are becoming 'more like courts' due to the 'general tendency toward 'judicialization', which often appears where a triangle is formed between complainant, respondent, and institutional adjudicator, sets up a natural dynamic for the panel to enhance its jurisprudence and its own role, supported by legally oriented NGOs and potentially by some sections of Bank staff whose work such an approach vindicates'.). *But see* Hansungule, above n. 57, at 151.

*Figure 1* *Conceptualising (quasi-) judicial review*

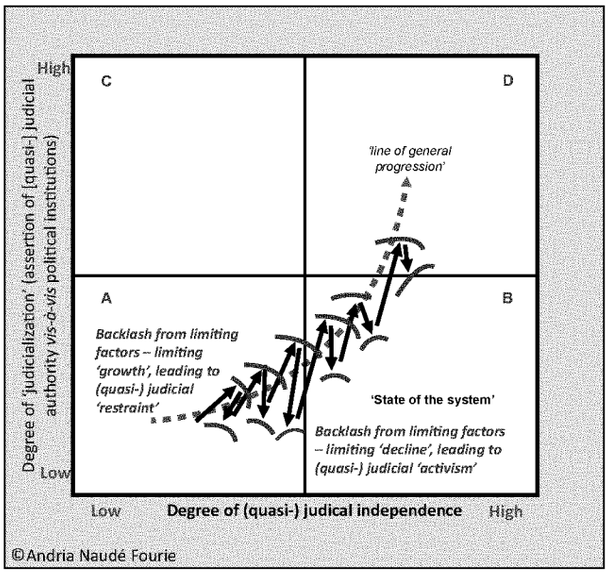
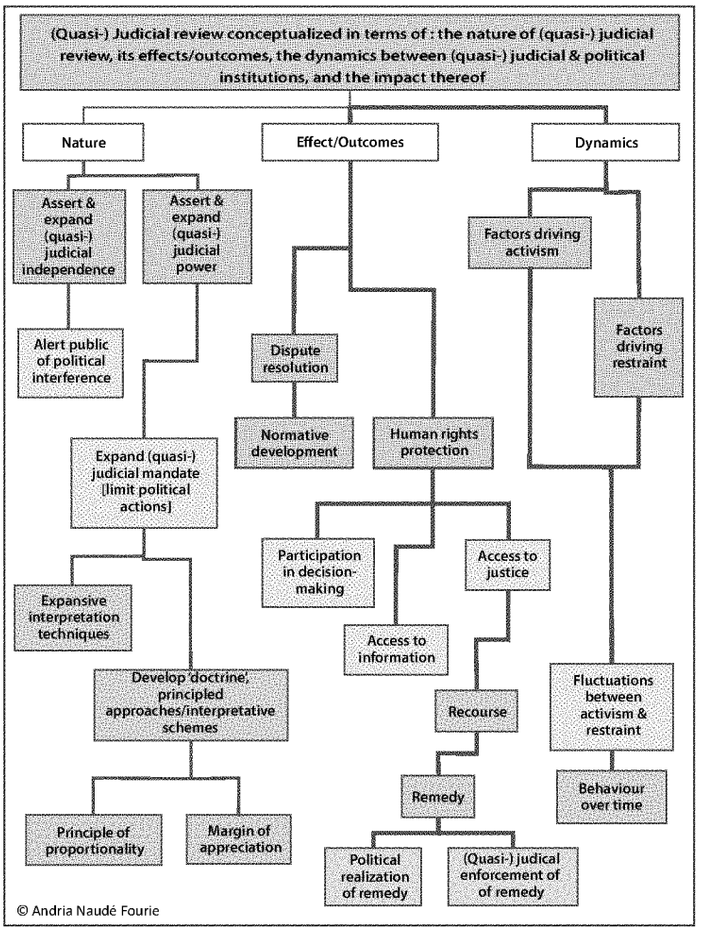



*Figure 2* *The (quasi-) judicial review model – excerpt from 'issue tree'*




of the policies.[95] Moreover, IAMs review the exercise of such professional judgement or managerial discretion in determining whether MDB actions or omissions constituted compliance with the relevant policy. Such reviews often occur over the objection of MDB management, who appears to argue either that, due to the intrinsic nature of 'discretion', there can be no 'margin'; or, that it is up to MDB management alone to determine where

95. *See e.g.* Bradlow and Naudé Fourie, above n. 45, at 30-6. *Also see e.g.* the World Bank's OP 4.12 (Involuntary Resettlement), para. 9 *and* OP 4.10 (Indigenous Peoples), para. 20 – available at: <http://www.worldbank.org/opmanual/> (last visited 31 October 2015).

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such margins should be drawn.[96] The analysis also revealed that the IAMs tend to reject these arguments – thereby asserting their authority to review the exercise of professional judgement or managerial discretion and, subsequently, allowing for broader or narrower 'margins', depending on the particular circumstances.[97]

In *Uganda: Power Projects*, for example, World Bank management had determined that the Bank's safeguard policy on Natural Habitats (OP/BP 4.04) was not applicable to the project because, although the project would result in the 'inundation of the Bujagali Falls' (which would admittedly be 'destroy[ing] a natural habitat of significance to the people of Uganda'), the project had 'identif[ied] specific actions to offset this impact'.[98] Hence, management concluded, the project would not be 'significantly converting or degrading a 'critical natural habitat' as defined in OP 4.04.'[99]

In interpreting the phrase, 'in the Bank's opinion' (contained in OP 4.04), the Inspection Panel acknowledged that it indicated 'the need for and importance of the considered judgment of the Bank' on the 'crucial question' whether a project involved 'significant conversion or degradation of critical natural habitats'.[100] However, the Panel argued, the inclusion of this phrase in the policy did not

> imply or give Management a blank check to apply or not certain policy provisions to a specific project but rather requires Management to form and provide expressly an opinion on the issue in question, which must be consistent with the objectives of the applicable policy.[101]



The Panel subsequently allowed for a narrower margin of appreciation when it concluded that the project's 'flooding of the Bujagali Falls area' should have been 'regarded as a critical natural habitat for purposes of OP 4.04' since the policy 'regards inundation as a form of significant conversion or degradation'.[102]

### 4.2 Developing the Database: Legal Doctrinal Analysis Supporting Data Collection and Classification

The database development stage executes the activities included in the processes of *data collection*, *classification*, *configuration*, and *testing* – with respect to progressively increasing datasets, until the entire dataset (*i.e.* of the IAM-practice material included in the project's scope) has been incorporated.[103]

Legal doctrinal analysis made significant contributions with respect to the processes of data collection and categorisation (which, as noted earlier, involves assigning the appropriate 'issue-code' or descriptor to an identified data entry).

As the project's scope expanded, data collection and configuration activities were executed through the collaborative effort of a small research team that included legal researchers schooled in legal doctrinal analysis and familiarised with the atypical legal content and format of IAM-case material. At this point, the conceptual models developed during the design stage with the assistance of legal doctrinal analysis, also served to facilitate such collaboration.

In other words, as the research team systematically worked through the source data (which, as noted, consisted primarily of *text*) – guided by the dynamic hypothesis and its supporting conceptual models – the team could identify a potential data entry by employing legal doctrinal analysis, even as it was not immediately clear what the data entry signified, or with which issue-code(s) the data entry should be configured within the database.[104] The team would regularly review recently collected and configured data, which would not only ensure data quality but would often also result in further refinement of the conceptual model and the database design.[105] In this way, through the 'shared surface' offered by normativity, the team could interact by reasoning from and through the norms contained in the data source material.[106]

To highlight one example, fairly early on during the database development stage, a particular data entry from the Inspection Panel's *China: Qinghai* investigation was identified and linked to the 'margin of managerial discretion' issue, discussed earlier. The data entry concerned the World Bank's application of its policies on Environmental Assessment and Involuntary Resettle-

96. *See e.g.* Bradlow and Naudé Fourie, above n. 45, at 30-6.
97. *Id. Also see* Naudé Fourie (2012), above n. 88, at 208-10.
98. *Uganda: Power Projects* (2007), Inspection Panel, Investigation Report, paras. 699 and 799. *Note*, World Bank OP 4.04 (Natural Habitats) states: '... the Bank does not support projects that, *in the Bank's opinion*, involve the *significant* conversion or degradation of *critical* natural habitats' (emphases added). OP 4.04 is available at: <http://www.worldbank.org/opmanual/> (last visited 31 October 2015). *Also note*, all IAM-cases referenced in this article can be accessed via their respected websites – as listed above n. 4.
99. *Id.*
100. *Uganda: Power Projects* (2007), Inspection Panel, Investigation Report, paras. 605-6.
101. *Id.*
102. *Id.*
103. On the approach followed to ensure data quality, *see* above, n. 87. *Also note*, the research project progressively expanded its scope by including additional IAMs; however, the project included the entire body of cases of IAMs in scope – as opposed to a data subset or selected cases.
104. *Note*, it is common for a data entry (*i.e.* an extract from IAM-practice material) in the issue-component of the IAM-practice database to be associated with multiple issue-codes due to the relationships among various issues.
105. *Note*, the project adopted an approach by which the (initial) inclusion of 'false positives' was considered preferable above the exclusion of 'false negatives' – i.e. when in doubt, a team member would include a data entry and flag it for discussion; whereupon a final determination would be made during the research team's regular data review meeting.
106. Brunnée and Toope, above n. 16, at 7. *And see* Boisson de Chazournes, above n. 49, at 187-8, arguing that the establishment of IAMs at MDBs 'reflects the evermore urgent need to build 'public spaces,' in the meaning attributed to that concept by the philosopher Jürgen Habermas' – *i.e.* public spaces that can facilitate the creation of 'unusual connections between partners of different stature, who need to exchange information, work together and even negotiate'; and that citizen-driven can be viewed as 'a formalization of the type of interrelation contemplated by Habermas' model,' because their practice 'connects individuals with the very core of the international decision-making process within this institution.'

ment, with the Inspection Panel arguing that these policies could not

> possibly be taken to authorize a level of 'interpretation' and 'flexibility' that would permit those who must follow these [policies] to simply override the portions of the [policies] that are clearly binding.[107]

Moreover, the Panel added, World Bank management 'had an obligation'

> to satisfy itself not only that the process and procedures mandated by the policies had been followed, but also that the work under review met professionally acceptable standards of quality.[108]

'In other words,' the Panel concluded, 'both process and quality were essential components of compliance'.[109] The Inspection Panel elaborated that a 'process' approach could mean that 'even a one-page environmental assessment of a major project could ... be in compliance if it passed the desks of, and was checked off by, the appropriate persons at the appropriate times in the decision process'.[110]

With this example at hand, data entries reflecting a similar line of reasoning in Inspection Panel cases preceding the 1999 *Qinghai* case were identified. In *India: NTPC Power*, for instance, the Panel commented that the project's resettlement and rehabilitation components 'appear[ed]' to be compliant '*at least on paper*, with the Bank's [policy on Involuntary Resettlement] and were [therefore] cleared by the Bank's Legal Department and Environmental Specialists';[111] however, because the 'loan was processed so rapidly', the Resettlement Action Plans were only 'completed immediately before the project was presented to the Bank's Board' for approval.[112] Hence, the Panel concluded, 'there was *no time to ensure that essential mechanisms and preconditions*, such as State Government commitment, capacity of implementing agency, etc. *were in place or adequate*'.[113]

As the project progressed, more examples of this nature were also identified in later Inspection Panel cases. For example, in *Colombia: Cartagena Water Project*, concerning the consideration of project design alternatives, the Panel noted 'that the appointment of a panel of experts to review the technical work in the feasibility study and the design of the Project [was] consistent with Bank policies, particularly OD 4.01 paragraph 13,' but the Panel also commented that it was 'not convinced that there was a *sufficiently thorough analysis of alternatives* before a decision on the [marine sewage] outfall was made'.[114] Whereas in *Albania: Power Sector*, on whether two meetings held with project-affected people in 2003 could be considered as 'the two EA [environmental assessment] consultations required by the Bank for a Category A [*i.e.* high risk] project' (as argued by Bank management), the Inspection Panel pointed out that these meetings took place well after the borrower government 'had approved the siting for the Project [concerning the location construction of a thermal power plant]'.[115] 'This form of EA consultation,' the Panel concluded, 'created the appearance of consultation and of consistency with the OP,'

> but in reality was a *'pro-forma move,' not a genuine consultation*. [The two meetings] contributed nothing to improving project selection, siting, planning or design of the Project, and was not consistent with timing required by the OP [4.01 on EA].[116]

By employing legal doctrinal analysis, the project came to the conclusion that these examples were indicative of a particular interpretive scheme developed and employed by the Inspection Panel. An interpretative scheme, in other words, that emphasises *compliance* with both the procedural (*process*) and substantive (*quality*) normative elements contained in the operational policies.

The project subsequently identified data entries that demonstrate the normative development occurring as a result of the Panel's employment of this interpretative scheme, as well as others – especially in areas concerning access to information, participation in decision-making, and access to justice, which, in turn, are critical for the realisation of sustainable development and, arguably, for 'mainstreaming' human rights in development practice.[117]

Finally, by employing legal doctrinal methods in concert with other conceptual and analytical tools, the project

107. *China: Western Poverty Reduction Project* (1999), Inspection Panel, Investigation Report (Executive Summary), para. 11.
108. *China: Western Poverty Reduction Project* (1999), Inspection Panel, Investigation Report, paras. 180-6.
109. *Id.*
110. *Id.*, at para. 39.
111. *India: NTPC Power Generation Project* (1997), Inspection Panel, Investigation Report, para. 19 (emphasis added).
112. *Id.* (emphasis added).
113. *Id.* (emphasis added).
114. *Colombia: Cartagena Water Project* (2004), Inspection Panel, Investigation Report, para. 77 (emphasis added).
115. *Albania: Power Sector* (2007), Inspection Panel, Investigation Report, paras. 343-44. *Also see e.g. India: Coal Sector* (2001), Inspection Panel, Investigation Report, paras. 348-9 (the Panel arguing that the project's Indigenous Peoples Development Plans were 'disconnected, [had] little depth, [were] just marginal and, on the whole, [did] not reflect a real 'felt' need'. *E.g.* the Panel expressed its concern 'that there has been no concentration on long-term projects such as literacy and numeracy classes, maternal and child health, and self help groups'). *And see India: Mumbai Urban Transport* (2004), Inspection Panel, Investigation Report, para. 725 (the Panel noted that while Management had 'early on reminded the Borrower on the need to form and register [replacement] housing cooperatives, it failed to adequately supervise this aspect of the Project ... in that it focused only on [the housing cooperatives'] registration and did not consider their operational capacity and effectiveness').
116. *Id.* (emphasis added).
117. *I.e.* the so-called 'Rio Declaration Principles', as reflected in the declaration adopted in 1992 during the United Nations Conference on Environment and Development, *see* <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163> (last accessed 31 October 2015). On the relationship between public participation and human rights protection *see e.g.* Bradlow and Chapman, above n. 49; *and see* the Inspection Panel's comments in the Chad: Petroleum case, below n. 124.




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identified various forms of normative development.[118] Including, for instance, normative development that strengthens the 'obligatory nature' of the operational policies;[119] enhances the degree of 'precision' or specificity of 'particular policies provisions';[120] clarifies, as well as elaborate, on the relationship between MDB operational policy frameworks and the international legal system (for instance, by referencing international legal standards, or by 'reading' certain international legal standards 'in' (to) the policies);[121] as well as a form of normative development that links the restrictive or *restraining* elements contained in the policies (such as those aimed at avoiding or mitigating harm) to other elements aimed at *enabling* the realisation of particular institutional aims.[122]

For example, as the IFC's Compliance Advisory Ombudsman Commented in *Chile: Empresa Electrica Pangue*:

> Business confidentiality is enshrined in IFC's disclosure policy. However, it may be interpreted expansively or minimally. The CAO has been urged not to judge the actions of IFC staff and management in the early and mid '90s by the standards of today, 2003. But the discussion of disclosure relates to recent and present activities. Communities consider that they have the right to know if the World Bank Group is exiting a deal, especially when they understand that the exit is predicated upon conditions being met by the sponsor that directly affect them. They want to have access to independent monitoring and verification reports of social and environmental issues which directly concern and impact them. They have a right to know the substance of negotiations that are being undertaken on their behalf. They have a right to know the operational and emergency planning that may impact their lives and security. They have a right to expect that a project of the World Bank Group will at the very least protect them, to the extent possible, from negative development impacts and, where unintended impacts occur, that mitigation measures are discussed and agreed with them. *These rights and issues of respect are not ones that evolve as policies evolve; they are fundamental.* They were in 1993, and they are in 2003. The policy framework with which IFC works to ensure that they are upheld has evolved, but IFC did not deal transparently with the people affected by this project.[123]

Or, as the Inspection Panel argued in *Chad: Petroleum*, '[g]iven the world-wide attention to the human rights situation in Chad ... and the fact that this was an issue raised in the request for inspection by a Requester'

> who alleged that there were human rights violations in the country, and that he was tortured because of his opposition to the conduct of the project, the Panel was obliged to examine the situation of human rights and governance in the light of Bank policies. We are convinced that the approach taken in our Report, which finds human rights *implicitly embedded in various policies of the Bank*, is within the boundaries of the Panel's jurisdiction. ... Nevertheless, the Panel takes issue with Management's narrow interpretation of the Bank's position on human rights [*i.e.* that the Bank's mandate excluded civil and political rights; or was limited to socio-economic rights]. ... The Bank policies on consultation, among others, *presume a basic respect for human rights.* There was a period in Chad when consultations with affected groups were conducted in the presence of armed gendarmes. This was hardly compatible with the Bank policies concerned. ... Mr. Chairman, perhaps this case should lead the Board to study the wider ramifications of human rights violations *as these relate to the overall success or failure of policy compliance in future Bank-financed projects.*[124]

Examples such as these demonstrate how law attains its place in transnational regulatory governance contexts through 'thin' (procedural) normative commitments (in this instance, as represented by the MDBs' adoption of operational policies frameworks and their establishment of citizen-driven IAMs to aid in the enforcement of these frameworks) and also how law secures and expands its place in these contexts by facilitating the realisation of 'thick' (substantive) normative commitments – notably, by means of the 'dispute resolution triad' formed between individual claimants, MDB Management (the 'respondents'), and IAMs (with Executive Board usually acting as final arbitral body).[125]



118. *See* Bradlow and Naudé Fourie, above n. 45, at 40-57. *Note*, data gathered by employing legal doctrinal methods in concert with other conceptual and analytical tools informed different conclusions about the normative contribution of IAMs than those reached by international legal scholars arguing that IAMs have not fulfilled their normative potential. *See e.g.* C. Tan, 'Mandating Rights and Limiting Mission Creep: Holding the World Bank and the International Monetary Fund Accountable for Human Rights Violations', 2 *Human Rights and International Legal Discourse* 97 (2008).
119. *Id.* Illustrated by examples from IAM-practice concerning the 'margin of managerial discretion', noted earlier – *see e.g. Indonesia: Wilmar Group 01 West Kalimantan* (2007), Compliance Advisor Ombudsman, Audit Report, para. 2.8.3; and *Bolivia: Comsur V-01 Bosque Chiquitano* (2003), Compliance Advisor Ombudsman, Assessment Report, at 10.
120. *Id. See e.g. Ecuador: Mining Development & Environmental Control Technical Assistance Project* (1999), Inspection Panel, Investigation Report, paras. 52, 57 & 103; *and see* Peru Agrokasa-01/Ica (2009), Compliance Advisor Ombudsman, Audit Report, para. 4.1.1.
121. *Id.*
122. *See e.g. Paraguay/Argentina: Yacyretá Hydroelectric Project* (2002), Inspection Panel, Investigation Report, paras. 405 and 408, commenting, with respect to its findings of significant non-compliance with the Bank's policy on Involuntary Resettlement, that the project 'demonstrate[d] that taking short-cuts with the Bank's safeguard policies is *counterproductive for all concerned*' (emphasis added).
123. *See Chile: Empresa Electrica Pangue SA 02 Upper Bio-Bio Watershed* (2002), Compliance Advisor Ombudsman, Assessment Report, at 24 (emphasis added).
124. *See Chad: Petroleum* (2001), Inspection Panel, Inspection Panel Chair's Address to Board on occasion of Board's adoption of the Panel's Investigation Report, para. 8 (emphases added.)
125. Brunnée and Toope, above n. 16, at 86; *and see* Shapiro and Stone Sweet, above n. 60.

