Research programme

Rethinking the Rule of Law in an Era of Globalisation, Privatisation, and Multiculturalisation

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Introduction

The research programme is the framework for the cooperation of Erasmus School of Law scholars in constitutional and administrative law, criminal law, international law and European law, jurisprudence, and legal philosophy. The programme is focused on problems of the rule of law as the common theme, and between 2010 and 2015 was organised in four distinctive subprogrammes. It has been extended for a further two years, to run until 1 January 2018.

Common to all conceptions of the rule of law is the idea that government decisions need to be subjected to legal rules in order to protect people from the arbitrary exercise of government power.[1] A narrow understanding of the rule of law, as is customary in Anglo-American jurisprudence, restricts the meaning of the concept to formal principles of governance by rules such as generality, prospectivity, and publicity.[2] A broad understanding of the rule of law expands its meaning to include substantive values and rights such as equality, access to justice, and human rights.[3] Our conception of the rule of law is based on the idea of the 'Rechtsstaat' as a compound of different principles, and is thus a broad understanding, taking on board

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[1] Compare Lon Fuller, *The Morality of Law*, New Haven: Yale UP 1969. For an overview of different conceptions of the rule of law, see Brian Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge: Cambridge UP 2004, pp. 91 ff.
[2] E.g. Joseph Raz, *The Authority of Law*, Oxford: Oxford UP 1979, pp. 210 ff.
[3] E.g. T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law*, Oxford: Oxford UP 2001.

formal principles of legality, separation of powers, human rights, access to justice, and democratic accountability.

The starting point for the new research programme is the recognition that traditional understandings of legal concepts do not suffice in dealing with the problems of a world in which legal orders are increasingly intertwined and legal institutions become increasingly interdependent. Three broad trends are at the basis of this increasing complexity: globalisation, privatisation, and multiculturalisation.

Globalisation typically is associated with the awareness that different localities on our planet, and thus people, are intimately connected through, for example, trade relations, environmental concerns, and the consequences of wars and conflicts. As a result, local problems have global dimensions and vice-versa. At the European regional level, similar tendencies are visible. The European context has changed the face of national legal orders across the board, from administrative and environmental law to competition law and procedural law. The European Convention on Human Rights, for instance, has had an enduring and pervasive influence on national courts. Globalisation was seen for a long time as an unstoppable process, and as spreading the benefits of trade and knowledge over the world. Although there have always been skeptics, their position has been strengthened recently by marked failures in the globalised economy. The most prominent example is, of course, the financial crisis, which has demonstrated the weaknesses of a global credit system. We can therefore identify a countertrend – that of de-globalisation – giving rise to a varied landscape of global, regional, and local areas of interaction.[4] In attempting to address such problems, the state is no longer the only unit of regulation: other agents, such as subnational government authorities, private actors, and international organisations, also exert considerable influence. In some areas, state regulation may appear to be the only option to address problems such as failing banks; in other areas such as global warming, possibilities for state actions are limited. How the rule of law might serve as a framework for addressing this variety of issues remains uncertain, and is the object of study in this programme.

Privatisation can be analysed in a similar way. In the 1980s and 1990s, privatisation and self-regulation in the market were seen as the solution to most problems of the welfare state. Privatisation goes hand in hand with a globalising economy, as well as constituting a particular regulatory strategy by national governments: many government tasks and powers have been delegated to private agencies. In important respects, however, regulation by private agencies now turns out to be problematic. Again in the context of the financial crisis, it has become obvious that responsible risk management does not come about spontaneously. Similarly, problems of accountability arise when democratic control over public interests such as infrastructure or health care is lacking. From a rule of law perspective, the challenge posed by privatisation is how to secure public values such as transparency, democratic participation, and accountability.

Multiculturalisation has been a feature of Western societies since the end of colonialism. Recently, however, it has been increasingly perceived as a problem. After a period in which emancipation of minorities was seen as a central goal, we now also see calls for the protection of national cultures, accompanied by changing ideas about integration. Law is one of the frameworks used to tackle such problems, but is also increasingly an area of contestation. The issue of state neutrality with regard to religion is an example. Fundamental legal questions arise concerning the extent of the positive obligations of states in relation to the effective realisation of human rights, particularly those relevant to minorities' identities, and concerning the meaning of human rights in relations between private parties. Conflicting human rights are subject to intense debate, in which both national identities and international sensitivities play a role. For example, an event such as the controversy over the Danish cartoons depicting the Prophet Mohamed shows how a national multicultural debate can reverberate internationally. The pluralism of multicultural societies thus seems to require a reassessment of longstanding rule of law values such as equality or freedom of religion.

