Introduction: The Incorporation Problem in Interdisciplinary Legal Research

Part 1: Theoretical Discussions

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

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

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

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

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

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

1 Towards Interdisciplinary Doctrinal Research

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

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

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

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

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

2 Methodological Obstacles

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

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

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

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

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

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

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

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

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

3 This Issue

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

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

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

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

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

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

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

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

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