# 5 Conclusion

Perhaps the first conclusion to be drawn from the experiences with developing and deploying an advanced legal-interdisciplinary methodology to study the practice of IAMs at MDBs – as discussed in this article – is that they are not so different from the experiences of 'conventional' legal doctrinal research projects.

After all, most of the project's source data is text (albeit a-typical legal text), whereas the claims filed before IAMs 'arise out of the conflicts of social practice',[126] as is true for legal cases, and the resolution of such claims require the deployment of interpretative techniques and principled or reasoned interpretative schemes similar to those employed by courts.[127]

Moreover, once legal researchers overcome the methodological obstacles presented by the particular format and content of IAM-practice material – which include an ambiguous and inconsistent use of legal terminology (by claimants, MDB management, Board of Executive Directors, and IAMs alike)[128] – they intuitively know 'what to do with the data'.[129]

In a way, these observations confirm Vick's argument that '[d]octrinalism' or 'the traditional doctrinal approach to legal questions' 'remains the benchmark against which legal academics define themselves and their work'.[130] It certainly served as 'the point of departure' for this project.[131] The experiences with this project also support Feldman's argument that legal doctrinal analysis is *something* that legal researchers 'constantly' and intuitively *do*.[132] However, Feldman remains sceptical of the value of employing non-legal methods, arguing that legal-interdisciplinary researchers invariably 'return to the well' because they are 'constantly disappointed' in 'some new science' that fails to 'provide answers to law's dilemmas'.[133]

And this is probably where the experiences of this project deviate most from those to which Feldman alludes.

Legal doctrinal methods occupy a prominent place within this research methodology because they make a distinct and significant contribution towards facilitating inquiry as well as collaboration within the research team. Legal doctrinal analysis certainly enabled the identification of patterns and structures in the data that mere textual analysis could not have done.

But while legal doctrinal methods may have constituted the 'right tools' for particular 'jobs', they have not been the only conceptual and analytical instruments of value in the project's methodological toolkit. In other words, the project employs legal doctrinal methods and legal theories, but not because *non-legal* methods and theories fail to live up to expectation. Nor, for that matter, does the project employ non-legal methods and theories because *legal* methods and theories 'disappoint'.[134]

Instead, the project employs a combination of legal and non-legal methods and theories in order to realise specific research objectives, irrespective of whether these objectives are predominantly *legal* or *non-legal*. The development of conceptual models, for example, which fulfil several important functions within this project, could not have been done by relying solely on one instrument in the methodological toolkit. The same could be said about designing and developing the IAM-practice database.

This is not to say, of course, that the distinctions between legal and non-legal methodological elements cease to exist, or that they become entirely insignificant. In fact, in order to integrate different questions, theories, and methods – as (legal-)interdisciplinary researchers have to do, albeit in varying degrees – it is crucial to understand what each element has to offer, what it cannot offer, and how they might best complement each other. Integration, as mentioned, remains both a 'core feature and major challenge of' interdisciplinary research,[135] but the experience with this research project indicates that the integration of legal doctrinal methods does not present any more or less of a challenge than those of other elements. Legal doctrinal methods have, however, proved to be a *synergetic fit* with the 'recursive approach to problem solving' underlying this project.[136]

One of the broader problems considered by this project concerns the place of law in transnational regulatory governance contexts – here, specifically with regard to the *transnational development context* involving MDBs and other co-financiers, MDB (donor and borrower) member states, (public and private sector) project implementing agencies, project-affected people, and civil society actors.

This article concludes that the IAM-practice research project has been able to generate new perspectives on this matter firstly, because it has been based in a *constructivist, interactional* (as opposed to a positivistic) *conception of legal normativity*.[137] A second reason concerns the project's focus on IAM and MDB *practice*, as

126. 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), at 45 – noting that '[a]ll standard sources for lawyers are texts'.
127. *See e.g.* Bradlow and Naudé Fourie, above n. 45, at 41-57.
128. Terms such as 'rights', 'interests', 'legalistic', 'recourse', 'redress', 'remedy', and 'jurisdiction' are often employed in IAM-practice material without any explanation as to their meaning; whereas legal doctrinal analysis of data entries containing such terms often indicates that their meaning often depends on the actor employing them. In this regard, *see* Naudé Fourie, above n. 58, at 1-3.
129. For additional examples of methodological obstacles to studying IAM-material, *see* Naudé Fourie, at *Id.*
130. Vick, above n. 25, at 188.
131. *Id.*
132. *See* R. Feldman, 'Law's Misguided Love Affair with Science', 10 *Minnesota Journal of Law* 95 (2009).
133. *Id.*
134. *Id.*
135. Hirsch Hadorn *et al.*, above n. 19, at 431.
136. *Id.*
137. *See* Section 1.1.




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opposed to being limited to institutional aspects.[138] Thirdly, facilitated by the design and development of the IAM-practice database, the project's scope could include *the entire dataset*, as opposed to a mere subset of IAM-practice or selected case studies.[139] And, finally, because of its *employment of legal doctrinal methods*, in combination with other methods and theories, the project could conclude that law has a distinct place in transnational regulatory governance contexts – that is, if you know where to look for law, and how to find it.



138. *I.e.* matters such as IAM-mandates, processes, functions, independence – *e.g.* as reflected in their constitutive documents, operating procedures, and MDB operational policy frameworks, which form the basis of IAM-review mandates. For examples of such contributions, *see e.g.* R.E. Bissell, 'Institutional and Procedural Aspects of the Inspection Panel', in G. Alfredsson, and R. Ring (eds.), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (2001) 107; *and see* E. Baimu and A. Panou, 'Responsibility of International Organizations and the World Bank Inspection Panel: Parallel Tracks Unlikely to Converge?', in H. Cissé, D.D. Bradlow & B. Kingsbury (eds.), *The World Bank Legal Review: International Financial Institutions and Global Legal Governance* (2011), e-Book. *Note*, this article does not dispute the value of such contributions; it merely argues that there are not enough empirical contributions in this particular area of study.

139. *See e.g.* S. Ananthanarayanan, 'A Crippled Inspection Panel', *India Together* (2004), available at: <http://www.indiatogether.org/2004/jul/hrt-wbinspect.htm> (last visited 31 October 2015); *and see* R. Oleschak-Pillai, 'Accountability of International Organisations: An Analysis of the World Bank's Inspection Panel', in J. Wouters, E. Brems, S. Smis & P. Schmitt (eds.), *Accountability for Human Rights Violations by International Organisations* (2010), at 406.

# Exploring the Potential (Contribution) of Multi-Disciplinary Legal Research for the Analysis of Minorities' Rights

**Kristin Henrard***

**Abstract**

This article sets out to contribute to the special issue devoted to multi-disciplinary legal research by discussing first the limits of purely doctrinal legal research in relation to a particular topic and second the relevant considerations in devising research that (inter alia) draws on non-legal, auxiliary disciplines to 'fill in' and guide the legal framework. The topic concerned is the (analysis of the) fundamental rights of minorities.

The article starts with a long account of the flaws in the current legal analysis of the European Court of Human Rights regarding minorities' rights, particularly the reduction in its analysis and the related failure to properly identify and weigh all relevant interests and variables. This 'prelude' provides crucial insights in the causes of the flaws in the Court's jurisprudence: lack of knowledge (about the relevant interests and variables) and concerns with the Court's political legitimacy.

The article goes on to argue for the need for multi-disciplinary legal research to tackle the lack of knowledge: more particularly by drawing on sociology (and related social sciences) and political philosophy as auxiliary disciplines to identify additional interests and variables for the rights analysis. The ensuing new analytical framework for the analysis of minorities' rights would benefit international courts (adjudicating on human rights) generally. To operationalise and refine the new analytical framework, the research should furthermore have regard to the practice of (a selection of) international courts and national case studies.

**Keywords:** minorities' fundamental rights, international courts, European Court of Human Rights, lack of knowledge, multi-disciplinary legal research

## 1 Introduction and Setting the Scene

The appropriate treatment of persons belonging to ethnic, religious, or linguistic minorities tends to be controversial in most states. As diversity in states is increasing, also due to the effects of globalisation and related migration streams, the tensions concerning minorities are expected to rise. These tensions imply challenges for public authorities, inter alia in view of liberal democracies' commitment to respect fundamental rights, also of persons belonging to minorities. The recurring criticisms of decisions by public authorities and (international) courts that affect fundamental rights of minorities, as failing to do justice to the complexities involved and the related multitude of relevant interests, point to the limits of pure legal doctrine in this respect. An article for a special issue dedicated to multi-disciplinary (legal) research obviously focuses on the ways in which this research method could contribute to tackling flaws in the analysis of minorities' rights. In other words, this article's central research question reads: in what way can the findings of non-legal research be incorporated in legal doctrinal research, so as to improve the identification and weighing of all relevant interests for the analysis of minorities' rights.

The analysis here will focus on the importance of multi-disciplinary legal research for the analysis of minorities' rights, which would ideally feed into the judicial practice of international courts. Liberal democracies globally share a commitment to fundamental rights, which implies that they accept the need to respect these rights when developing policies, legislation, and practice, also in relation to minorities. When states fail in their primary responsibility to respect fundamental rights,[1] subsidiary protection and human rights leadership of international courts, and related guidance for states, is crucial.[2] The problem analysis in this article will zoom-in on the jurisprudence of the European Court of Human Rights (ECtHR), undoubtedly the international court adjudicating on human rights issues par excellence in Europe.[3] Furthermore, over the years, the ECtHR has become the international human rights court with the

* Professor of minorities and fundamental rights at the Erasmus School of Law.

1. The concept 'courts' includes quasi-judicial bodies.
2. J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Martinus Nijhoff (2009), at 255-57; M. Kumm, 'Democracy is Not Enough: Rights, Proportionality and the Point of Judicial Review', *NYU School of Law Public Law Research Paper No 09-10*, at 3-5 (2009).
3. All member states of the Council of Europe have ratified the convention, thus accepting the Court's ultimate jurisdiction on questions pertaining to human rights (enshrined in the convention). CJEU's Opinion 2/2013 may have dismissed the draft agreement on EU accession to the ECHR; the Lisbon treaty still requires the EU to ratify the ECHR.



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most extensive and rich jurisprudence on minorities, both in terms of range of topics and numbers of judgements.[4]

### 1.1 Human Rights, Limitations, Interpretation Principles, and Judicial Activism

It is generally accepted that the law, and certainly human rights law, is not only determined by the text of the legal provisions concerned, but also by the interpretation of that text. Since the formulation of human rights is open to a range of different interpretations, the interpretation principles, or maxims adopted are often decisive. The effective enjoyment of fundamental rights[5] is an overarching concern for international courts monitoring the compliance of fundamental rights. In the words of the ECtHR, the convention must be interpreted in a manner which renders its rights practical and effective, not theoretical or illusory.[6] This implies that the scope of application of rights should be interpreted broadly, generously. Since most fundamental rights are not absolute, their effective protection does not require their absolute realisation. Nevertheless, *limitations* by public authorities need to respect particular requirements.[7] Indeed, the requirements that states need to meet when they want to limit the enjoyment of rights are of paramount importance to safeguard their effective protection. In this respect, an interpretation maxim has developed following which limitations need to be construed restrictively.[8] In line with the overarching rational of human rights conventions, the protection of human rights is the baseline, and thus limitations need to be interpreted restrictedly.[9] Consequently, when something is accepted to fall within the scope of application of a right, states have to respect and protect this right, and they need to have very good and concrete reasons to limit its enjoyment. The maxim arguably points to a rather high baseline level of scrutiny by international courts, which in turn implies that these courts do not leave considerable discretion to the contracting states.

The overarching concern with the effective enjoyment of fundamental rights has influenced the development in the framework of international conventions on human rights of sui generis interpretation principles, more particularly the teleological and the evolutive interpretation principle.[10] While the former implies a consideration of the underlying ratio of rights, the evolutive or dynamic interpretation of human rights reflects that these rights are not static. The latter characteristic of fundamental rights is nicely captured in the ECtHR's living instrument doctrine, following which 'the European convention is a living instrument ... [that] should be interpreted in the light of "present day conditions"'.[11]

It may be obvious that different opinions can and do exist not only about the most decisive interpretation principle but also on what 'effective enjoyment', 'telos', etc. mean and imply. The ensuing different interpretations also reflect different visions about the role of international courts and the appropriateness of judicial activism. While different interpretations of the law can be defended, ultimately a choice needs to be made by the adjudicator.[12] Admittedly this choice is *subjective* to some extent.[13] Nevertheless, the generally recognised maxim that limitations to fundamental rights need to be interpreted restrictively has already been argued to point to the appropriateness of a rather high level of scrutiny as baseline. The latter, in turn, implies a strong case for judicial activism, for the appropriateness of a rather 'active' court, in the sense of one that does not easily 'follow' the arguments of the states. Furthermore, given the generally recognised importance of the maxims of legal certainty and predictability for the rule of law, it is arguably important that courts adopt explicit and transparent reasoning regarding the interpretation they adopt.[14] This explicit reasoning can, in turn, contribute to a certain sense of *objectivity*.

### 1.2 Human Rights, Interpretation, Limitations, and Multi-Disciplinary Legal Research

Multi-disciplinary legal research investigates the extent to which non-legal disciplines can function as auxiliary disciplines to guide the interpretation of the legal norms



4. *Inter alia* G. Gilbert, 'The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights', *Human Rights Quarterly*, at 736-80 (2002). *See also* S. Akermark, 'Limits of Pluralism-Recent Jurisprudence of the European Court of Human Rights with Regard to Minorities: Does the Prohibition of Discrimination Add Anything?', *Journal on Ethnopolitics and Minority Issues in Europe*, at 1-24 (2002).
5. Minorities' fundamental rights encompass both general rights (for everyone) and minority-specific rights. Notwithstanding differences in formulation, for both general human rights (including the prohibition of discrimination) and minority-specific rights proportionality considerations, is key. *See inter alia* K. Henrard, 'Non-Discrimination and Full and Effective Equality', in M. Weller (ed.), *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies*, OUP (2007), at 94-5; J. Ringelheim, 'Minority Rights in a Time of Multiculturalism – The Evolving Scope of the Framework Convention on the Protection of National Minorities', *Human Rights Law Review*, at 114, 116, 121 (2010). The analysis in this article is focused on general rights.
6. ECtHR, *Airey* v. *Ireland*, Series A No. 32, 2 EHRR (1979-1980), at 305.
7. R. Dworkin, *Taking Rights Seriously*, Harvard University Press (1977), at 133, 188, 223; K. Henrard, 'A Critical Analysis of the Margin of Appreciation Doctrine of the ECtHR, in Particular about Rights to a Traditional Way of Life and to a Healthy Environment: A Call for an Alternative Model of International Supervision', *Yearbook on Polar Law*, at 388 ff.; D. Réaume, 'Limitations on Constitutional Rights: The Logic of Proportionality', *University of Oxford Legal Research Series No. 26/2009*, at 1-2.
8. G. Letsas, *A Theory of Interpretation of the ECHR*, OUP (2007), at 83.
9. *Inter alia* N. Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, CUP (2002), at 184.
10. *Inter alia* Letsas, 2007, Chapter 3 in particular.
11. ECtHR 25 April 1978, 5856/72 (*Tyrer* v. *The United Kingdom*), para. 183.
12. *See also* J. Pauwelyn and M. Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals', in J.L. Dunoff and M.A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations*, CUP (2012), at 445-69; M. Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism', *EJLS*, at 3 (2007).
13. *Inter alia* Poiares Maduro, 2007, at 3; R.H. Fallon, 'A Constructivist Coherence Theory of Constitutional Interpretation', *Harvard Law Review*, at 1223 and 1247 (1987).
14. *See also* D.L. Faigman, 'Madisonian Balancing: A Theory of Constitutional Adjudication', 88 *Northwestern University Law Review*, at 642-3 (1993-1994).

and thus 'fill in' the legal framework.[15] An article on multi-disciplinary legal research inevitably explores whether these interpretation principles for human rights also imply openings to other disciplines. Teleological interpretation, and its reflection on the ratio of norms, invites input from moral and political philosophy and, depending on the concept, also other disciplines such as psychology. The evolutive or dynamic interpretation of human rights, and the need to take into account changes in society, calls for a consideration of sociological theories and data. In other words, the input of these other disciplines can be argued to be necessary for the proper (doctrinal) analysis of human rights, in relation to both the determination of the scope of application of human rights, and the limitation analysis.

A central requirement for a limitation to a fundamental right to be legitimate is that the limitation is proportionate to the legitimate aim invoked by the state.[16] This proportionality requirement depends, following the Court's steady jurisprudence, on all relevant circumstances of the case. In other words, complying with the proportionality requirement is intrinsically related to a balancing of all relevant interests, according to each interest's relative weight. Proper balancing is essential for the effective protection of fundamental rights by international courts, and arguably requires that the respective weight of all relevant interests is considered and discussed.[17] Put differently, only when all relevant interests are taken into consideration and given their appropriate weight can the legal standards be *correctly* applied.

Arguably, identifying all relevant interests, as well as the relevant variables – determining the relative weight of the interests concerned – cannot be realised with a purely legal perspective. Especially in complex cases, the perspectives of non-legal disciplines, and particularly social sciences and political philosophy, provide additional insights and information about the interests in play, including historical and collective dimensions thereof. Indeed, confirming the preceding argumentation concerning interpretation principles, human rights is a field of law which almost per se requires input from non-legal disciplines in order to obtain the doctrinally correct application of the law.[18] Not surprisingly, legal doctrinal research on human rights increasingly turns to non-legal disciplines, as auxiliary disciplines to guide the interpretation of the legal norms.

Exploratory research shows that such multi-disciplinary research is especially called for concerning the fundamental rights of persons belonging to (ethnic, religious, and linguistic) *minorities*. The effective protection of rights, hinted at above, is particularly important for persons belonging to minorities, given their vulnerable position.[19] However, and notwithstanding the principled commitment of liberal democracies, the rights of persons belonging to ethnic, religious, and linguistic minorities tend to present a challenge for public authorities in light of other policy concerns, including pursuing 'an integrated society', tackling economic crises, and terrorism threats.[20] As the problem analysis below will confirm, courts confronted with cases on minorities' rights encounter difficulties in identifying and weighing all relevant interests concerned. These cases are often complex, not only in terms of the range of different interests in play, but also in terms of the historical and collective layers of these interests. Systemic discrimination against a group deeply affects a society's structure, with discrimination in the field of education, entailing discrimination in the employment sphere and so on. Traditional, ingrained dominance of particular groups, and/or prolonged periods of discrimination against others, in turn, implies that the status quo reflects the majority norm. Disproportionate impact on minority groups of the related apparently neutral rules is not always detected by (international) courts.[21] Hence – returning to the central research question of this article – it merits investigating in what way the findings of non-legal research can be incorporated in legal doctrinal research, and feed into judicial practice, so as to improve the identification and weighing of all relevant interests for the analysis of minorities' rights.