Although the trends of globalisation, privatisation, and multiculturalisation themselves are not new, the realisation that they also challenge existing

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[4] Roger C. Altman, 'Globalization in retreat', *Foreign Affairs*, Vol. 8/4, July/August 2009, pp.

conceptualisations of law has become much stronger in recent years. The influence of these trends reaches further than is usually acknowledged: they engender not only substantive but also systemic change in legal systems. It is important to note, as pointed out above, that the trends no longer point in a clear direction. For each of the trends, one can identify countertrends as well. In addition, the three trends are themselves interconnected. A globalised world, for example, is one in which the scope for private enterprise is greater and, given the absence of a global regulator, self-regulation is likely to emerge. Similarly, multiculturalism is to a large extent the result of the transboundary nature of labour markets and of individuals or groups seeking refuge from conflict.

Taking these trends together with other characteristics of modern society, particularly the growing importance of technological innovation, we see that legal actors are increasingly operating in a highly dynamic environment. Legal systems have a conservative bias with their emphasis on values such as legal certainty and respect for authority (such as precedent). It is necessary to develop an adequate theory of the dynamics of law and the innovations needed in law to respond to these changes. To some extent, legal regulation itself becomes part of the problem when an overload of rules and accompanying bureaucracy is produced. Deregulating has been a standard answer to such juridification, but has drawbacks itself. The main challenge lies in finding an innovative form of regulation that fits the context in which it will operate.

The complexity of the problems arising from these trends leads to both practical and theoretical insecurity about the boundaries of law and the rule of law. In this research programme, we work on the basis of the idea that the use of legal instruments alone cannot provide an adequate response to the aforementioned trends and to the related challenges of regulating life in these complex settings. However, we also take as our point of departure the understanding that legal mechanisms have a role to play in society, and that these mechanisms and this role is worthy of academic research. Our methodological starting point is that legal analysis – if combined with insights from other disciplines such as political science, sociology, linguistics, philosophy and

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2-9.

economics – will enable us to better understand and respond to the complexities of law in society.

The following research question is central: *what do these changing trends of globalisation, privatisation, and multiculturalisation entail for the legitimacy of law as the order that is to curb power and provide a normative direction?* Therefore, the approach of the programme is a combination of rethinking core concepts and instruments associated with the rule of law, and of incorporating an interdisciplinary perspective on the rule of law.

The basic idea

The aim of the research programme is to rethink the institutions, principles, and procedures that constitute the rule of law by incorporating interdisciplinary insights in the analysis and evaluation of their functioning. Our reconceptualisations of the rule of law should enable us to provide a framework for an adequate response to the trends of globalisation, privatisation, and multiculturalisation. This will require a careful analysis of existing conceptions of the rule of law in a variety of contexts in order to assess whether core values and principles need to be re-affirmed, extended, or renewed. In the long run, combining legal tenets with political, philosophical, linguistic, sociological, and economic strands of thought should lead to new conceptualisations of the rule of law and human rights.

From 2010 to 2015 this broad notion was made more concrete in four subprogrammes, each of which addressed more specific research questions following from the themes sketched above. Three subprogrammes focussed on a specific set of problems with regard to the rule of law. The first subprogramme takes its cue from the developments of globalisation and privatisation and the impact this has on international, European, and national law. It addresses the fundamental question of the exercise of power. The second subprogramme focuses on the trend of multiculturalism and its relationship to political institutions and human rights. It addresses the way in which conflicts and challenges of pluralism can be approached in liberal democratic societies. The third subprogramme deals with the problem of the role of the different branches of government as protectors of the rule of law. Its main focus is on the shifting role of courts, both in terms of their institutional setting and their argumentative strategies. The fourth subprogramme takes a completely different

angle: it addresses the methodological aspects of the research programme by investigating the methods of interdisciplinary legal research.

The four subprogrammes each have a distinctive focus, as follows (original texts in the annex):

I. Decrypting the public power paradigm in denationalising and privatising legal orders;

II. The new challenges of cultural, religious, and linguistic pluralism;

III. Rethinking the judicial guarantee of the rule of law in a globalising and (de)juridifying legal context;

IV. Interdisciplinary rule of law research: methodological and conceptual aspects.

In 2016 and 2017, results from these four subprogrammes will still form an important part of the output of the programme, but the cooperative focus will shift to five research clusters which embody new areas of joint attention and collaboration.