The analysis of this article proceeds in three sections. Section 2 discusses the jurisprudence of the ECtHR concerning minorities and argues that the Court in several respects reduces cases and fails to properly balance



15. 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*, Mohr Siebeck (2011), at 11.
16. In principle one has to have regard to the formulation of each right and the stipulations of its limitation clause. Nevertheless, the jurisprudence of the supervisory organs reveals that the proportionality requirement is key.
17. *See* infra on the argument that 'proper balancing' also requires a critical review of the justifications put forward by the state. The level of scrutiny adopted by the courts is in any event important for the effective protection of fundamental rights.
18. K. de Feyter, 'Treaty Interpretation and the Social Sciences', in F. Coomans et al. (eds.), *Methods of Human Rights Research*, Intersentia (2009), at 218, 231. *See also* the argument from Vranken restated by Elaine Mak in her contribution to this issue, emphasising that interdisciplinary insights are required when arguments with an empirical connotation play a role in legal reasoning (Elaine Mak, 'Watch Out for the Under Toad: The Challenge of Contextualisation in Comparative Legal Analysis', [5]). The examples given, such as arguments concerning reasonable and context-oriented interpretation, and effective legal protection play a central role in human rights reasoning (*see also* infra).
19. A.S. Akermark, *Justifications of Minority Protection in International Law*, Martinus Nijhoff (1997), at 23-8; K. Henrard and R. Dunbar (eds.), *Synergies in Minority Protection: European and International Law Perspectives*, CUP (2008), introduction; R. Medda-Windischer, *Old and New Minorities: Reconciling Diversity and Cohesion*, Nomos (2008), introduction.
20. *Inter alia* R. Rubio-Marin, 'Integration in Immigrant Europe: Human Rights at a Crossroads', in R. Rubio-Marin (ed.), *Human Rights and Immigration*, OUP (2014), at 73-5.
21. *See* below for further elaboration, also through the discussion of particular cases.


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all relevant interests and variables. Two major causes are identified for these jurisprudential flaws, namely lack of knowledge and concerns about its own political legitimacy. This article focuses on multi-disciplinary legal research as a means to tackle the lack of knowledge of the ECtHR (and other international courts). Furthermore, it is anticipated that when the Court would address the lack of knowledge by relying on non-legal disciplines, this could possibly have indirect beneficial effects for its concerns about its political legitimacy.

Section 3 focuses on ways in which multi-disciplinary legal research could tackle the lack of knowledge and the related uncertainty regarding the identification of all relevant interests and variables for the analysis of minorities' rights. It discusses how and in what ways the findings of non-legal disciplines can enrich the analysis of minorities' rights, and what disciplines could function as 'auxiliary disciplines'. Section 4 goes on to discuss how the findings of non-legal disciplines could feed into the judicial practice of the ECtHR and other international courts in a way which alleviates concerns for its own political legitimacy.

In other words, in this article multi-disciplinary legal research is discussed as a means to address both causes of the current flaws in the *ECtHR*'s jurisprudence on minorities, the lack of knowledge, and the concerns about its own political legitimacy. More *generally, international courts'* use of data of non-legal disciplines will not only contribute to the identification and proper weighing of all relevant interests in cases on minorities' rights, but their explicit and transparent reasoning could also bring objectivity and predictability to judicial decision making, and indirectly address legitimacy concerns.



## 2 ECtHR Case Law: A Problem Analysis

Turning to the European Court of Human Rights, this Court is increasingly confronted with cases on (ethnic and religious) minorities that trigger heated debates throughout Europe. Admittedly, the text of the European Convention on Human Rights does not include rights for (persons belonging to) minorities. Nevertheless, the teleological and evolutive interpretation principles used by the ECtHR clearly carry potential to address specific minority concerns pertaining to their separate identity (and substantive equality). In terms of the scope of application of rights, the Court's willingness to do so and to interpret the scope of rights generously is visible in several jurisprudential lines.[22] For example, the Court easily recognises that the wearing of the headscarf is a manifestation of one's religion and thus covered by the freedom of religion. Similarly, the Court's acknowledgement that respect for a traditional way of life is a component part of the right to privacy is beneficial for ethnic minorities. However, a different picture emerges when assessing the Court's limitation analysis. The following critical assessment focuses on the Court's reasoning in its analysis of limitations to these fundamental rights.

Notwithstanding its overall outstanding reputation,[23] it has been noted – also by other academics – that the ECtHR's jurisprudence on minorities and their rights is flawed because it does not identify and weigh all relevant interests in the limitation analysis, thus often inappropriately 'reducing' cases regarding minorities.[24] The Court can be argued not to take 'all relevant circumstances' into account, as it proclaims to do. More particularly, the Court in several respects fails to acknowledge the various layers and the group-character of disadvantage and discrimination suffered by minorities. Consequently, when balancing the respective interests, the Court does not accord sufficient weight to the interests on the minorities' side. Insights from social sciences and political philosophy would arguably help 'complete' the picture, and enable the Court to identify all relevant interests and variables. As will be demonstrated in the more in-depth analysis below, this 'reduction' of cases by the Court is visible in several cases on Roma, the paradigmatic example in Europe of a group who has been the victim of prolonged systemic discrimination. Similarly, in cases regarding religious minorities, the Court can be seen to often disregard structural advantages of majorities, related to the extent to which the dominant religion's values are ingrained in society, thus glossing over the related disadvantages of religious minorities.[25]

Prior to the discussion of a selection of judgements that provides paradigmatic examples of the flaws in the ECtHR's jurisprudence,[26] the parameters for a critical analysis of the Court's case law are set out. In order to explain the criticisms regarding the Court's analysis, we need to return to the doctrine of legitimate limitations and more particularly the central requirement that limi-

22. Note thought the Court's restraint in relation to language rights that pertain to communications with the public authorities: K. Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination*, Kluwer (2000), at 125-28; an analysis confirmed in L. Peroni, 'Erasing Q, W and X, Erasing Cultural Differences' in E. Brems (ed.), *Diversity and European Human Rights: Rewriting Judgments of the ECtHR*, CUP (2013), at 445-68.

23. *Inter alia* A. Timmer, 'Towards an Anti-Stereotyping Approach for the European Court of Human Rights', *Human Rights Law Review*, at 708 (2011). *See also* H. Keller and A. Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, OUP (2008).

24. The term 'redux' was used explicitly in the (title of) Julie Ringelheim's article on the ECtHR's *Chapman* case (J. Ringelheim, 'Chapman Redux: The European Court of Human Rights and Roma Traditional Lifestyle', in E. Brems (ed.), *Diversity and European Human Rights: Rewriting Judgments of the ECtHR*, CUP (2013), at 426-44). Similar ideas were already visible in earlier writings, *Inter alia* by Olivier de Schutter, Sia Spiliopoulou Akermark, and Kristin Henrard, and when focused on religious rights Javier Martinez Torron and Lucy Vickers.

25. P.G. Danchin, 'Islam in the Secular Nomos of the European Court of Human Rights', *Michigan Journal of International Law*, at 693 (2011); J. Martinez-Torron, 'Limitations on Religious Freedom in the Case Law on the European Court of Human Rights', *Emory International Law Review*, at 607 (2005).

26. It is indeed beyond the scope of this article to conduct a comprehensive analysis of the relevant case law of the ECtHR.

tations need to be proportionate to the legitimate aim pursued by the state, and the related balancing of the respective interests.[27] As acknowledged above, different opinions about the role of international courts translate in different stances about the appropriateness of judicial review. Nevertheless, the basic tenets of the human rights paradigm, more particularly the maxim that limitations need to be interpreted restrictively, point towards the appropriateness of a rather high baseline level of scrutiny by international courts when evaluating the proportionality requirement.[28] Arguably, the ECtHR's margin of appreciation doctrine invites a critical assessment in this respect. As will be developed in Section 4 of this article, a turn to the multi-disciplinary legal perspective could, over time, also have beneficial effects on the Court's concerns about its political legitimacy, underlying the use of the margin of appreciation doctrine.

It is first of all important to clarify that this doctrine concerns one form of state discretion in relation to fundamental rights among several others.[29] Several of those forms of discretion are not at all problematic but simply reflect the nature of human rights. One form of discretion flows from the fact that human rights' standards are not set at the level of the best possible protection, but rather denote a bottom line, a minimum that needs to be realised. Obviously, there are many degrees of realisation above that bottom line, and the choice states make in this respect falls fully within their discretion. The choice of means/methods to reach the bottom line is similarly a matter of acceptable state discretion.[30] However, the margin of appreciation doctrine as developed by the Court concerns the demarcation of the bottom line in a particular case, more particularly the question whether a particular limitation is proportionate to the legitimate aim invoked.

While in some respects the ideas underlying the margin of appreciation seem sound and acceptable, in the end leaving states a margin of appreciation sits uneasily with adopting a serious level of scrutiny by way of baseline, as argued above. Indeed, the bottom line is case specific, and depends each time on all relevant circumstances. National authorities can be said to be better placed to make this case-specific assessment as they are 'closer' to their societies. In this respect, the margin of appreciation is said to reflect that international courts are subsidiary to the national authorities, who bear the primary responsibility to respect fundamental rights (in their jurisdiction).[31] Nevertheless, the fact that states have the primary responsibility to respect human rights does not guarantee that they also do so. Indeed, the assumption is challenged on a daily basis by accounts of human rights' violations in the contracting states. Hence, it is essential that the system of international supervision actually assesses whether the national authorities have respected 'the bottom line'. This would confirm the appropriateness of a rather high level of scrutiny by way of baseline. However, the margin of appreciation is inversely related to the level of scrutiny (review) adopted by the Court. Hence, the wider the margin left to states, the lower the level of scrutiny adopted by the Court. Put differently, the more generous the Court is in the margin it leaves states, the less likely that the level of scrutiny it adopts will attain the baseline level advocated here. Furthermore, when states ratify the Convention, they accept that the European Court has the competence to review their actions and inactions for compliance with the Convention, and has the final word in this respect.[32] Granting states a margin of appreciation concerning the 'bottom line' appears to downgrade the international supervision system set up by the Convention.

Returning to the argumentation about 'proper balancing', this baseline level of scrutiny is also intrinsically related to – to some extent implicit in – 'proper balancing'. 'Proper balancing' arguably implies meticulous balancing: all relevant interests and variables should be suitably identified and appropriately weighed.[33] When setting out to identify all relevant interests and variables for the proper analysis of minorities' fundamental rights,[34] the two overarching concerns of minority protection, namely (substantive) equality and the right to (a separate) identity, are a logical starting point.[35] The right to equal treatment[36] concerns both a right to substantive or real equality and an effective protection against invidious discrimination, which shields against disadvantageous treatment for which there is no reasonable and objective justification. An effective protection against invidious discrimination is an essential precondition for a proper treatment of persons belonging to minorities. Substantive equality builds on this, and goes further in that it may require differential treatment so as

27. Kumm, 2009, at 3; T.A. Aleinikoff, 'Constitutional Law in the Age of Balancing', *Yale Law Journal*, at 943 (1987); Christoffersen, 2009, at 107-8; J.H. Gerards, *Belangenafweging bij rechterlijke toetsing aan fundamentele rechten*, Kluwer (2006), at 7-26.
28. Henrard, 2012a, at 372, 388 ff.
29. J. Rivers, 'Proportionality and Variable Intensity Review', *Cambridge Law Journal*, at 191-201 (2006).
30. *See also* state obligations in relation to the implementation of EU directives.
31. *Inter alia* P.G. Carozzo, 'Subsidiarity as a Structural Principle of International Human Rights Law', *AJIL*, at 69 (2003); Letsas, 2007, at 83; P. Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?', *Human Rights Law Journal*, at 3 (1998).
32. Articles 19, 32, and 46 (in relation to Article 1) ECHR.
33. Kumm, 2009, at 3-4; Henrard, 2012a, at 370-3.
34. *See inter alia* R. Alexy, *A Theory of Constitutional Rights*, OUP (2002), at 178, 184, 192. This problem analysis focuses on the jurisprudence of the ECtHR. However, minorities are entitled not only to general fundamental rights (as in ECHR) but also to minority specific rights (as in the Framework Convention for the Protection of National Minorities – FCNM): K. Henrard, 'The Added Value of the Framework Convention for the Protection of National Minorities: The Two Pillars of an Adequate System of Minority Protection Revisited', in Verstichel et al. (eds.), *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?*, Intersentia (2008), at 91-3.
35. Henrard, 2008, at 92; Medda-Windischer, 2008, at 96-7.
36. For an extensive analysis *see* Henrard, 2007.




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to do justice to the specificities of the case. In so far as this differential treatment aims to take into account (accommodate) the specific identity characteristics of minorities, substantive equality is actually interlinked with the right to identity. The latter implies a prohibition of forced assimilation.[37] Fundamental rights that contribute to the realisation of the right to identity include rights that protect the minorities' own way of life, the expression of one's separate identity, and its maintenance (through education). Of course, everything depends on the interpretation of these rights and the balancing of the respective interests in case of limitations to these rights.[38]

### 2.1 A Selection of ECtHR Judgments Pertaining to Minorities – Paradigmatic Examples of Flawed Balancing

The following examples of cases on systemic discrimination of ethnic minorities and on claims for accommodation by religious minorities explain and clarify how the Court can be and has been seen to 'reduce' cases concerning minorities.[39] Throughout the analysis, the flaws in the Court's jurisprudence will be related to the major causes hinted at above, namely lack of knowledge and concerns about the Court's political legitimacy, while clarifying the role of the margin of appreciation doctrine. The possible improvement of the Court's reasoning through the use of non-legal disciplines will be hinted at as well.

It is generally recognised that Roma suffer systemic discrimination. The Court, however, often does not give due weight to the decades of neglect and discrimination that this group had to endure, the groups' special needs in relation to its separate, own way of life, and at times even a case-specific background of racist incidents.[40] The related 'reduction' of the cases is visible in cases on police violence against Roma, and Roma evictions from caravans and townships because of the illegality of the accommodation.[41]

In cases of alleged discriminatory violence by police officers against Roma, the Court is strikingly reticent in the sharing of the burden of proof. In EU law (and general non-discrimination law), a special allocation of the burden of proof for discrimination cases[42] has been developed: because it is virtually impossible to prove discriminatory intent, the claimant only needs to prove facts that allow a presumption of discrimination to arise, making a prima facie case. The government then needs to prove that no discrimination took place. The ECtHR, however, has been most reticent in accepting a prima facie case which would shift the burden of proof to the government.[43] Arguably the Court does not take all relevant circumstances into account, thus reducing the case, when it discounts – in the allocation of the burden of proof – the broader context of decades of police abuse in particular countries/regions, even when this is combined with racial slur uttered by policemen. Findings of non-legal disciplines, particularly social sciences, could point to the relevance of the broader contextual information when deciding whether or not a presumption of discrimination is made out.

A second line of cases on Roma, which point towards the Court's 'reduction' of the cases regarding minorities, concerns evictions from caravans and townships because of the illegality of the residence.[44] Several cases concern Roma living in caravans on plots of land that are – according to general land planning rules – not allowed



37. Y.M. Donders, *Towards a Right to Cultural Identity?*, Intersentia (2002), at 3, 8, 41-2; Henrard and Dunbar, 2008, at 11-4; A. Xanthaki, 'Multiculturalism and International Law: Discussing Universal Standards', *Human Rights Quarterly*, at 24 (2010).
38. Donders, 2002, at 329-34; Henrard, 2008, especially at 101-4.
39. *See also* E. Brems (ed.), *Diversity and European Human Rights: Rewriting Judgments of the ECHR*, CUP (2013), chapters 7, 8, 9, 16, and 17. Similar mechanisms are at play in cases involving linguistic minorities: Henrard and Dunbar, 2008, throughout the chapters as one of the synergies studied, *see* p. 14.
40. O. de Schutter, 'Le droit au mode de vie tsigane devant la Cour européenne des droits de l'homme: droits culturels, droits des minorités, discrimination positive, note sous CEDH Buckley c. Royaume-Uni arrêt du 25 septembre 1996', *Revue Trimestrielle de droits de l'homme*, at 81 (1997); K. Henrard, 'The Council of Europe at the Rescue of a Paradigmatic Case of Failed Integration. About Roma, the Multidimensional Nature of Integration, and How Promising General Principles Can Meet Flawed Applications in Practice', *European Yearbook on Minority Issues*, at 271-316 (2010-2011) [*de facto* out in 2013. they are indeed running behind in terms of years] (throughout the article, conclusion p. 316).
41. *Inter alia* Henrard, 2013, at 303, 308, 310. A third line of cases concerns Roma's relegation to separate and sub-standard education (in several Eastern European states). Notwithstanding the striking overrepresentation of Roma children in schools/classes for children with mental disabilities, the Court for a long time ignored this disproportionate impact of at first sight neutral rules on a vulnerable minority group. The related disregard by the Court for questions of overall impact on effective and actual access to a right (education) constituted another form of 'reduction' of the related cases. In the meantime, the Court seems to have firmly incorporated indirect discrimination in its non-discrimination jurisprudence and, in a range of cases, goes rather far in acknowledging the systemic nature of the misdiagnosis of Roma children, and the danger of cultural bias in the tests used. Nevertheless, it can still be questioned whether the Court attaches proper weight to all interests in play when it classifies the problem as one of indirect discrimination and not of direct discrimination. Indeed, when public authorities hold in place a system of which is known that it disadvantages Roma pupils, would this not reflect an intent to maintain the system and thus disadvantage Roma? *See also* M. Davidovic and P.R. Rodriguez, 'Roma Maken School in Straatsburg', 34 *NJCM Bulletin*, at 155-72 (2009).
42. *Inter alia* M. Ambrus, *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection: Theory and Four Case Studies*, Eleven International Publishing (2011), at 27-30.
43. ECtHR (GC), *Nachova e.a.* v. *Bulgaria*, 6 July 2005. For references to other similar cases, *see* the ECtHR's Factsheet on Roma and Travellers (www.echr.coe.int). The recent case on a religious minority with a similar history of systemic discrimination, *Begheluri e.a.* v. *Georgia*, 7 October 2014, seems to denote a certain relaxation in establishing a prima facie case of discrimination.
44. The *Yordanova* case (ECtHR, 24 April 2012) concerns the expulsion of Roma from a township of self-made shacks and the destruction of these shacks against a background of racist incidents. Strikingly the Court glosses over the latter background and focuses on the legitimate aim of safeguarding safety and security in relation to housing, without however acknowledging the possibility of a mixed motive, namely also one of racial discriminations (based on deep-seated prejudice against Roma).

for habitation, while there are too few official caravan sites to cater for the Roma. The Court does acknowledge the interest of Roma to lead an own way of life. However, in all these cases, the Court easily allows general planning policy considerations of the state to outweigh the Roma's interest, granting states a broad margin of appreciation in the matter.[45] In other words, the Court does not seem to (want to) be aware of the severe ramifications for Roma of these hurdles in terms of accommodation, and the broader ramifications it has for their physical and psychological well-being and for their integration in society. In this case, the lack of knowledge is most likely compounded by concerns about the Court's legitimacy when it would curtail states' freedom to develop their own policy in light of local circumstances. Indeed, the European consensus about the need to improve the situation of Roma (visible in numerous documents of the EU, Council of Europe, and the Organisation for Security and Cooperation in Europe (OSCE) has not yet translated in a common policy in terms of caravans and caravan sites.

Similarly, in cases concerning religious minorities, the Court disregards structural advantages enjoyed by the majority, related to the extent to which the dominant religion's values and symbols are ingrained in society. Consequently, it glosses over the ensuing disadvantages of religious minorities.[46] A striking example of this type of 'reduction' is visible in the *Lautsi* case in which the Grand Chamber holds that a crucifix in a public school class room is merely a passive symbol: this reasoning arguably 'reduces' the interests of pupils not to be inappropriately exposed to the symbols of one religion to the exclusion of all others.[47] More generally, the Court has a steady line of jurisprudence granting states a wide margin of appreciation in relation to the way in which they organise 'church-state relations'.[48] The grant of a wide margin to states in the broad range of religious matters covered by 'church-state relations', reflects the Court's weariness to impinge on an area that is since the middle ages considered to be a core aspect of state sovereignty.[49]

The preceding overview of case law and related analysis reveals that 'discrimination' themes tend to play an overarching role in cases on minorities. As was highlighted above, discrimination complaints by minorities are often complex, due to the systemic and structural nature of the discrimination concerned. The invidious discrimination is always related to their separate identity and ensuing prejudices. Protection against this type of discrimination would thus *indirectly* also protect their right to identity. In so far as the differential treatment aims at protecting or promoting minorities' separate identity, the goal of substantive equality also contributes *directly* to minorities' right to identity.[50]

Unfortunately, precisely in cases on ethnic, religious, and linguistic minorities, the ECtHR seems to avoid non-discrimination analysis as much as possible,[51] particularly when it ultimately concerns requests for suitably adapted measures and policies.[52] It may be that complaints of minorities often pertain to complex situations, but this complexity actually requires a well-considered development of the non-discrimination analysis, rather than avoidance. The proper identification and weighing of all relevant interests and variables in the rights analysis, where necessary having regard to social sciences and political philosophy, is equally essential here. Furthermore, avoiding non-discrimination analysis stifles the consistent and coherent development of non-discrimination law.

Similarly, in relation to minorities' right to identity, the Court has not moved beyond the general recognition that states have a duty to facilitate the minority way of life, and take minorities' separate identity into account when devising and implementing laws.[53] The Court has indeed been reluctant to identify concrete state obligations in this respect, presumably also because it is uncertain on how to identify and quantify all the relevant interests involved.[54] Similar concerns play in rela-



45. *Inter alia* ECtHr [GC] 18 Januari 2001, 27238/95 (*Chapman* v. *The United Kingdom*); ECtHR, *Winterstein e.a* v. *France*, 17 oktober 2013.
46. J. Temperman, 'State Neutrality in Public School of Education: An Analysis of the Interplay Between the Neutrality Principle, the Right to Adequate Education, Children's Right to Freedom of Religion or Belief, Parental Liberties, and the Position of Teachers', *Human Rights Quarterly*, at 885-6, 893-4 (2010); L. Zucca, 'Lautsi: A Commentary on a Decision by the ECtHR Grand Chamber', *International Journal of Constitutional Law*, at 218-29 (2013).
47. *See also* J. Temperman (ed.), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public Classroom*, Martinus Nijhoff (2012), particularly the chapters in part V.
48. For a more detailed analysis which demonstrates that in certain religious matters the Court de facto is narrowing the margin of appreciation it leaves states: *see* K. Henrard, 'How the European Court of Human Rights' Concern Regarding European Consensus Tempers the Effective Protection of Freedom of Religion', *Oxford Journal on Law and Religion*, at 23 (2015).
49. In the middle ages this understanding was captured in the latin adagium 'cujus regio, ejus religio'. *See also* K. Henrard, *The Ambiguous Relationship between Religious Minorities and Fundamental (Minority) Rights*, The Hague, Eleven (2011), at 20-4. The *Lautsi* case clearly demonstrated the strong concern about the Court's political legitimacy that underlies the Court's grant of a wide margin of appreciation to states regarding the way in which they organise 'church-state relations'. The Grand Chamber reversed the finding of a violation by the Chamber following a public outcry and interventions by thirty three parties in the Grand Chamber proceedings.
50. This needs to be related to the two overarching concerns of minority protection, being the right to equal treatment and the right to identity: *see* above.
51. L. Claridge, 'Protocol 12 and *Sejdić and Finci* v. *Bosnia and Herzegovina*: A Missed Opportunity?', *European Human Rights Law Review*, at 82-6 (2011); J. Maher, 'Eweida and Others, a New Era for Article 9?', *International and Comparative Law Quarterly*, at 216 (2014).
52. Henrard and Dunbar, 2008, at 351-52; Ringelheim, 2013, at 427.
53. ECtHR, *Chapman*, para. 96. *See also* Henrard, 2012a, at 379-80; Ringelheim, 2013, at 431-3.
54. de Schutter, 1997, at 82-3. This uncertainty is at times reflected in contradictory judgements and reasoning in particular cases between Chamber and Grand Chamber as in the *Lautsi* v. *Italy* judgement, discussed below.


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tion to the recognition of cultural, religious, and linguistic dimensions to effective access to education, and public (health care) services.[55]

These examples show the ECtHR discounting the prolonged and group nature of discrimination against minorities, not properly acknowledging the full range of relevant interests on the side of minorities, and the myriad and often accumulated layers of disadvantage that they are confronted with. This lack of proper identification and weighing of the relevant interests and variables compromises the effective protection of minorities' fundamental rights.[56] Furthermore, the related superficial reasoning by the Court implies that no guidance is given to the contracting states for their policy development.[57] In the preceding analysis, the existing flaws in the ECtHR's analysis of minorities' fundamental rights have been argued to stem from a combination of *two major causes*: lack of knowledge on the one hand and concerns about the Court's own political legitimacy on the other. To some extent, the flaws in the Court's reasoning can be explained by a lack of knowledge about all the relevant parameters that influence the respective weights of minorities' interests. To some extent, the Court might prefer (choose) not to get too deep into these often controversial matters. This 'preference' ties in with more overarching concerns that the Court might jeopardise its political legitimacy when it would pronounce itself on cases that are intertwined with contracting states' perceptions of national identity and/or of conceptions about state sovereignty in relation to the place of religion in society.[58]



The preceding analysis of the ECtHR case law has also hinted at the way in which the Court seems to navigate its lack of knowledge and concerns about its political legitimacy through the application of *the margin of appreciation doctrine*; more particularly, by granting states in several cases pertaining to minorities a *broad* margin of appreciation.[59] The Court has indeed clarified that the breadth of the margin of appreciation is not always equally broad, while identifying several relevant factors.[60] Two of these factors merit further discussion as they tend to lead to unsatisfactory results for persons belonging to minorities, due to the particularly wide margin of appreciation granted to states. Firstly, the Court often uses the factor of the European consensus, referring to a consensus among European states.[61] A high level of European consensus entails a narrow margin of appreciation for states, while a lack of consensus widens the margin considerably.[62] Whereas the former seems perfectly justifiable, the latter is not at all obvious. The absence of European consensus could also be considered to invite guidance by the Court, instead of leaving the matter (almost) entirely to the contracting states themselves.[63] Since policies concerning minorities tend to concern complex, and often controversial matters, it will come as no surprise that little consensus can be detected. Consequently, states are invariably granted a particularly wide margin of appreciation.[64] Secondly, the Court tends to leave states also a very broad margin of appreciation concerning general policy choices. Again, minorities are often strongly affected by general policy choices, such as planning regulations (housing) and curriculum content (education). Leaving states a broad margin of appreciation in these matters tends to mean that the Court formulates little or no evaluation, and does not even seem to try to identify all relevant interests, let alone weigh them. In other words, the Court more or less 'hides behind' the broad margin it leaves states.

In the end, Court's use of the margin of appreciation doctrine enables it to avoid taking a stance on many complex and mostly controversial minority questions. Without advocating that the judiciary should disrespect the separation of powers and take the place of the executive/legislator, it remains the task of the ECtHR to supervise that states respect their human rights obligations under the ECHR in the development of their policies and practices. Whereas the lack of knowledge as such could in theory also induce the Court to adopt a more 'searching' level of scrutiny, the combination with the concern about political legitimacy seems to tilt the Court towards the 'safer', more prudent route of not evaluating at all, or at least less. Leaving states a broad margin of appreciation in cases concerning minorities means that the Court virtually abdicates its own supervisory role and leaves the matter largely to the states concerned.[65] This, in turn, tends to entail a protection of the status quo and the existing dominance of the

55. K. Henrard, 'Minorities, Identity, Socio-Economic Participation and Integration: About Interrelations and Synergies', in K. Henrard (ed.), *The Interrelation Between the Right to Identity of Minorities and Their Socio-Economic Participation*, Brill (2012c), at 56-8, 60-2.
56. A. Farahat, 'The Exclusiveness of Inclusion on the Boundaries of Human Rights in Protecting Transnational and Second Generation Migrants, *European Journal of Integration and Law*, at 254 (2009); Henrard, 2012a, at 372-3.
57. A similar lack of guidance is visible when the Court grants states a broad margin of appreciation and does not actually analyses the case, nor engage in a weighing of the respective interests: Henrard, 2012a, at 372-3; J. Kratochvil, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights', *Netherlands Quarterly of Human Rights*, at 330, 332 (2011).
58. Similar uncertainty exists for public authorities, this time in confrontation with national backlashes against minority-tailored rights and policies. Rubio-Marin, 2014, at 90-3; S. Vertovec and S. Wessendorf (eds.), *The Multiculturalism Backlash: European Discourses, Policies and Practices*, Routledge (2011), at 1-31.
59. Y. Arai-Takahashi, 'The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry', in A. Follesdal, B. Peters & G. Ulfstein (eds.), *Constituting Europe: The ECtHR in a National, European and Global Context*, CUP (2013), at 96-7; Brems, 2013, chapters 7, 8, 9, 16, and 17; Henrard, in Foblets, 2012, at 59-86.
60. However, these factors are not used in a consistent, let alone systematic way: Kratochvil, 2011, at 345-7; Mahoney, 1998, at 3.
61. D. Shelton, 'Subsidiarity and Human Rights Law?', *Human Rights Law Journal*, at 4-11 (2006).
62. *Inter alia* Kratochvil, 2011, at 329-30.
63. *Inter alia* Henrard, 2012a, at 374-5.
64. Henrard, 2012a, at 376-80; Ringelheim, 2013, at 440.
65. N. Bratza, 'Living Instrument or Dead Letter – The Future of the ECHR', *European Human Rights Law Review*, at 116-28 (2014); Henrard, 2012a, at 371.

majority.[66] Leaving this broad margin to states also implies that the Court does not provide guidance to the state parties on how to analyse cases on minorities' rights and balance the respective interests. In both respects, the effective protection of minorities' rights is compromised.[67]

## 3 Lack of Knowledge to Identify and Weigh All Relevant Interests and Variables Pertaining to Minorities and Their Rights: A Turn to Multi-Disciplinary Legal Research

The selection of cases discussed above confirmed that cases pertaining to minorities and their fundamental rights are often complex. One of the important causes for the flaws in the jurisprudence of the ECtHR on minorities, and more particularly the way in which the Court reduces these cases, concerns the impossibility to identify all relevant interests and variables with a purely legal lens. Since the effective protection of minorities' rights depends on proper balancing of all the relevant interests and variables, it merits exploring what non-legal disciplines can contribute in terms of additional insights about these interests and their relative weight.[68] This multi-disciplinary legal research would then ideally feed into judicial practice.[69]

This research has indeed not yet been fully conducted. However, the preliminary research in relation to the above cases has provided the first indications about what disciplines could function well as auxiliary disciplines for the analysis of minorities' fundamental rights, more particularly in light of the underlying complexities of cases on minorities' rights. Subsequently, some thoughts are put forward on the way in which the data/findings of the non-legal disciplines can be incorporated in the legal (fundamental rights) frame.

The preceding analysis of the ECtHR's case law criticised the Court's reduction of the cases, inter alia by not sufficiently taking into account the group dimension of disadvantage suffered by minorities and the layers of disadvantage resulting from systemic discrimination. Another line of criticism focused on the Court's glossing over the extent to which a particular religion has infused the social fabric of a state, thus disadvantaging adherents to other religions. Arguably, these various layers of disadvantage that minorities experience are important components of 'all relevant circumstances' the Court says it needs to take into account when evaluating cases. Indeed, these layers of disadvantage imply ever so many barriers to effective enjoyment of rights, whereas the effective enjoyment of rights is an overarching concern of the ECtHR.

Non-legal disciplines that are particularly apt to unveil relevant interests and layers of disadvantage that have been missing so far from the Court's analysis are political philosophy and (empirical) social studies. The justice perspective in political philosophy uncovers, for example, relevant (group-related) interests for the rights analysis.[70] In terms of relevant variables, the philosophical and sociological (social science) perspectives bring to the fore and highlight (inter alia) the group dimension of the disadvantage suffered,[71] the accumulation of various layers of disadvantage, and also the systemic nature of disadvantage and discrimination.[72] These additional interests and/or variables that determine the relative weight of an interest all refine one way or the other the quantification of disadvantage (damage) suffered.

Similarly, the attention for the interrelation between various integration dimensions in social sciences allows to identify and quantify additional layers of disadvantage (harm) suffered by the members of the minority concerned. Indeed, several integration dimensions have been distinguished in social sciences, which all relate and interrelate for full integration:[73] structural integration, social integration, cultural integration, and identificational integration. Structural integration is undoubtedly most relevant in terms of law and rights as it concerns rights, status, and (non-discriminatory) access to the labour market and core institutions in society. Nevertheless, sociological theories emphasise the interrelation with the other integration dimensions. Hence, hav-



66. Arai-Takahashi, 2013, at 96-7; S.E. Berry, 'A Tale of Two Instruments: Religious Minorities and the Council of Europe's Rights Regime', *Netherlands Quarterly of Human Rights*, at 34 (2012); K. Henrard, 'A Critical Appraisal of the Margin of Appreciation Left to States Pertaining to 'Church-State Relations' under the Jurisprudence of the ECtHR', in M.C. Foblets et al. (eds.), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace*, Ashgate (2012d), at 68-9.
67. M.R. Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights', *International and Comparative Law Quarterly*, at 638-50 (1999). *See also* D. Xenos, 'The Human Rights of the Vulnerable', *International Journal of Human Rights*, at 591-614 (2009).
68. *See* supra for broader usefulness of the findings of this project, namely to guide the supervisory practice of international courts generally and policy development of public authorities globally.
69. *See* infra in Sections 4 and 5.
70. *See inter alia* J.H. Carens, *Culture, Citizenship and Community: A Contextual Exploration of Justice as Evenhandedness*, OUP (2000); B. Parekh, *A New Politics of Identity: Political Principles for an Interdependent World*, Palgrave Macmillan (2008).
71. *Inter alia* W. Kymlicka, 'The Internationalization of Minority Rights', *International Journal of Constitutional Law*, at 4 (2008).
72. J. Apap, 'The Relationship Between Integration and Citizenship', in S. Carrera (ed.), *The Nexus between Immigration, Integration and Citizenship in the EU. CHALLENGE Collective Conference Paper*, April 2006: <http://www.ceps.be, 13>; A. Favell, *The Europeanisation of Immigration Politics*, European Integration Online Papers (1998); R. Koopmans, I. Michalowski & S. Waibel, 'Citizenship Rights for Immigrants: National Political Processes and Cross-National Convergence in Western Europe, 1980-2008', *American Journal of Sociology*, at 1202-1245 (2012).
73. *Inter alia* F. Heckmann et al., *Effectiveness of National Integration Strategies towards Second Generation Migrant Youth in a Comparative European Perspective*, EFFNATIS Final Report to the EU Commission, Bamberg 2001.


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ing regard to these other integration dimensions and the related disadvantages suffered there by persons belonging to minorities are important to identify layers of disadvantage that have been neglected in the human rights analysis so far. More particularly, discrimination in terms of structural integration has considerable negative repercussion for the other integration dimensions as well. When one is de facto excluded from access to quality education, as was visible in a range of Roma cases before the ECtHR, one is not only barred from higher education and thus the better jobs, but one also has less chances to interact with members of other social groups. Lack of social contacts hampers social integration and, in turn, inhibits mutual behavioural and attitudinal adaptations, while flawed structural, social, and cultural integration hinders the emergence of a sense of belonging and commitment (identificational integration). This more extensive and explicit consideration of layers of disadvantage, and their interaction and mutual reinforcement, arguably invites a reassessment of the weight of the respective interests concerned.

A more general reason why it is important to have regard to social science integration studies for a more comprehensive identification of relevant interests and variables for the analysis of minorities' fundamental rights is that striking parallels exist between the 'target' groups of integration and fundamental rights of (persons belonging to) minorities.[74] Integration (goals) evidently concern population groups that are different from the majority or the dominant groups in society.[75] Hence, integration concerns seem to be targeted at minorities in the broad sense of the word, encompassing traditional minorities and indigenous peoples as well as new or immigrant minorities.[76] Relatedly, the search for the optimal balance between unity and diversity is equally key in relation to integration as to minority policies.[77] Furthermore, a preliminary investigation reveals that at least some of the foundational values for integration and fundamental rights overlap,[78] namely equality and participation. Actually, the recent and much debated judgement of the ECtHR in *SAS* v. *France* (1 July 2014) shows the pressing need for the Court to incorporate the integration perspective in a more principled manner in its jurisprudence. Indeed, the abrupt way in which the Court introduced 'living together' and the underlying integration argument as decisive arguments in its rights analysis triggered several critical remarks. The introduction of the integration argument was not only not explained, it furthermore did not do justice to the complexities involved.[79]

When exploring the further question how multi-disciplinary research can feed in the analysis of minorities' fundamental rights, it should be highlighted that, as Theunis Roux nicely formulates in his article for this special issue: the incorporation of non-legal disciplines into doctrinal research necessarily occurs on laws' terms.[80] In other words, the standard for incorporation is an internal legal standard: the translation and incorporation of other disciplines is geared towards the coherent development and improvement of legal doctrine.[81] Multi-disciplinary legal research for the analysis of minorities' rights specifically aims to enrich and improve this analysis by identifying additional relevant interests for this analysis, as well as relevant parameters. This implies that the non-legal disciplines 'feed' into the human rights paradigm, and more particularly human rights doctrines concerning interpretation principles, legitimate limitations, the proportionality principle, balancing of interests, and also the margin of appreciation doctrine.[82] Put differently, these other disciplines would not be decisive, hence it does not matter so much that within these non-legal disciplines there are differences of opinion about the relevance of particular interests and/or variables. The different disciplines considered in this respect may highlight different interests and/or different variables, but these differences are not something that compromises the usefulness of multi-disciplinary legal research, rather to the contrary. Indeed, the findings of these non-legal disciplines are merely used to point to the possible relevance of additional interests, and to obtain insights about possibly relevant variables that otherwise would be overlooked. In the end, in so far as this multi-disciplinary legal research would feed into judicial practice, courts would still (have to) consider all



74. M. Pentikainen, 'Integration of Minorities into Society: How It Is Reflected in International Documents and in the Work of ECRI and the Advisory Committee of the Framework Convention', in M. Scheinin and R. Toivanen (eds.), *Rethinking Non-discrimination and Minority Rights*, Institute for Human Rights, Åbo Akademi University (2004), at 97-133.
75. K. Henrard, 'The Intractable Relationship Between the Concepts "Integration" and "Multiculturalism": About Conceptual Fluidity (Substantive) Context Specificness and Fundamental Rights Perspectives', in M. Podunavac (ed.), *The Challenges of Multiculturalism; the South-Eastern European Perspectives in the European Discourse*, Heinrich Böll Foundation (2013), at 107-24; Henrard, 2011, at 338.
76. *Inter alia* G. Alfredsson, 'Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law', in N. Ghanea and A. Xanthaki (eds.), *The Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry*, Martinus Nijhoff (2004), at 169; W. Kymlicka, 'Beyond the Indigenous/Minority Dichotomy', in St. Allen and A. Xanthaki (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Hart (2011), at 187-8; R. Penninx, D. Spencer & N. van Hear, *Migration and Integration in Europe: The State of Research*, Oxford (2008). *See also* K. Henrard, 'Tracing Visions on Integration and/of Minorities: An Analysis of the Supervisory Practice of the FCNM', *International Community Law Review*, at 338-9 (2011) (special issue).
77. *Inter alia* T. Hadden, 'Integration and Separation: Legal and Political Choices in Implementing Minority Rights', in N. Ghanea and A. Xanthaki (eds.), *Minorities, Peoples and Self-Determination*, Martinus Nijhoff (2005), at 174-7.
78. Ch.R. Beitz, *The Idea of Human Rights*, OUP (2011); G. Engbersen, 'Spheres of Integration: Towards a Differentiated and Reflexive Ethnic Minority Policy', in R. Sackmann, B. Peters & Th. Faist (eds.), *Identity and Integration: Migrants in Western Europe*, Ashgate (2003), at 59-76. *See also* Hadden, 2005, at 180.
79. E. Brems, '*S.A.S.* v. *France* as a Problematic Precedent', blog 9 July 2014, <http://strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/>.
80. Th. Roux, 'The Incorporation Problem in Interdisciplinary Legal Research: Some Conceptual Issues and a Practical Illustration', [7].
81. *See also* B. Van Klink and S. Taekema, 'Limits and Possibilities of Interdisciplinary Research into Law: A Comparison of Pragmatist and Positivist Views', [Repub.eur.nl], at 12.
82. For the possible 'impact' over time on the use of the margin of appreciation doctrine, *see also* under 4 below.

relevant circumstances of the case before them, and decide what factors and variables to consider in the concrete case before them. In other words, the legal framework remains key in framing the analysis, the non-legal disciplines are 'merely' considered to expand the range of interests and variables that can be relied upon, ultimately by courts, for the analysis of minorities' rights.