- Cluster 1: The rule of law and the 'nobody' problem (non-State actors and expert knowledge).
- Cluster 2: Creating and securing sustainable and inclusive prosperity in economic globalisation.
- Cluster 3: Conceptualizing the rule of law in a dynamic context
- Cluster 4: Human Rights and Diversity
- Cluster 5: The citizen as consumer and producer of dispute resolution and regulation

Cluster 1

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The Rule of Law and the 'Nobody' Problem
(Non-State Actors and Expert Knowledge)

Cluster leaders: Alessandra Arcuri & Florin Coman-Kund

In the book of Odyssey, Homerus tells the story of Ulysses in the land of the Cyclopes. To escape the terrible giant Polyphemus, Ulysses tells him that his name is Nobody. When blinded by Ulysses, Polyphemus calls his fellow giants for help, shouting that Nobody had blinded him. This cluster of research will be studying what we call the 'Nobody' problem for the Rule of Law paradigm.

Authority in contemporary legal systems is increasingly exercised by a multitude of actors that are traditionally not considered as law-makers. These include technical experts, agencies, subsidiary bodies of international organizations, private-public partnerships, regulatory networks, or more generally, assemblages of different actors. Their atypical nature renders these actors 'nobodies' in the legal field. While there is increasing, if scattered, evidence as to their capacity of exercising public authority, it is difficult to trigger their accountability because we lack the legal vocabulary to call them. Legally these are 'nobody'. Think for instance of the role of the Troika in the Greek crisis. While it is evident that many legally relevant decisions matured within this body, legal avenues to challenge these decisions were foreclosed because legally the Troika is 'nobody'.

The direct or indirect production of legally relevant decisions by these actors (irrespective of their formally legally binding character), and more generally their exercise of public authority in various guises, has been recurrently considered as problematic. While the legal scholarship has started to pay attention to this phenomenon, the institutions, mechanisms, and concepts enabling these actors to become part and parcel of the legal realm remain under-researched. The main ambition of our research cluster is thus to study the implications of this phenomenon for the rule of law. In order to do that, we will ask: how is the authority of these 'nobodies' exercised in practice? What are the processes by which allegedly non-legally bindings decisions turn into legal acts and compelling standards applicable in various legal orders? What are the sources of authority of these 'nobodies'? What forms of accountability do already exist and what types of accountability mechanisms are fit for 'capturing' this quasi-legal phenomenon?

This research cluster will thus tackle perceived legitimacy gaps in the widest sense, including accountability, procedural safeguards, participation, openness and transparency, legal review mechanisms, and examine these issues in light of current understandings of the rule of law. In this context it will be researched whether existing rule of law theoretical underpinnings and benchmarks are well suited for framing the increasingly complex and inter-linked regulatory processes, where these non-traditional actors ('nobodies') play an important role. Alternatively, it will be considered whether similar or different legal-normative benchmarks are appropriate for legitimizing the regulatory process in different arenas (global, EU, national) and whether a reconceptualization of the rule of law is required with a view to grasp the complexities and dynamics of these multi-level and multi-actor regulatory decision-

making processes. While keeping a legal focus (e.g. by combining and comparing EU law, public international law and global administrative law), this cluster will also embark upon interdisciplinary approaches by integrating insights from political science, public administration, and science and technology studies. Moreover, normative-theoretical perspectives on rule of law, legitimacy, accountability, etc. will be complemented with empirical methods and case study research mainly for theory testing and theory building purposes.

Exemplary policy areas featuring prominent developments of expertise-based decision making processes, standards and actors at the intersection between global, European and state legal orders will be comprehensively examined through in-depth case studies. In this respect, fields like food safety, registration of medicines, aviation safety, registration of chemicals, economic and financial governance will serve as cases in point.

Cluster 2

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Creating and securing sustainable and inclusive prosperity in economic globalisation

Cluster leaders: Fabian Amtenbrink, Anastasia Karatzia & René Repassi

Economic globalisation and the resulting intertwinement of international, supranational, and national law give rise to new challenges in conceptualising and implementing the rule of law, including our understanding of public interest and the way in which public power should be exercised. In the context of globalisation, economic governance is no longer confined to the national or even the supranational level. This is all the more so given the fragmentation of public power between state and non-state actors, as well as across the national, European, and international levels.[5] We aim to address these challenges by looking into economic governance from three perspectives: global, EU, and national economic governance. Starting from the premise that economic governance constitutes a toolbox for achieving economic policy objectives such as sustainability, inclusion, and – ultimately – prosperity, the research questions of this cluster will revolve around two closely interlinked themes:[6]

(i)   *Economic globalisation and national determination*

Considering that economic governance is a means to achieve prosperity, what is the impact of economic globalisation on the common good? How does prosperity have to be defined and ensured in light of the social fabric and protection standards? National and supranational legislators, policy makers, and courts increasingly have to consider the interrelations between the various legal systems vis-à-vis challenges that surpass national determination. How can legal protection and enforcement in a globalised economy be understood and how is this understanding compared with that of traditional enforcement mechanisms at the state level?