Overall, the preceding analysis has arguably demonstrated that further (multi-disciplinary legal) research is warranted about the way in which non-legal findings and theories about layers of disadvantage encountered by minorities, also in terms of the various integration dimensions, can be translated into (additional) interests and variables relevant for the analysis of minorities' rights.[83]

## 4 Influencing the Practice of the ECtHR and International Courts More Generally: From Knowledge to 'Courage'?

This more developed multi-disciplinary legal research *could* subsequently feed into judicial practice, in the sense that (international) courts generally could consult the resulting more complete overviews of potentially relevant interests and variables. One cannot expect courts, judges, to do themselves all the multi-disciplinary legal research, but they might be willing to draw on the findings of such research conducted by academia.[84] The courts would then decide case by case which interests and variables to include in their legal assessment and reasoning, in light of the special circumstances of each case. In other words, courts' *in concreto* weighing would remain, but they could draw on a 'richer', more complete, toolkit. To the extent that courts would have doubts about the way in which the findings of non-legal disciplines would need to be weighed, they could draw on the assistance of experts (in these disciplines) as is already the practice in a number of fields.

As was acknowledged before, courts' interpretation of the law and analysis essentially involves making a choice from a variety of plausible alternatives. Arguably, the ECtHR and other international courts would only use the multi-disciplinary legal research findings, in so far as they would be willing to review (the case and the respective interests) seriously and adopt a rather searching level of scrutiny. Courts may be concerned about their political legitimacy when adopting these higher levels of scrutiny, leaving less discretion to the contracting states. Nevertheless, it is opined that when courts can rely on multi-disciplinary legal research which allows them to chart the quantum of the disadvantage suffered by vulnerable minority groups in a more comprehensive manner, these courts may actually be swayed to do so. International human rights courts' readiness to do so is not unlikely especially in view of the potential contribution to the effective protection of minorities' fundamental rights, which remains their overarching concern after all.

This is exactly what is argued to lay behind the US Supreme Court reliance on social sciences in its seminal judgement in *Brown* v. *Board of Education* that underscored that segregation itself meant inequality.[85]

Furthermore, it may very well be that expanding international courts' explicit reasoning, and attempting to tackle lack of knowledge outright by relying on multi-disciplinary legal research, would actually enhance their legitimacy and also states willingness to comply. Indeed, while there is always a question of choice and thus subjectivity in the way in which a court would use the multi-disciplinary legal research findings, making this choice explicit and arguing it in light of 'all relevant circumstances of the case' arguably objectivises the court's reasoning. Ultimately, when courts makes this choice, and the related reasoning, explicit, a body of jurisprudence can emerge, that bring still more 'objectivity' to the balancing.[86] In this respect, the ECtHR might feel gradually more confident and 'courageous' to have less recourse to a broad margin of appreciation for states, while also other international courts adjudicating on fundamental rights might find the 'courage' to reduce the amount of discretion they leave states.

## 5 Conclusions

This article sets out to contribute to this special issue devoted to multi-disciplinary legal research by discussing first the limits of purely doctrinal legal research in relation to a particular topic, and second the relevant considerations in devising research that (inter alia) draws on non-legal, auxiliary disciplines to 'fill in' and

83. J. Friedrichs and W. Jagodzinski, 'Theorien Socialer Integration', *Kolner Zeitschrift fur Sociologie und Socialpsychologie* (1999); Henrard, 2013, at 107-24.

84. *See also* infra on the US Supreme Court judgement in *Brown* v. *Board of Education* (347 U.S. 483 (1954) which has been hailed for its for fuelling an increasing multidisciplinary law: *Inter alia* M. Heise, '*Brown* v. *Board of Education*, Footnote 11, and Multidisciplinarity', 90 *Cornell Law Review*, at 307-8 (2005). At the same time the judgement was criticised for relying on one particular study whose methodology gave rise to substantial technical criticism (*Ibid.*, at 294-5).

85. J.M. Wisdom, 'Random Remarks on the Role of Social Sciences in the Judicial Decision-Making Process in School Desegregation Cases', 39 *Law and Contemporary Problems*, at 138, 142 (1975), underscoring that 'the social science evidence was the kind of support a court likes to find in a record to lend factual and scientific aura to a result ... dictated by the moral necessity of changing social attitudes'.

86. This phenomenon of 'objectivisation' is already visible in highly sensitive and controversial instances of conflicting rights of, for example, the right to respect for privacy and the freedom of expression: *see inter alia* K. Henrard, 'Botsende grondrechten en het EHRM: een pleidooi voor meer zorgvuldige argumentatie en minder "margin of appreciation" voor staten', in E. Brems, R. de Lange & K. Henrard (eds.), *Botsing van Grondrechten*, BJU 2008, 29-61.





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guide the legal framework. The topic concerned is the (analysis of the) fundamental rights of minorities.

The introduction highlights the generally acknowledged truth that law, also human rights law, is open to multiple plausible interpretations. Courts, when adjudicating, need to make a choice what interpretation to adopt. This choice depends on the interpretation principles relied upon and also on the position taken in relation to the role of courts, and the degree of activism that would be appropriate. Relying on foundational principles of fundamental rights, the case is made for human rights courts to adopt a rather activist approach, adopting a baseline level of scrutiny which is rather high. Furthermore, while acknowledging the inherently subjective nature of the interpretation of fundamental rights, it is opined that when courts would develop extensive explicit reasoning, this would facilitate the emergence of lines of jurisprudence, and thus predictability and a certain objectivity.

The article starts maybe somewhat a-characteristically with a critical assessment of the jurisprudence of the European Court of Human Rights regarding the analysis of minorities' rights, more particularly the failure to properly identify and weigh all relevant interests and variables and the related reduction of minorities' cases its analysis operates. This 'prelude' is necessary because it provides crucial insights in the causes of these alleged flaws in the Court's jurisprudence: lack of knowledge (about the relevant interests and variables for the analysis of minorities' rights) and concerns with the Court's political legitimacy. At the same time the critical analysis of the Court's jurisprudence allows already for the identification of possible contributions from findings from sociology (related social sciences) and political philosophy. The article goes on to argue for the need for further multi-disciplinary legal research, drawing on social sciences and political philosophy as auxiliary disciplines that could ultimately assist courts in tackling the lack of knowledge when analysing minorities' rights. Subsequently, these researches (findings) could feed into judicial practice, possibly with the help of experts.



The ECtHR and other international human rights courts are not unlikely to draw on this multi-disciplinary legal research when it would enable them to really take into account 'all relevant circumstances' of the case before them and thus identify and properly weigh all relevant interests in cases on minorities' rights. In addition to the significant contribution to the effective protection of fundamental rights, the courts' ensuing explicit and transparent reasoning will over time crystallise into lines of jurisprudence, thus bringing further objectivity and predictability to judicial decision making.

Furthermore, the ensuing more explicit reasoning by international courts will offer better guidance to public authorities, ending their often disturbing uncertainty, thus making them more 'at ease' when ruling on minorities' rights, knowing that they can justify the choices made in light of a broad panoply of relevant interests and variables. This in turn might further contribute to a positive cooperation between contracting states and international courts, and thus reduce the latter's (perceived) legitimacy problems.

# Insult in Context: Incorporating Speech Act Theory in Doctrinal Legal Analysis of Interpretative Discussions

**Harm Kloosterhuis***

**Abstract**

In this article, I want to show that some doctrinal problems of legal interpretation and argumentation can be analysed in a more precise way than a standard doctrinal analysis, when we use insights from speech act theory and argumentation theory. Taking a discussion about the accusation of the criminal act insulting as a starting point, I will try to show that the doctrinal perspective on meaning of statutory norms and of the qualification of utterances as legal acts lacks the instruments to explain why discussions about these meanings and utterances are so complicated. In short, a doctrinal analysis focuses on word or sentence meaning, distinguishing between the literal or semantic meaning on the one hand and the meaning in context on the other. However, the analysis of this 'meaning in context' is often rather vague, especially in cases of indirect and strategic communication. It is the analysis of this meaning in context that can profit from insights from speech act theory. I do not want to 'solve' the problems of the interpretation of the norms concerning insulting. I only use this case in point as an exemplary example to discuss important (often implicit doctrinal) starting points about the related concepts meaning and intention (or commitment) in interpretative discussions.

**Keywords:** interdisciplinary doctrinal research, interpretation, argumentation, speech act theory

## 1 Introduction

This special issue of *Erasmus Law Review* seeks to address the question as to how we can translate and incorporate various non-legal disciplines and their findings into the language of legal doctrine. It is apparently assumed that other disciplines may provide useful insights to legal doctrinal research. In this contribution, I want to help validate this assumption by showing that some problems of legal interpretation and interpretative discussions can be analysed in a more precise way than in a standard doctrinal analysis when we draw on insights from *speech act theory*. Taking a discussion about the accusation of the criminal act insulting as a starting point, I will try to show that the doctrinal perspective on *meaning* of statutory norms and of the qualification of utterances as legal acts lacks the instruments to explain why discussions about these meanings and utterances are so complicated. In short, a doctrinal analysis focuses on word or sentence meaning, distinguishing between the literal or semantic meaning on the one hand and the *meaning in context* on the other. However, the analysis of this 'meaning in context' is often rather vague, especially in cases of *indirect* and *strategic communication*. It is the analysis of this meaning in context that can profit from insights from speech act theory. I do not want to 'solve' the problems of the interpretation of the norms concerning insulting. I only use this case in point as an exemplary example to discuss important (often implicit doctrinal) starting points about the related concepts *meaning* and *intention* (or commitment) in interpretative discussions.[1]

Before I will give an overview of the different parts of this article, I want to say something about the theoretical background of this case study and about the close bond between legal theory and speech act theory. This relationship goes back to the first publications of H.L.A. Hart. Already in his inaugural lecture *Definition and Theory in Jurisprudence* (1953), Hart defends a contextual analysis of the meaning of legal concepts: 'We must take not the *word* "right" but the sentence "You have a right" not the *word* "State" but the sentence "He is a member or an official of the State."'[2] In the footsteps of Hart's analysis, Neil MacCormick and Dick Ruiter used insights from speech act theory to build a theory of institutional legal positivism.[3] This theory is not only

* Erasmus School of Law, Erasmus University Rotterdam.

1. This analysis is an elaboration of my argument defended in H.T.M. Kloosterhuis, 'The Logic of Indirect Insulting in Legal Discussions. A Speech Act Perspective', in *Explorations in Language and Law. An International, Peer-Reviewed Publication Series* (2012) 69, at 82 (Aprilia: NOVALOGOS/Ortica editrice soc. coop); and H.T.M. Kloosterhuis, 'Institutional Constraints of Topical Strategic Maneuvering in Legal Argumentation. The Case of "Insulting"', in T. Bustamante and C. Dahlman (eds.), *Argument Types and Fallacies in Legal Argumentation* (2015) 67, at 75 (New York, NY: Springer).
2. H.L.A Hart, *Definition and Theory in Jurisprudence* (1953) 4, at 5, 16-7 (Oxford: Oxford University Press).
3. D.N. MacCormick and O. Weinberger, *An Institutional Theory of Law. New Approaches to Legal Positivism* (1986) (Dordrecht: Reidel); D.N. MacCormick, *Institutions of Law. An Essay in Legal Theory* (2007) (Oxford: Oxford University Press); D.W.P. Ruiter, *Institutional Legal Facts. Legal Powers and Their Effects* (1993) (Dordrecht: Kluwer Academic Publishers); and D.W.P. Ruiter, *Legal Institutions* (2001) (Dordrecht: Kluwer Academic Publishers).



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relevant for the 'big' questions of legal philosophy. It can also be seen as a contribution to the answer of John Searle's basic question concerning the construction of social reality and of institutional facts.[4] More recently Andrei Marmor uses speech act theory to explain problems of legal interpretation, focusing on the pragmatic aspects of indirectness in legal language. In several publications, Marmor shows the fruitfulness of this approach when analysing implicatures, presuppositions, and commitments in legal language and strategic language use.[5] Marmor not only analyses problems of legal interpretation by using speech act theory, he also uses this analysis to test and adapt the standard model of this theory. Marmor rightly states that one of the crucial starting points of this model is the *presumption of cooperation* in communication, and he shows that the legal context offers important examples of *strategic* communication.[6]

My analysis of interpretative discussions about insulting is also both an application and a test of speech act theory. The reasoning in this contribution proceeds as follows. In the first section I will describe the doctrinal analysis of the interpretative discussions about the accusation of insulting, I will show its problems and I will sketch the necessary conditions to solve these problems. As a first step in solving the problems, I will redefine 'insulting' in terms of a speech act and I will argue that there is no *direct* relation between one of the standard speech acts and the effect of being insulted. As a second step, I will show that this relation is an indirect one and that there is an apparent difference between sentence or word meaning on the one hand and speaker or utterance meaning on the other hand. Then – as a final step – I will demonstrate how this indirect relation creates the possibility of strategic communication where someone brings about the effect of an insult and denies the commitment to this effect. With these three steps I want to show how the doctrinal concept *meaning in context* can be clarified and specified with the help of insights of speech act theory. In the concluding remarks I will reflect on the results of this analysis in light of the aim of this issue: incorporating non-legal disciplines in the doctrinal legal research.



4. 'How can there be an objective world of money, property, marriage, governments, elections, football games, cocktail parties, and law courts in a world that consists entirely of physical particles in fields of force, and in which some of these particles are organised into systems that are conscious biological beasts, such as ourselves?' J.R. Searle and D. Vanderveken, *Foundations of Illocutionary Logic* (1985), xi (Cambridge: Cambridge University Press.
5. A. Marmor, *The Language of Law* (2014) (Oxford: Oxford University Press); A. Marmor, 'Can the Law Imply More Than It Says? – On Some Pragmatic Aspects of Strategic Speech', *USC Legal Studies Research Paper No. 09-43* (2009), available at: <http://ssrn.com/abstract=1517883>.
6. *See also* J.J. Lee and S. Pinker, 'Rationales for Indirect Speech: The Theory of the Strategic Speaker', 117 *Psychological Review* (2010) 785, at 807; S. Pinker, M.A. Nowak & J.J. Lee, 'The Logic of Indirect Speech', 10(3) *Proceedings of the National Academy of Sciences USA* 833, at 838 (2008); and S. Pinker, 'The Evolutionary Social Psychology of Off-Record Indirect Speech Acts', 4(4) *Intercultural Pragmatics* 437, at 4614 (2007).

## 2 The Problem: The Doctrinal Analysis of Discussions about the Accusation of Insulting

In 10 March 2009, the Supreme Court of the Netherlands ruled in an important case about the relation between freedom of speech and the prohibition of insulting. The case was about Article 137c of the Criminal Code, which makes insulting statements about a group of people a crime. The Supreme Court acquitted a man who stuck a poster in his window with the text 'Stop the cancer called Islam' of insulting Muslims. According to the district court and the court of appeal, this statement was insulting for a group of people due to their religion, considering the strong connection between Islam and its believers. But the Supreme Court argued that criticising a religion is not automatically also insulting its followers. According to the Supreme Court the appeal court gave too wide an interpretation of the expression 'a group of people according to their religion' in Article 137c. People expressing themselves offensively about a religion are not automatically guilty of insulting its followers, even if the followers feel insulted. The Supreme Court ruled that 'the statement must unmistakably refer to a certain group of people who differentiate themselves from others by their religion'. While people may not insult believers, they can insult their religion. The sole circumstance of offensive statements about a religion also insulting its followers is not sufficient to speak of insulting a group of people due to their religion.

This decision of the Supreme Court incited reactions of criticism and confusion. In critical reactions, people wondered why for instance denying the Holocaust is insulting for Jews and comparing the Islam with cancer is not insulting for Muslims. And there was confusion about the distinction made by the Supreme Court: how is it possible to make a distinction between insulting a religion (allowed) and insulting members of a religious community (forbidden)? In his legal comment on the decision, commentator P.A.M. Mevis criticised this aspect of the ruling. He argued that the legal qualification 'insulting a group of people because of their religion' now depends on the wording chosen. One and the same insulting effect can be reached with criminal and non-criminal formulations. Mevis concludes with the critical question whether this is a desirable result.

This decision of the Supreme Court is only one example showing the difficulties of interpreting the relevant Dutch legal norm about insulting. Case law about insults shows that clear rules about this interpretation are lacking and that the argumentation is often backed with rather vague references to 'the meaning in context' and 'the specific circumstances of the case'. This vagueness results in uncertainty and – sometimes – in absurd consequences in case law on this topic. Let me give one

more example. In 2012, the Supreme Court ruled that calling a police officer an 'ants fucker' is not an insult.[7] But in 2013, the Court of Appeal distinguished from this decision by ruling that calling a police officer 'an ants fucker and an acorn' – probably because of the specific circumstances of the case – must be qualified as an insult.

Now, what could be the explanation for these problems regarding the interpretation of statutory norms about insulting? Let us first look at the relevant statutory rule in the example 'Stop the cancer called Islam' in Article 137c of the Dutch Penal Code:

> Article 137c
> He who publicly, verbally or in writing or image, deliberately expresses himself in a way insulting of a group of people because of their race, their religion or belief, or their hetero- or homosexual nature or their physical, mental, or intellectual disabilities, will be punished with a prison sentence of at the most one year or a fine of third category.

This rule contains the following conditions for the application: (i) there is an act of insulting of (ii) a group of people, (iii) there is an intention to insult, (iv) the insult is in public, (v) verbally or in writing or image, and (vi) because of race, religion or belief, or hetero- or homosexual nature or physical, mental, or intellectual disabilities. These six conditions are developed in case law. These case law-rules refine and specify the six necessary conditions, but the case law about 137c also resulted in a new condition for the application. According to the rules from case law about the application of Article 137c, three questions should be answered. The first question is whether or not an utterance is an insult and whether or not the other conditions of 137c are fulfilled. If the utterance is an insult and the other conditions are fulfilled, the next question is whether or not the utterance is part of a public debate. And if the insult is an utterance in a public debate the third question is whether or not the utterance is unnecessary offensive.

Let us now focus on the first question: is the utterance insulting? The doctrinal answer to this question proceeds as follows. In order to qualify an utterance as an insult the words themselves and semantic rules may often suffice, but often one may require the *context* to understand the actual meaning of the words.[8] In the case about the Dutch politician Geert Wilders, the Public Prosecution explained how these contextual criteria work in practice:

> The words 'in itself' mean 'according to his phraseology and in conjunction'. In order to know what words mean, words themselves may often suffice, but one may require the rest of the text to understand the actual meaning of the words. It could be clear, for instance, that the tone of the entire text is ironic. Those few words which in isolation may be construed as insulting, would then in their totality, in conjunction, be ironic and hence have an entirely different meaning. 'Assessment in conjunction' must be understood as the interpretation of words *within* the bigger picture of the statement; the text, the film or anything else it may be part of.

What one can expect with these *contextual criteria* is that there is room for reasonable disagreement about the question whether a certain utterance counts as an insult. In short, the contextual criteria – often in combination with the 'criterion' the 'specific facts of the case' – provide little clarity about the correct application of Article 137c. In my opinion the explanation for this problem is the doctrinal concept of *meaning*. The problem with the doctrinal approach is that questions about meaning are formulated as problems of *sentence* or *word meaning* (semantics) and that the contextual criteria to provide little insight in the *speaker meaning* or *utterance meaning* (pragmatics). An adequate explanation for the problems regarding the analysis of interpretative discussions about insulting should specify this speaker or utterance meaning. In the next section I will do that by analysing the meaning of 'insulting' as a speech act. This analysis results in a theoretical description of insulting incorporation not only sentence meaning but also *intention* (or commitment) a part of the speaker meaning.



## 3 The Analysis of Insulting as a Speech Act

The distinction between *sentence meaning* or *word meaning* on the one hand and *speaker meaning* or *utterance meaning* on the other is one of the central starting points of speech act theory.[9] Sentence or word meaning is determined by semantics, syntaxis, and conventions of language, but speaker or utterance meaning is also related to the context and the intentions of the speaker. Central in the analysis of speaker meaning is the concept *speech act*: a form of acting where four acts coincide:[10]

1. an *utterance act*: the bringing forth certain speech sounds, words and sentences,
2. a *propositional act*: referring to something or someone and predicating some properties of that thing or person,
3. an *illocutionary act*: investing the utterance with a communicative force of promise, statement of fact and so on,

7. HR 8 mei 2012, LJN BV9188.
8. Of course there are more precise legal definitions for these components but these often result in new interpretation problems. 'Insulting', for instance, is described as 'to defile one's honour' and 'honour' as 'recognition of moral dignity that every citizen has a right to expect'. These definitions are also vague and are, therefore, new sources for differences of opinion about the applicability of Art. 137c.
9. J.R. Searle, 'What Is a Speech Act?', in J.R. Searle (ed.), *The Philosophy of Language* (1971) (London: Oxford); and H.P. Grice, 'Logic and Conversation', in P. Cole and J.L. Morgan (eds.), *Syntax and Semantics 3: Speech Acts* (1975) 43, at 58 (New York, NY: Academic Press).
10. Searle, above at n. 9.


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4. a *perlocutionary act*: bringing about certain interactional effects, such as shock or boredom.

Let us now illustrate these distinctions with the example of calling a police-officer a homo. The sentence meaning is related to the propositional act: saying that a person is a homo, which could be a neutral statement. The speaker meaning is related to the illocutionary and the perlocutionary act: the communicative force of the utterance results in the interactional effect of being insulted.
The next step in the analysis of the speaker meaning of insulting is answering the question which illocutionary acts could be connected to the effect of being insulted. Searle claims that there are five and only five types of *illocutionary acts*.

- *Assertive* illocutionary acts that commit a speaker to the truth or acceptability of the expressed proposition, for example making a statement.
- *Directive* illocutionary acts that are to cause the hearer to take a particular action, for example requests, commands and advice.
- *Commissive* illocutionary acts that commit a speaker to some future action, for example promises and oaths.
- *Expressive* illocutionary acts that express the speaker's attitudes and emotions towards the proposition, for example congratulations, excuses, and thanks.
- *Declarative* illocutionary acts that change the reality in accord with the proposition of the declaration, for example baptisms, pronouncing someone guilty or pronouncing someone husband and wife.



The successful performance of an illocutionary act will always result in the effect that the hearer understands of the utterance produced by the speaker. But in addition to the illocutionary effect of understanding, utterances normally produce and are often intend to produce, further perlocutionary effects on the feelings, attitudes, and subsequent behaviour of the hearers. An assertive speech act as asserting or argumentation may result in the perlocutionary effect of convincing or persuasion and a commissive speech act as a promise may create expectations. Perlocutionary effects are defined as intended by the speaker or writer and based on rational ground by the addressee.[11] Within the framework of speech act theory we are now able to give a more precise definition of the effect 'being insulted':

> *being insulted is a perlocutionary effect that is intended by the speaker or writer and that is based on rational considerations on the part of the addressee.*

The next question now is how the perlocutionary effect of being insulted is related to the five types of illocutionary acts. I will argue that there is no direct associated perlocutionary effect with one of the five illocutionary acts. (i) The assertive point is to say how things are. (ii) The directive point is to try to get other people to do things. (iii) The commissive point is to commit the speaker to doing something. (iv) The declarative point is to change the world by saying so. (v) The expressive point is to express feelings and attitudes. None of these points is directly connected to the effect of being insulted. How then, in other words, is a language user capable of inferring an 'insult' from an assertion, a promise, a question, a compliment, or a declaration? In the following I will argue that this connection is indirect.
Let us now, in trying to connect the effect of being insulted to one or more illocutionary acts, look at some examples from Dutch case law. According to Dutch case law the following utterances count as insult:

1. Calling a police-officer a 'homo'.
2. Greeting a police-officer with 'Heil Hitler'.
3. Saying 'I am gonna fuck you' to a police-officer.
4. Having a tattoo or a bomber jack with the text '1312' or 'ACAB' (All Cops Are Bastards).
5. Referring to a passage in the bible where Pilatus washes his hands.
6. Saying or implicating that the Holocaust did not happen.

These examples illustrate that the direct perlocutionary effects of these acts are not 'being insulted' Calling a police officer a homo or comparing an employer with Pontius Pilatus are assertive illocutionary acts, in which a proposition is presented as representing a state of

11. In other to make clear what this perlocutionary effect involves the following distinctions can be made (F.H. Van Eemeren, *Strategic Maneuvering in Argumentative Discourse. Extending the Pragma-Dialectical Theory of Argumentation* (2010), at 37 (Amsterdam/Philadelphia, PA: John Benjamins Publishing Company). Van Eemeren distinguishes between effects of the speech act that are intended by the speaker or writer and consequences that are brought about accidentally. Van Eemeren reserves the term act, in contradistinction with 'mere behaviour', for conscious, purposive activities based on rational considerations for which the actor can be held accountable. As a result, bringing about completely unintended consequences cannot be regarded as acting, so in such cases there can be no question of the performance of perlocutionary acts. According to Van Eemeren a rough and ready criterion for distinguishing between the performance of perlocutionary acts and the bringing about of unintended consequences is whether the speaker can reasonably be asked to provide his/her reasons for causing the consequences in question. Second, Van Eemeren distinguishes between consequences of speech acts whose occurrence may be regarded to be based on rational considerations on the part of the addressee and consequences that are divorced from reasonable decision-making, like being startled when someone shouts 'boo!'.

affairs, with an associated perlocution as accepting a description or being convinced, but not being insulted. Saying 'I am gonna fuck you' to a police-officer is a commissive illocutionary act – a promise or a threat – in which the speaker commits himself to carrying out an action. The associated perlocutionary effects of commissives are accepting the promise or being intimidated, but not being insulted. Greeting a police-officer with 'Heil Hitler' is an expressive illocutionary act with an associated perlocution as accepting the greeting but again – not being insulted. So there is no direct connection between the act and the effect of being insulted. In the next section I will show that this connection is indirect.

## 4 Insulting as Conversational Implicatures and the Possibilities for Strategic Communication

So, the question now is: how is it possible to derive the *indirect* perlocutionary effect 'being insulted' from illocutionary acts whose associated perlocutionary effects is primarily a different one. The key to an answer to this question is analysing these examples as forms *conversational implicatures* as baptised by Grice. In order to analyse the difference between sentence meaning and speaker meaning, Grice postulated a general Cooperative Principle and four maxims specifying how to be cooperative:

- *Cooperative Principle*. Contribute what is required by the accepted purpose of the conversation.
- *Maxim of Quality*. Make your contribution true; so do not convey what you believe false or unjustified.
- *Maxim of Quantity*. Make your contribution as informative as is required for the current purposes of the exchange. Do not make your contribution more informative than is required.
- *Maxim of Relation*. Be relevant.
- *Maxim of Manner*. Be perspicuous; so avoid obscurity and ambiguity, and strive for brevity and order.[12]

According to Grice it is common knowledge that people generally follow these rules for efficient communication and, so long as there are no indications to the contrary, assume that others also adhere to the maxims. Cases in which the speaker leaves certain elements implicit, yet the listener still understands what he means over and above what he 'literally' says, can then be explained by assuming that, in combination with the cooperative principle, these maxims enable the language users to convey conversational implicatures. So, if a speaker is able to adhere to the maxims, yet deliberately and openly violates one of the maxims, even though there is no reason to suppose that he has completely abandoned the cooperative principle, then it is possible to derive a conversational implicature. A general pattern for the working-out of a conversational implicature might be given as follows:

1. he has said that q;
2. there is no reason to suppose that he is not observing the maxims, or at least the Cooperative Principle;
3. he could not be doing this unless he thought that p;
4. he knows (and knows that I know that he knows) that I can see that the supposition that he thinks that p is required;
5. he has done nothing to stop me thinking that p;
6. he intends me to think, or is at least willing to allow me to think, that p;
7. so he has implicated that p (Grice 1975, p. 31).[13]

In order to give a more precise description of inferring conversational implicatures, it is insightful to combine the maximes of Grice with Searle's conditions for the performance of illocutionary acts. For the performance of an assertive the preparatory conditions are that the speaker has reasons for acceptance of the truth of the propositional content and the sincerity condition is belief. For the performance of a co missive the propositional content condition is that the propositional content represents a future course of action of the speaker, the preparatory condition is that the speaker is able to perform this course of action and the sincerity condition is intention. For the performance of a directive the propositional content condition is that the propositional content represents a future course of action of the hearer, the preparatory condition is that the hearer is able to perform this course of action and the sincerity condition is desire. For the performance of a declarative, there are no special propositional content conditions, the preparatory condition is that the speaker is capable of bringing about the state of affairs represented in the propositional content solely in virtue of the performance of the speech act and the sincerity conditions are belief and desire. For the performance of an expressive, there are no general propositional content, preparatory and sincerity conditions. But most expressives have propositional content conditions (you cannot apologise for the law of *modus ponens)*, the preparatory condition that the propositional content is true and the sincerity condition about a state of affairs that the speaker presupposes to obtain.

Let us now try to reconstruct the possible argumentation about the accusation of insulting in our examples. The line of reasoning of the public prosecution defending the standpoint that an utterance counts as an insult would be as follows.

Someone who calls a police-officer a homo implicates an insult by openly violating one of the maxims. When the assertive is not true, the speaker violates the maxime of quality, or in terms of the conditions for performing an

12. Grice, above n. 9, at 26-30.

13. Grice, above n. 9, at 31.

assertive, the speaker infringes one of the conditions for performing the assertive. When the assertive is true the speaker violates the maxime of relevance, or in terms of the conditions for performing an assertive, the speaker violates the essential rule, because there is no sense or point.

The fired employee who compares his employer with Pontius Pilatus does not say that his dismissal is like the condemnation of Jesus, but he is implicating it by openly violating the maxime of quality and the conditions for an assertive illocutionary act.

Someone who greets a police-officer with 'Heil Hitler' implicates an insult by openly violating the maxime of relation, or more precise the sincerity conditions for performing an expressive illocutionary act. Someone who promises or threats a police-officer to fuck him implicates an insult by openly violating the maxime of quality of relation, or more precise the preparatory and sincerity conditions for performing a commissive illocutionary act.

Saying or implicating that the Holocaust did not happen counts as an insult because it is (or counts as) a violation of the maxime of quality. In terms of the conditions for performing the assertive illocutionary act, this utterance can be analysed as a violation of the preparatory and maybe also the sincerity conditions for performing an assertive illocutionary act.

The examples of indirect insulting illustrate two important characteristics of conversational implicatures. The first is that the presence of the implicature must be capable of being worked out for even if it can in fact be intuitively grasped, unless the intuition is replaceable by an argument, the implicature (if present at all) will not count as a conversational implicature. The second characteristic is that a conversational implicature is always *contextually cancellable* if one can find situations in which the utterance would simply not carry the implicature.[14] In other words, in using an 'indirect insult' there is *plausible deniability*. These two characteristics are the explanation for the room for disagreement in discussions about the accusation of an indirect insult. The party who claims that a certain illocutionary act carries the implicature 'insulting' and the perlocutionary effect 'being insulted' claims that there are good arguments for this standpoint, given the conventional meaning of the utterance and the conventional rules for conversations. Because of the plausible deniability the accused can argue that there was no insult at all. In the examples mentioned this was precise one of the types of argumentation to defend the standpoint that there was no insult. Of course this *plausible deniability* also 'facilitates' forms of strategic communication (or the accusation of strategic communication), because the effect of being insulted is reached without commitment to this indirect or implied content.

Let us to illustrate this point take a closer look to the argumentation in the case 'Stop the Cancer called Islam'. Is it possible to analyse this utterance as implicating an insult because the writer openly violates one of the maxims or conditions for performing a directive illocutionary act? The analysis of the utterance as an open violation of the maxime of quality and the sincerity conditions for the performance of an assertive – Islam is not a cancer – can easily be countered with the argument that it was meant metaphorically. The analysis of the utterance as a violation of the maxime of relation and the essential condition for an assertive, can be countered by arguing that this utterance was part of a public debate. This was in fact the point the defence made in this case.

It is good to summarise the analysis so far. In light of the foregoing we can redefine the definition of insulting as follows. Being insulted is an *indirect* perlocutionary effect that is intended by the speaker or writer and that is based on rational considerations on the part of the addressee. Because of this indirectness there is always room for disagreement in actual cases about the accusation of insulting. This room for disagreement also involves the possibilities of strategic communication where someone is achieving an effect like insulting and can deny the intention to insult or the commitment for having insulted. In my opinion, this explains the problems of interpretative discussions about insulting in a better way than the doctrinal analysis based on the imprecise concept 'meaning in context'.



## 5 Concluding Remarks: The Relevance for Doctrinal Legal Research

The central question in this special issue is: how can we translate and incorporate the various non-legal disciplines and their findings into doctrinal legal research? In this article I tried to contribute to an answer to this central question by showing that some doctrinal problems of legal interpretation and argumentation can be analysed in a more precise way than a standard doctrinal analysis, when we use insights from *speech act theory*. In these concluding remarks I want to relate my findings to the aims, the problems, and the methods of doctrinal legal research.

What are the aims of doctrinal legal research, which central problems are analysed, and what are the methods used to solve these problems? According to Taekema, there are three central characteristics of doctrinal legal scholarship: the orientation towards legal practice, the internal perspective taken by legal scholars and the hermeneutical method used.[15] According to Taekema the close relationship between scholarship and practice and

14. H.P. Grice, *Studies in the Way of Words* (1989), at 44 (Cambridge: Harvard University Press).

15. H.S. Taekema, 'Relative Autonomy: A Characterisation of the Discipline of Law', in B. van Klink and S. Taekema (eds.), *Law and Method. On Interdisciplinary Research into Law* (2011) 33, at 52 (Tübingen: Mohr Siebeck).

its combined descriptive and normative orientation has two methodological consequences. The first is the *internal perspective to the practice of law*. This means that scholars regard the subject matter of their research from the same point of view as the people who engage in the subject. The second consequence is the *hermeneutical method used* in doctrinal legal research. In short, this method is used for interpreting legal texts. It presupposes that the meaning of a text is not immediately clear because of a potential problematic interaction between author, text, reader, and broader context. Taekema concludes that the method of hermeneutics does provide a solution for solving the interpretation problems, but it show us that the discourse of interpretation is one of plausibility rather than on of truth and deduction. Therefore legal scholarship is necessarily *argumentative*.
The incorporation of speech act theory in the doctrinal analysis and the specification of the doctrinal concept of 'meaning in context' in terms of speech acts and perlocutionary effects is – as I have tried to show – also characterised by the orientations identified by Taekema. First I tried to solve practical problems about the interpretation of an article of the Dutch criminal code. I tried to demonstrate that these problems are the result of the doctrinal approach to the meaning of words in legal norms. Although the perspective of 'meaning in context' is a good starting point, the doctrinal perspective fails to give an adequate analysis of speaker meaning and of indirect communication. As an alternative I proposed to use the instruments of speech act theory to solve these problems. Second, this analysis based on speech act theory takes an (epistemological) internal perspective as a starting point, because the analysis of speaker meaning is connected with intentions and commitments and shared normative expectations in communication. Third, the analysis shows that there are no easy cases concerning indirect insulting (and, I think this conclusion can be generalised tot other forms of interpretation and indirect communication in law). Therefore, this analysis also illustrates the argumentative character of legal scholarship.




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# The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law

**Terry Hutchinson***

**Abstract**

The doctrinal methodology is in a period of change and transition. Realising that the scope of the doctrinal method is too constricting, academic lawyers are becoming eclectic in their use of research method. In this transitional time, legal scholars are increasingly infusing evidence (and methods) from other disciplines into their reasoning to bolster their reform recommendations.

This article considers three examples of the interplay of the discipline of law with other disciplines in the pursuit of law reform. Firstly the article reviews studies on the extent of methodologies and reformist frameworks in PhD research in Australia. Secondly it analyses a 'snapshot' of recently published Australian journal articles on criminal law reform. Thirdly, it focuses on the law reform commissions, those independent government committees that play such an important role in law reform in common law jurisdictions.

This examination demonstrates that while the doctrinal core of legal scholarship remains intact, legal scholars are endeavouring to accommodate statistics, comparative perspectives, social science evidence and methods, and theoretical analysis, within the legal research framework, in order to provide additional ballast to the recommendations for reform.

**Keywords:** doctrinal research, interdisciplinary methods, law reform



## 1 The Context

Like the Roman god Janus who is portrayed with two faces one looking to the past and the other to the future, the doctrinal methodology has strong roots in the past, but it is now transitioning towards an electronic globalised future. This discussion concentrates on the future of legal scholarship and the evolving taxonomy for incorporation of insights from other disciplines, particularly the social sciences, into reform-oriented legal research.

Even when a non-legal response might be just as appropriate to resolve a broader social problem, doctrinal researchers have tended to continue to work within the parameters of the discipline in order to make recommendations for reform. They have confined their research to a critical analysis and synthesis of the law. However, realising that the scope of the doctrinal method is too constricting, academic lawyers are becoming eclectic in their use of research method. Legal scholars may not often utilise non-doctrinal methods themselves, but they do include the results of the use of these methods in their research. In this transitional time, legal academics are increasingly infusing evidence (and methods) from other disciplines into their reasoning to bolster their reform recommendations. Current studies suggest that this is not occurring to the same extent within the law reform commissions.[1]

This article considers three examples of research and writings by lawyers which are directed to law reform. This analysis examines the extent of the interplay between doctrinal analysis and research from non-doctrinal research methodologies within these sets of materials. Firstly the article reviews studies on the extent of methodologies and reformist frameworks in PhD research in Australia. Secondly it analyses a 'snapshot' of recently published Australian journal articles on criminal law reform. Thirdly it focuses on the law reform commissions, those independent government committees that play such an important role in law reform in common law jurisdictions.

This examination demonstrates that while the doctrinal core of legal scholarship survives intact, legal scholars are, to some extent, endeavouring to accommodate statistics, comparative perspectives, social science evidence and methods, and theoretical analysis, within the legal research framework, in order to provide additional ballast to the recommendations for reform.

* Associate Professor, Faculty of Law, QUT Law School (t.hutchinson@qut.edu.au); Marika Chang (QUT Law School) was the research assistant on this project.

1. K. Tranter, 'Citation Patterns within the Australian Law Reform Commission Final Reports 1992-2012', 38(1) *University of New South Wales Law Review* 318 (2015).

## 2 Clarifying the Basics: What Is Doctrinal Research?

Historically, doctrinal analysis has been the dominant legal method in the common law world, although other categories of research such as reform oriented, theoretical, and fundamental have been acknowledged as important and to this extent doctrinal research has always included an interdisciplinary aspect. Nevertheless, legal academic success has been measured within a doctrinal methodology framework, which includes the tracing of legal precedent and legislative interpretation. The essential features of doctrinal scholarship involve 'a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation'.[2] There is general consensus on this type of broad description. This 'conceptual analysis critique' is based on an understanding of the rules of precedent between the court jurisdictions, the rules of statutory interpretation, the tacit discipline knowledge such as the difference between civil and criminal jurisdictions, and various tests of liability, along with the acknowledged reasoning methods, borrowed from philosophy and logic, such as induction and deduction.

How does the doctrinal method relate to law's discipline paradigm? Thomas Kuhn viewed paradigms as a shared frame of reference among researchers, which could be upset by new revelations leading to generational struggles between newer and more established researchers.[3] Thus, paradigms are shared worldviews within a discipline, which determine what topics are 'suitable' to study, what methodologies are acceptable, and what criteria may be used to judge success. Other descriptions of paradigms include 'taken-for-granted mind sets', and according to this view, socialisation into the discipline is instrumental in ensuring that newcomers take on these 'ways of knowing'.[4] A discipline paradigm encompasses any underlying philosophies, which again, in the common law world, has been predominantly liberalism, with its ideas of rationalism, the importance of personal property and individual self-determination. There are other aspects to the paradigm – the once-prevalent view of law as being objective and neutral, and positivism, with its view of law as being 'what is' rather than what 'could be' or 'should be' also form part of the paradigm. These characteristics are particularly ubiquitous in the British common law legal tradition. The established paradigm within research in the discipline of law has involved the individual scholar's legal voice.

So doctrinal research was the predominant category identified in all the discipline assessments for law that took place in the 1980s.[5] In 1987, the Australian Pearce Committee highlighted doctrinal as the main category in its research taxonomy, describing it as research which 'provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments'.[6] The Council of Australian Law Deans subsequently expanded on this earlier definition – 'Doctrinal research, at its best, involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials'.[7] In 2006, Martha Minow, Dean of Harvard Law School, identifies 'doctrinal restatement' as one of the main contributions legal scholars make within their research.[8] Susan Bartie identifies 'doctrinalism' as a 'unifying element in legal scholarship in England and Australia'.[9] Writing from a European perspective in 2011, Rob van Gestel and H.-W. Micklitz, describe the process in similar terms stating that in doctrinal work, 'arguments are derived from authoritative sources, such as existing rules, principles, precedents, and scholarly publications'.[10] Accordingly, they continue, the law 'somehow represents a system' so that 'through the production of general and defeasible theories, legal doctrine aims to present the law as a coherent net of principles, rules, meta-rules and exceptions, at different levels of abstraction', and 'decisions in individual cases are supposed to exceed arbitrariness because they have to fit into the system' so that the system remains coherent.[11] Therefore, there is widespread agreement on the basic tenets of doctrinal research.

The doctrinal method has been widely criticised, largely because it has never been explicated sufficiently for non-lawyers – or for lawyers themselves![12] Legal researchers have not been in the practice of describing their methodologies even within their academic work. In the past, few PhD theses have provided a separate description detailing the extent of the method. The method is assumed knowledge within the discipline – part of the grab-bag of skills associated with 'thinking like a lawyer'. The doctrinal method is qualitative and idiosyncratic and, especially in the courts and in prac-



2. T. Hutchinson, 'Valé Bunny Watson? Law Librarians, Law Libraries and Legal Research in the Post-Internet Era', 106(4) *Law Library Journal* 579, at 584 (2014).
3. T. Kuhn, *The Structure of Scientific Revolutions* (1996).
4. J. Jones, 'Undergraduate Students and Research', in O. Zuber-Skerritt (ed.), *Starting Research — Supervision and Training* (1992), at 54.
5. H. Arthurs, *Law and Learning: Report to the Social Sciences and the Humanities Research Council of Canada by the Consultative Group on Research and Education in Law* (1983), at 66; D. Pearce, E. Campbell & D. Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987).
6. Pearce, Campbell & Harding, above n. 5, 2, 312 [9.17].
7. Council of Australian Law Deans, *Statement on the Nature of Legal Research* (2005), at 3.
8. M. Minow, 'Archetypal Legal Scholarship – A Field Guide', 63(1) *Journal of Legal Education* 65-69, at 65 (2013).
9. S. Bartie, 'The Lingering Core of Legal Scholarship', 30(3) *Legal Studies* 345, at 350 (2010).
10. R. Van Gestel and H-.W. Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?', *European University Institute Working Papers Law* (2011)/05, at 26.
11. *Ibid.*
12. W. Twining, *Taylor Lectures 1975 Academic Law and Legal Development* (1976) (Lagos: University of Lagos Faculty of Law).


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tice, the outcomes are often limited to the specific facts of the case. As a way of combating criticism from the physical sciences, Christopher Langdell, in the early part of the nineteenth century, had tried to promote law as a 'legal science', and the law library as a 'lawyer's laboratory'. In the Preface to *Contracts*, he commented:[13]

> Law, considered as a science, consists of certain principles or doctrines. ... Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases. ... Moreover, the number of fundamental legal doctrines is much less than is commonly supposed. ... *If these doctrines could be so classified and arranged that each should be found in its proper place*, and nowhere else, they would cease to be formidable from their number. ... It seemed to me, therefore, to be possible ... *to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines.*[14]

A few years later, in the Harvard Law School Annual Report, Langdell again noted:
'The work done in the Library is what the scientific men call original investigation. The Library is to us what a laboratory is to the chemist or the physicist, and what a museum is to the naturalist'.[15] In this respect Langdell was suggesting that the law 'ought to be studied from its own concrete phenomena, from law cases, in the same way that the laws of the physical sciences are derived from physical phenomena and experiments'.[16]
Historically, the doctrinal process has been described within a problem framework with a number of linear steps including assembling the facts, identifying the legal issues, analysing the issues with a view to searching for the law, undertaking background reading and then locating primary material, synthesising all the issues in context, and coming to a tentative conclusion.[17] There is certainly a need for a more sophisticated approach to tease out the doctrinal method. Whether the doctrinal method can ever be stated in a formulaic way is problematic. At its heart it is fluid. It is difficult to reduce to an algorithm.

### 2.1 Additional Categories of Legal Research

Doctrinal research was not the only type of research categorised within the early discipline reviews. The reports categorised other methodologies such as law reform research, legal theory research, and fundamental research separately.[18] The Pearce Committee acknowledged 'reform-oriented' research, research which 'intensively evaluates the adequacy of existing rules and which recommends changes to any rules found wanting', as a separate category.[19] Arguably what was being delineated here was also a form of doctrinal research. Pure doctrinal research identifies and analyses the current law. Reform-oriented research recommends change. Most 'good' quality doctrinal research goes well beyond description, analysis, and critique, and invariably suggests ways the law could be amended or the philosophy, processes or administration of the law could be improved. In many common law jurisdictions, there are separate organisations working to develop a reform agenda, these being the law reform commissions. These are discussed at more length later in this article. The reform-oriented research taking place in the commissions was primarily doctrinal, but depending on resources, had a consultative aspect and the potential to be 'interdisciplinary' in its methods.[20]
The third type of research identified in the Pearce Committee Report was theoretical research – 'research which fosters a more complete understanding of the conceptual bases of legal principles and of the combined effects of a range of rules and procedures that touch on a particular area of activity'.[21] Legal theory is a crucial tool to provide a critical perspective on the law. However, in the past, the utility of theoretical research may have been diminished because of the limited exposure of the profession to theory (and the language of theory) and also because of the seeming gap between legal theory and practice.[22] Lawyers, even academic lawyers, have been so steeped in positivism that they have not sufficiently fostered knowledge of legal theory and the skills of critique and applied this to the law.
Certainly this is not the case currently. Research activity at postgraduate level always includes a conceptual framework, a component of which is the theory underlying the law itself, and the philosophy that best encapsulates the researcher's view of the law. In the postmodern world, legal researchers understand that nothing is objective. Even the choice of topic for examination depends on the researcher's world view. Very few doctrinal researchers would not acknowledge that fact in the twenty-first century.
The Canadian Arthurs Report identified a further category – 'Research designed to secure a deeper understanding of law as a social phenomenon, including research on the historical, philosophical, linguistic, economic, social or political implications of law', or fundamental research.[23] This type of research treats law as a phenomenon, as a problem with cause and effect.[24] Fun-

13. B. Kimball, *The Inception of Modern Professional Education: C.C. Langdell, 1826-1906* (2009), at 349, app., 2.
14. C.C. Langdell, *A Selection of Cases on the Law of Contracts* (1871) from Kimball, above n. 13 (emphasis added).
15. C.C. Langdell, *Annual Report 1873-74* from Kimball, above n. 13, at 67, 349, app., 2.
16. Kimball, above n. 13, at 351, app., 2, n. 10; J. Redlich, *The Common Law and the Case Method in American University Law Schools* (1914), at 15.
17. T. Hutchinson, *Researching and Writing in Law* (2010) 41, at 42.
18. Pearce, Campbell & Harding, above n. 5, 2, at 310 [9.12].
19. *Ibid.*, 3, app. 3, at 17 [54].
20. D. Weisbrot, 'The Future for Institutional Law Reform', in B. Opeskin and D. Weisbrot (eds.), *The Promise of Law Reform* (2005), at 31.
21. Pearce, Campbell & Harding, above n. 5, 3, app. 3, at 17 [54].
22. Arthurs, above n. 5, at 68.
23. *Ibid.*, at 66.
24. *Ibid.*, at 69.

damental research uses social science methodologies to examine the law through the prism of another discipline's. view – the economist or linguist or criminologist. Can fundamental research include a doctrinal component? On the basis that all research on law necessarily acknowledges the law as its basis then the answer to that must be a resounding 'yes'. Interdisciplinary legal articles, even those being written by non-lawyers from an 'outsider' view, frequently acknowledge the 'black letter' or 'doctrinal core' of law as the starting point, whatever methodology is being used to pursue the author's agenda.[25] Once again there must be an acknowledgement that the boundaries between the various categories are not closed in the present century. The methodology denotes the difference.

There are at least two other important categories of legal research which were not categorised separately in the reports in the 1980s. These are policy research and comparative research. Public policy research normally takes place within government departments rather than in academia but it too has a doctrinal component. There is certainly a cross-over with the methods used by the institutional law reform commissions because the process includes public consultation, discussion papers, public submissions, surveys, public meetings, and written reports. The difference lies in the degree of political interference in public policy outcomes. The policy inquiries are funded and driven by politicians, whereas law reform terms of reference emanate from government, and the research is conducted independently of departmental interference.

Martha Minow identifies 'Comparative and Historical Inquiries' as another typology or 'intellectual contribution' of legal scholarship which 'Describe an earlier era or contrasting legal regime; Contextualize the selected era or regime utilizing social sciences such as anthropology or history; and Illuminate differences, choices, or continuities when compared with contemporary domestic practice'.[26] Despite not being placed in a separate category, comparative research was acknowledged in the earlier taxonomies which included statements about the need for lawyers to 'keep up' with the 'legal and other relevant literature of all common law jurisdictions including England, New Zealand, Canada and the United States'.[27]

From this discussion it is evident that there is a need for a new interdisciplinary taxonomy that recognises the interplay of the changing methods and purposes within the legal discipline paradigm. Kuhn suggests that paradigms can and do change and there is no doubt that this is occurring within the discipline of law. The examples examined in Section 3 of this article demonstrate that the paradigm of the sole researchers working at their computer and involved in qualitative doctrinal scholarship remains. Even so, although the scholars do not always apply the non-doctrinal methods themselves, there is an increasing application of the research results from the use of such methods by legal scholars. The door is definitely ajar to further change though the link between doctrinal and non-doctrinal needs to be better articulated and explored.

25. Bartie, above n. 9.
26. Minow, above n. 8, at 68.
27. Pearce, Campbell & Harding, above n. 5, 3, app. 3 at 17 [53].

# 3 Examining Methodologies Informing Recommendations

If we accept the methodological ground rules for doctrinal work, with the simplistic problem based structure as a naïve framework, and also recognise that theory, fundamental research, comparative research, and law reform have always played a role within the discipline's research landscape but often as separate genres, the next issue is to examine how non-doctrinal methodologies are being infused into legal research in the twenty-first century. Is this fundamentally changing the doctrinal method? Are lawyers using non-doctrinal methodologies and data as a matter of course? At what point in the analysis is this data being infused into the discussion and how is this evidence being synthesised with the law in coming to a conclusion or recommendation for reform? What is current practice and how valid are the outcomes or any recommendations for change based on the studies? Is there adequate internal cohesion in the analysis reinforcing the recommendations? These are difficult questions and this article can only hope to provide basic assessments of trends using examples of previous studies on PhD theses, a snapshot of recent articles written by lawyers for Australian law journals and the studies of outputs of the law reform commissions.



## 3.1 Interdisciplinarity Evidenced in PhD Theses and Law Journal Articles

There are few empirical studies examining the methodologies employed in legal scholarship.[28] Any recent studies of the use of legal research methodologies focus on the postgraduate research arena. A survey of postgraduate research in Australian law schools undertaken in 2002 demonstrated that only 20% of all doctoral research projects could be described as purely 'doctrinal'.[29] A more recent examination of HDR theses submitted to the Australasian Digital Thesis Program website in the 5-year period 2004–2009 reveals that most of the legal theses include a doctrinal component, even though only a few students overtly identified the study

28. While statistical studies on methodologies being used in legal research are rare, the topic of how lawyers research is not a new area of legal academic concern. *See*, for example, E. Jones, 'Some Current Trends in Legal Research', 15(2) *Journal of Legal Education* 121 (1962-1963).
29. D. Manderson and R. Mohr, 'From Oxymoron to Intersection: An Epidemiology of Legal Research', 6 *Law Text Culture* 159, at 164 (2003); and *see* D. Manderson, 'Law: The Search for Community', in S. Marginson (ed.), *Investing in Social Capital* (2002), at 152 on breakdown of empirical and doctrinal PhDs in Australia.


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they were conducting as being to any extent 'doctrinal'.[30] According to this study, 16 of the 60 theses examined include a chapter to describe the use of non-doctrinal methodologies, 21 theses discuss methodologies as part of another chapter, and one deals with the methodology in an appendix. Any overt description of method in the thesis invariably signalled an interdisciplinary perspective, so the results demonstrate a higher proportion of doctrinal papers than occurred in the 2002 survey with 37% (n = 22) in this group being purely doctrinal. This demonstrates that law is still essentially a scholarly endeavour.

There are differences between the research process and methods undertaken in a PhD program compared to a great deal of legal academic scholarship. PhD requirements influence the scope and the depth of analysis of any study as well as the choice of research methodology. The PhD students will usually attempt a triangulation of methods and may well base their conclusions on several different collections of research data. The categories of methods the PhD students choose are constrained by the supervisors' levels of expertise and the student's training. The non-doctrinal methodologies are invariably fully reported in the thesis, but the extent of doctrinal analysis is rarely acknowledged, described, or unpacked.

Following completion, the PhD candidates may either translate their work into a monograph or publish several separate journal articles dealing with sections of the thesis. This entails segmenting the work. Broadly speaking, different topics will be packaged for the various audiences to best disseminate the research amongst the assorted discipline audiences. The doctrinal legal analysis will be published in a university law review or topic specific law journal targeting academic and practising subject specialists. As a rule, lawyers do not 'like' detailed statistics because many have not been fully trained in statistical method, so the law journal article will not include extensive discussion of empirical work undertaken in the thesis and certainly not mathematical formulas. The theoretical framework of the project will be emphasised for a law and society or sociology journal. More practical policy and reform aspects combining the law and social science studies will be directed to subject-specific 'current issues in the law' titles. Studies including details of the empirical analysis are diverted to the criminology and social science journals.

Undoubtedly law academics use a similar approach for publishing outputs from their larger funded and team-based projects. Different aspects of the broader studies are highlighted according to the publishing profile of the target journals. For this reason it is difficult to validly determine the total extent of methodologies being implemented by legal scholars simply by examining law journal articles.

30. T. Hutchinson and N. Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research', 17(1) *Deakin Law Review* 83, at 99 (2012); The study of the Australasian Digital Thesis Program website was undertaken by Felicity Deane and Terry Hutchinson and completed in October 2010.

Despite the existence of these limitations on assessing legal research activity, an examination was conducted of a set of journal articles on the topic of 'reform of the criminal law' which were published in 2013. This 'snapshot' of publications encompassed articles published in Australian law journals – but only those held on the AustLII database.[31] A basic search string resulted in a retrieved list displaying 60 items. When book reviews, speeches, and government publications were omitted, then only thirty-two refereed journal articles remained as a relevant subset of the database.[32] This subset included articles which were written by lawyers, included doctrinal analysis, and specifically dealt with 'criminal law and reform'. This entire group of articles had been published in refereed (blind peer reviewed) journals. The examination of the articles in the retrieved list focused on the author's profession (all had legal qualifications), whether the articles included a doctrinal analysis of legislation or case law, the extent of the description of additional methods, and the point at which it was introduced into the discussion. Were statistics included in the analysis and if so, where were these sourced? Where a comparison was included, the study considered whether this was contextual or a full comparison and whether there was also reference to public international law. Did the author mention law reform commission recommendations?

All the articles used a doctrinal research methodology to some extent. In two articles there was more emphasis on theory, criminology, and international law rather than an analysis of specific case law or legislation. The doctrinal methodology design was tacit; not so any non-doctrinal methods. Surveys, for example, were outlined and explained using appropriate tables. While only two of the articles were reporting that the authors had themselves undertaken surveys, interviews, or statistical projects,[33] eighteen used statistics published elsewhere in discussing the basis of concerns. This provided foundation for the discussion of the prevalence of offences and involved the use of news article reports, law reform submissions, and social science studies (predominantly reports of surveys) from medical and other interdisciplinary journals. To this extent the statistics provided context for the legal discussion.

All the articles analysed pertinent secondary literature with only two including an explicit acknowledgement of the literature review. The review of the literature is an

31. Australasian Legal Information Institute <www.austlii.edu.au/>.

32. These were located on the AustLII database using the search term 'crim* w/10 (reform* OR recommend*)' within the Australian journal titles published in 2013. The search was conducted on 16 February 2015. There are approximately 100 Australian journal titles on this database including most of the university law reviews.

33. M. Brown, G. Lansdell, B. Saunders & A. Eriksson, ''I'm Sorry But You're Just Not That Special ...' Reflecting on the 'Special Circumstances' Provisions of the Infringement Act 2006 (Vic)', 24(3) *Current Issues in Criminal Justice* 375 (2013) (semi-structured interviewing and court observations and quantitative, descriptive data extracted from CLC databases); H. Douglas and R. Fitzgerald, 'Legal Processes and Gendered Violence: Cross-Applications for Domestic Violence Protection Orders', 36(1) *University of New South Wales Law Journal* 56 (2013) (examination of Magistrates Court files).

implicit quality indicator in the doctrinal methodology paradigm. The extensive footnoting used as the preferred citation style for this group of articles provides an updated record of the secondary literature on the topic. The scope and currency of these references provide a strong warrant for the author's credentials and knowledge of the subject area. Relevant texts, journal articles, and law reform publications are referenced where applicable to the discussion rather than brought together under a formal literature review heading.

Fourteen of the thirty-two articles were jointly authored, signalling a definite movement away from the lone scholar paradigm. Six of the articles disclosed their funding sources as being either from external publicly funded grants or university internal grants, and five of these were jointly authored. At least 6 of the 14 jointly authored articles emanate from subject-specific university or faculty research centres and working groups. Those articles that were jointly authored were likely to include interdisciplinary approaches, such as criminology and law, or emanate from the research centres.

The actual number of discrete comparative analyses in this retrieved group was low. Only two of the articles had as their main objective a comparison of the law between jurisdictions. However, twenty-three of the articles include a comparative review of the existing law particularly for the Australian state jurisdictions as well as pertinent examples from international jurisdictions. The Arthurs Report had recognised that comparative and historical research involving legal rules was likely to lead to 'new' solutions.[34] However, their comment in 1983 was that 'experience, and our own investigation, shows that historical or comparative research is not undertaken routinely even by scholarly investigators, and rarely carried out by practitioners. Perhaps we stand on the threshold of change in this regard ...'.[35] The change has occurred. It is widely recognised that comparative research approaches are becoming the norm within the current doctrinal method, and this small snapshot of articles reinforces this perspective. There are discrete comparisons of legal provisions in two or three jurisdictions, comparisons of the legislation between numbers of jurisdictions in order to provide context, and at the very least the use of comparative data and information on the law in other jurisdictions using secondary literature. Law is less parochial in the twenty-first century. Globalisation and technology mean that the wider legal sphere is more accessible and pertinent for the legal scholar. This in itself is intriguing and needs more examination to test and confirm this practice using a larger body of evidence. Certainly reports published by law reform commissions have consistently included a comparative approach. The current expectation in the literature is that there will be some statement of the legal jurisdictional status quo or an acknowledgement of obvious discrepancies in practice elsewhere. This forms part of the context of the doctrinal discussion.

Many of the articles (twenty-three) include recommendations for reforming the law informed by the evidence presented. Suggestions for reform included calls for social reform to engender change, improved data collection and review mechanisms, or specific non-legislative action. Five of the articles simply critiqued the existing laws.

Some of the limitations of this pilot study must be acknowledged openly. It might be expected that more non-doctrinal methods would be found in studies of criminal law and law reform. Studies of reform in other areas of law such as tort law or corporate law or equity might well be more legalistic in approach. There is space for more extensive studies of the published literature to gauge such differences. Overall, within this pilot study of thirty-two doctrinal articles on reform of the criminal law written by lawyers, there was evidence of an increasing reference to comparative law and to published statistics and social science evidence to contextualise the law and to reinforce the doctrinal analysis and conclusions. Studies utilising empirical methods or with a mainly theoretical focus were less common.

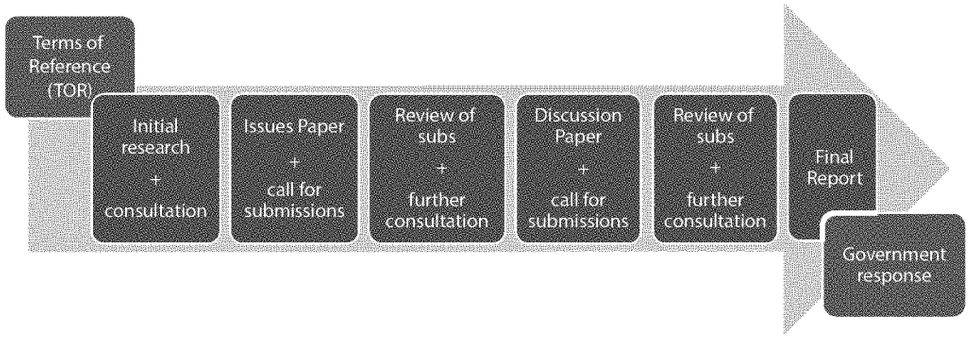
### 3.2 Interdisciplinarity and the Work of the Law Reform Commissions

The third study centres on the reports emanating from the law reform commissions. Before examining the research within the commissions, it is necessary to understand a little more about how the commissions function. Law reform bodies have an established role in common law history. The commissions are independent government agencies charged with the task of reforming the law. Evidence exists of law reform commissions in Scotland in 1425 and various *ad hoc* committees set up to reform and rationalise the law over the centuries in England,[36] with law reform committees being formed in Australia from the 1870s.[37] The permanent English Law Commission was established in 1965, and statutory law reform commissions on a similar model are now established in most common law jurisdictions.[38] The Australian Law Reform Commission (ALRC) was established as an independent statutory body in 1975. Under s21 of the *Australian Law Reform Commission Act 1996* (Cth) the Commission's brief is to systematically develop and reform the law by:



34. Arthurs, above n. 5, at 68.
35. *Ibid.*
36. W. Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada* (1986), at Chapter 2 Law Reform Commissions in the United Kingdom 15-99 generally.
37. *Ibid.*, at 100-68: Chapter 3 Law Reform Commissions in Australia; *See also* Australian Law Reform Commission, *Annual Report 1975* (1975), at 5-19.
38. There are Law Reform Commissions in most of the Australian jurisdictions. Canada too has multiple reform commissions or institutes, for example, The Law Reform Commission of Nova Scotia and the non-statutory Alberta Law Reform Institute. In the United Kingdom, the Law Commission and the Scottish Law Commission are statutory commissions established by the *Law Commissions Act 1965* (UK); The United States has multiple committees or commissions, for example, The California Law Revision Commission and the Michigan Law Revision Committee.

*Figure 1* *The Law Reform Process*




i. bringing the law into line with current conditions and ensuring that it meets current needs; and
ii. removing defects in the law; and
iii. simplifying the law; and
iv. adopting new or more effective methods for administering the law and dispensing justice; and
v. providing improved access to justice.[39]

The Australian state law reform commissions are, with a few exceptions, modelled on the national body, though they invariably have fewer resources.[40] The terms of reference for law reform enquiries are normally set by the Attorney General in consultation with the Commission. Consultation with the general public and stakeholders is always a key element of the inquiry process. Figure 1 demonstrates the typical law reform process.



There have been trends in the popularity of law reform commissions resulting in the periodic closure and rebirth of agencies in common law jurisdictions depending on government finances and reform agendas.[41] The ALRC for example has been reviewed several times since 1975.[42] Possibly because of this high level of scrutiny, the Commission's Annual Reports contain very detailed information on performance and outcomes.[43] The levels of implementation of all ALRC reports are reasonably high:

- 60% are substantially implemented;
- 28% are partially implemented;
- 2% are under consideration;
- 3% are awaiting response; and
- 7% have not been implemented.[44]

The law reform commissions are touted as one of the main conduits for law reform.[45] However, there are many other channels available for advocating legal and regulatory change. These include 'parliamentary committees and ad hoc commissions of inquiry',[46] as well as periodic reports from internal government policy units, reports from government instrumentalities such as the sentencing councils, the children's commissions, the human rights commissions, and even the courts' annual reports. Tranter has identified two possible approaches to law reform – one being the 'research institute' approach where 'recommendations are generated by experts analysing relevant data and academic literature' and the other evidencing a 'community engagement' approach where 'recommendations are located as having emerged from a process of community consultation'.[47] By and large the law reform commissions fall within the latter 'community engagement' category. Many of these other bodies would be categorised as 'research institutes'.

Although comparative legal perspectives and references to published statistics feature in the reports and publications of the formally constituted law reform commissions, the principal method employed by the commissions is public consultation. Justice Kirby, the founding chair, commented that the ALRC ushered in a new era for law reform in Australia with the 'value adding' involved in public consultation.[48] The current ALRC Chair, Rosalind Croucher, also champions the consultation process:

> Through its widespread and thorough consultation strategies, the ALRC is able to build consensus and understanding of its proposals within the community and this assists the government in turn to implement various recommendations, even in a context where change may be challenging.[49]

39. *Australian Law Reform Commission Act 1996* (Cth), and see the *Public Governance, Performance and Accountability Act 2013* (Cth).
40. Commonwealth of Australia, The Senate, *Legal and Constitutional Affairs References Committee: Inquiry into the Australian Law Reform Commission* (2011), at 9.
41. N. Rees, 'The Birth and Rebirth of Law Reform Agencies', *Australasian Law Reform Agencies Conference 2008 Vanuatu 10-12 September* (2008).
42. 1977-1979 Senate Standing Committee on Legal and Constitutional Affairs inquiry; 1993-1994 House of Representatives Standing Committee on Legal and Constitutional Affairs; 1997-1998 Possible Improper Interference with a Potential Witness before the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (73rd Report); 2010-2011 Senate Legal and Constitutional Affairs Committee Inquiry into the Australian Law Reform Commission.
43. Australian Law Reform Commission, *Report 125: Annual Report 2013-13* (2014), at 26.
44. *Ibid.*, at 27.
45. Commonwealth of Australia, above n. 40, at 9 [2.18].
46. L. Barnett, 'The Process of Law Reform: Conditions for Success', 39 *Federal Law Review* 161 (2011).
47. Tranter, above n. 1; Barnett, above n. 46.
48. Justice Kirby has concluded that 'the most original "value added" of the ALRC – and its chief contribution to the law reform technique in the years after its establishment – was its emphasis on public consultation'. M. Kirby, 'Are We There Yet?', in B. Opeskin and D. Weisbrot (eds.), *The Promise of Law Reform* (2005), at 435.
49. Australian Law Reform Commission, above n. 43, at 5.

Public consultation constitutes a non-doctrinal method and as such is interdisciplinary in its approach. However, consultation was probably not what the former Commissioner of the Law Commission of Canada, Roderick Macdonald, had in mind when in the mid-90s he was arguing for a 'reimagining' of law reform processes, including 'co-opting non-academic and academic', 'non-legal and legal', with the notion of reform being to 'transcend doctrine'.[50] Macdonald advocated that law reform should be focusing on alternative reform processes (and outcomes) rather than simply presenting a report together with redrafted legislation as a standard response, and that there should be a different choice of projects moving away from substantive law topics to broader areas of social justice and 'the relation of law and society'.[51] W.H. Hurlburt challenged all of these ideas in a spirited reply in the same issue of the journal.[52] However, these methodological constraints were perceived as a failing in the Canadian Arthurs Report which held that 'the basic problem with much law reform research is rather that it is located toward the doctrinal end of the methodological spectrum, and consequently fails to confront most problematic issues'.[53] Greycar and Morgan perceived that the law reform bodies were using 'limited consultation processes that often leave out of account the concerns of those most affected' and disadvantaged groups.[54] Greycar and Morgan provide examples of the lack of empirical methods and data in the formation of law reform recommendations in favour of so-called "common sense" anecdotal information'.[55] More recently Angela Melville's comparison between New Zealand and Canadian law reform commissions pointed out the difference in approaches.[56] Melville noted the methodological insularity, 'top down' approach and even paternalistic attitude exhibited by some commissions who confined the stakeholder list and limited the questions addressed to them.[57] Other commissions were more interested in broader questions – presenting papers in open academic conferences prior to the reports being published so as to engage with stakeholders, and commissioning private empirical studies prior to writing the reports.

However, this article is examining the extent of interdisciplinarity and the use of non-doctrinal methodologies by lawyers to reform the law. The question, therefore, must be whether the evidence, gathered from the consultations and submissions sent to the law commissions in their enquiries, is being infused into the recommendations? Are the commissions using the submissions in drafting their recommendations? Kieran Tranter's study into the citation practices within the ALRC final reports from 1992 to 2012 found that 'submissions were the most frequently cited source' (46%), supporting an argument that 'the best way to influence the executive is to locate recommendations within what can loosely be called the 'community'.[58] Community participation not only provides 'responses and feedback', it also promotes 'a sense of public 'ownership' over the process of law reform'.[59] However, whether there is a statistical correlation between the number of those respondents supporting a course of action and the final recommendation is more difficult to determine. The submissions are often divided as to their arguments and proposals for the most advantageous way forward. Not all responses are helpful in terms of the information or views they proffer, but the ability to refer back to those providing submissions can assist deliberations. The likelihood is that the recommendations are being based primarily on case law and the arguments provided by the judges and the weight of commission opinion favouring a particular line of action, rather than emanating from the views of those providing submissions. This issue requires further research.

To what extent do the law reform commissions have recourse to academic material on the issues they are studying? Many of the recommendations extend more broadly than simply reforming the legislation – but this very much depends on the scope of the terms of reference handed to the agency. While the reports are referencing legal reforms implemented (and sometimes evaluated favourably) in other jurisdictions, recent examination of the reports produced by the commission has demonstrated a paucity of reference to published academic commentary on the issues they are examining, and also little empirical data to back up the recommendations.[60] So in Tranter's study, 'citations to secondary academic material in the form of books, journal articles and conference papers were quite low at only 6% of the total citations'.[61]

There may be clear explanations for this. The reports have narrow terms of reference, and it may be the case that only a very few academic articles are ever directly on point. In addition, the articles and texts referenced in the final reports are in no way fully indicative of the background literature reviews, extensive annotated bibliographies, and working papers produced by the Commissions, and which are never made public; all that is published is the final reports. In the past, publishing costs may have limited the materials that could be released. However, this is certainly not the case at present when electronic files can be easily uploaded onto the websites. It could well be argued that when extensive background research has been undertaken at the public

50. R. Macdonald, 'Recommissioning Law Reform', 35 *Alberta Law Review* 831, at 870 (1996-1997).
51. *Ibid.*, at 875.
52. W.H. Hurlburt, 'The Origins and Nature of Law Reform Commissions in the Canadian Provinces: A Reply to "Recommissioning Law Reform" by Professor R.A. Macdonald', 35 *Alberta Law Review* 880 (1996-1997).
53. Arthurs, above n. 5, at 70.
54. R. Greycar and J. Morgan, 'Law Reform: What's in It for Women?', 23 *Windsor Yearbook on Access to Justice* 393 (2005).
55. *Ibid.*
56. A. Melville, 'Conducting Law Reform Research: A Comparative Perspective', 28(2) *Zeitschrift für Rechtssoziologie* 153 (2007), at 153.
57. *Ibid.*, at 158, 159.
58. Tranter, above n. 1.
59. R. Atkinson, 'Law Reform and Community Participation', in B. Opeskin and D. Weisbrot (eds.), *The Promise of Law Reform* (2005), at 160.
60. Tranter, above n. 1, at 349.
61. *Ibid.*

expense, then these preliminary working papers should be made available. Until this occurs, it should be queried whether the low level of citation of secondary material truly reflects the background research undertaken for the reports.

A more worrying aspect of the research is the apparent lack of reference in the reports to empirical studies. The literature reviews cover secondary legal literature. There is no evidence of the law reform commissions undertaking literature reviews of the wider social science and scientific evidence base on the issues being covered apart from clarification and definition of existing processes when required. The emphasis always lies on the primary materials – the legislation and case law. The secondary literature is only used to assist in interpreting the law. There is little or no attempt to deal with the wider context apart from what is provided by the submissions and consultations. As Barnett has commented, there is a real need in law reform to 'uncover the facts upon which law reform proposals are based', so that 'they need to see the entire picture and identify the real problem(s) before launching into a search for policy solutions'.[62] So reference is being made to the community stakeholders, and their views on the issues. The law is being considered closely. But very rarely is new data compiled from within the commissions. There are reasons for this. The use of additional interdisciplinary methods is dependent on government budgets. Even attempting to educate the public about an issue can be an expensive process. The commissions focus on the role of clarifying the law for other lawyers and the general public. As detailed previously, the law reform commissions have always performed this role well.

Further research is necessary to determine if there are regularly gaps between existing empirical data, the consultation responses, and the recommendations. However, the recommendations in a law reform report are not the final word. Any major recommendations for legislative change must be presented to cabinet and then parliament for debate. If there are gaps in the arguments presented, then those aspects should be addressed at that point.



## 4 Conclusion

It is clear from this discussion that academic lawyers are using non-doctrinal methods, but they are often infusing these methods within their doctrinal research framework. Definite inroads have been made in relation to the use of comparative approaches. Arguably comparative law, extending far beyond a simple backward glance to the genesis of a legal proposition, is now an intrinsic part of legal scholarship. Published government statistics and the published results of social science research are also being included in doctrinal academic writing to provide contextual framing or to highlight the disparity between the law, social policy, and the existing social evidence base. There are some examples of joint authorship and lawyers working in tandem with those from other disciplines to investigate all sides of the contextual prism in an effort to best achieve enlightened critique. Theoretical and philosophical discussions invariably include footnotes to the doctrinal stasis to provide factual legitimacy. Theory is also increasingly used as a vehicle for critiquing and analysing the basis of the 'black letter' law. Theory is part of the contextual framing. Researchers query – 'What was the pre-eminent theory at the point in history when this law commenced? Are those theories and those economic and political views infused in the law still relevant and valid today?' The doctrinal method remains true to its core, but it is certainly less constrained than in the past.

This article has used examples of existing studies on PhD students' theses, a snapshot of recent articles written by lawyers for Australian law journals and the outputs of the Australian Law Reform Commission to provide some basic assessments of trends in the use of interdisciplinary and doctrinal methods especially focusing on reform agendas. These are Australian examples. Is there any great disparity between Australian legal scholarship and that being undertaken elsewhere? Further empirical study is required on this issue. More research needs to be carried out to determine at what point in the legal analysis the non-doctrinal data is being infused into the discussion and how exactly doctrinal lawyers are infusing this evidence in coming to a conclusion or making recommendations for reform. The discussion has by no means finished. There is evidence of a broadening of the method overall, but we need a more sophisticated study of larger amounts of data to verify the trends observed so far.

62. Barnett, above n. 46, at 181.

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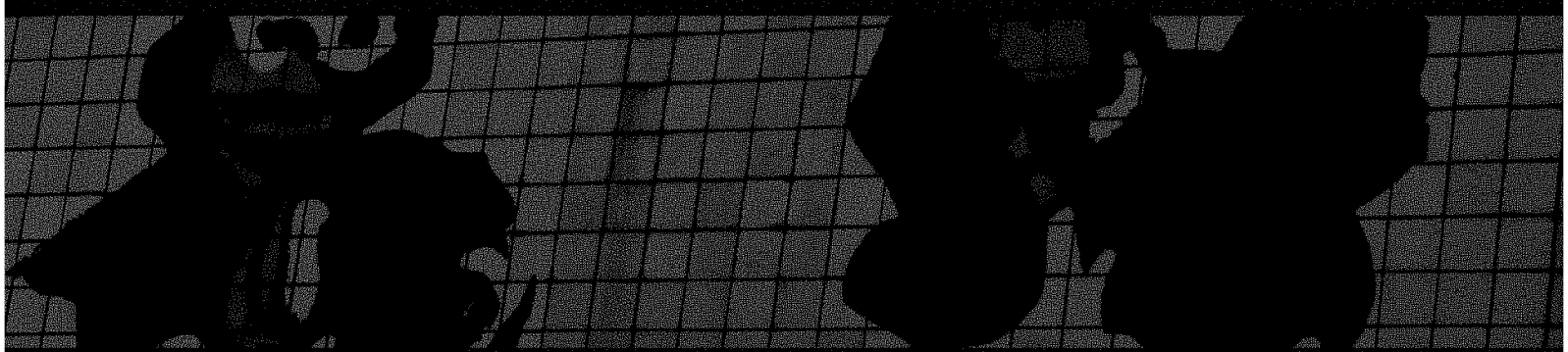

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## Austerity in Civil Procedure and the Role of Simplified Procedures