(ii)   *Democracy and economic globalisation*

In the context of economic globalisation, decision-making is not necessarily in line with traditional democratic and legitimacy considerations. For instance, in the context of globalisation, governance in the European and Monetary Union (EMU) is affected in complex ways by developments on the global level. The influence of these developments on the design of EMU governance gives rise to issues of legitimacy and accountability. Issues of a similar nature emerge from the proliferation of (supranational) agencies and international fora including informal networks established and operating at the global level (e.g. G20; Basel Committee on Banking Supervision, the Joint Forum of International Financial Regulators). Could these issues be considered by revisiting the lenses through which policy outcomes of supranational and international policymakers are assessed? For example, there may be a need to reconsider the relevance of global administrative law (GAL) principles and standards as a yardstick to assess economic globalisation. If this is so, what would it mean for issues such as the relevance of human rights considerations in economic governance?

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[5] See Rule of Law research programme, Subprogramme I: 'Decrypting the public power paradigm in denationalizing and privatizing legal orders'
[6] Dani Rodrik, *The Globalization Paradox* (OUP, 2012).

Cluster 3
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Conceptualizing the rule of law in a dynamic context

Cluster leader: Sanne Taekema

In this cluster the focus is on explanatory and evaluative accounts of the rule of law idea in a changing social and political environment. What changes and continuities of the rule of law can we discern in response to the dynamics of legal regimes and the interaction between law and policy? As well as exploration of overarching conceptual questions on the rule of law, research will concern more concrete instruments and procedures and evaluate these as rule of law instantiations.

The question of how to conceptualize the rule of law is particularly urgent in light of the plurality of actors involved in legal decision-making in international and transnational governance. In light of the different roles and views of such legal actors, normative, value-based rule of law thinking needs to be related to more instrumental views of rule of law policy. This question also entails a broader concern with the concept of law: how do we conceptualize legal orders and the meaning of the rule of law in such conceptualizations? Here, we also draw on interdisciplinary research, especially from a humanities perspective, to understand and problematize the normative claims of law and the perspective of the judge.

Procedural questions arise with transnational problems such as security and immigration policy, in which national, regional and international procedures prompt research on the quality and legitimacy of decision-making. The impact of procedural mechanisms and efforts to engage citizens in governance structures are a primary concern. Theoretical and historical investigation of procedural elements of the rule of law tradition will be complemented with research on particular issues and policy areas.

Cluster 4
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Human Rights and Diversity

Cluster leader: Kristin Henrard

Western societies have been 'multicultural' since the end of colonialism. The related population diversity in states has only expanded due to incessant migration streams, and recently also an actual refugee crisis. Following a move towards multicultural policies in several European countries, embracing diversity, more recently the focus has shifted towards problematizing this diversity, from a range of perspectives. The related challenges for governments are manifold, and go hand in hand with fundamental legal questions, often inviting reassessments of longstanding rule of law values.

Questions arise about what can reasonably be expected from governments regarding the respect for and protection of separate ethnic, religious and linguistic identities of minorities, also given the perceived threat to 'national cultures'. To what extent can migrants be considered (new) minorities and what does this then mean in terms of entitlements? Revisiting the interpretation of the scope of application of fundamental rights and the scope of positive state obligations in this respect arguably imply 'stretching' the rule of law, or at least the 'law' in the rule of law. Conversely, questions arise about what can be expected from new-comers regarding 'integration' (integration requirements) while respecting their fundamental rights? What does state neutrality in relation to religion imply?

Furthermore, the recent heightened influx of asylum seekers confronts governments with their limited resources. This in turn raises complex questions about state obligations regarding social and economic rights, tying into broader questions about the relation between austerity measures and human rights. The migration and refugee crisis furthermore triggers more profound challenges to state sovereignty, and invites rethinking the role of 'nationality' and 'legal status' as relevant marker for 'access' and 'participatory' rights in the current mobile world.

An overarching question for this cluster concerns the implications of the right to equal treatment, which encompasses not only the right to effective protection against invidious discrimination, but also a right to differential treatment (accommodation) insofar as one finds oneself in a substantively different position.

Synergies with the work of the EUR Institute on Migration and Diversity are actively pursued.

Cluster 5

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The citizen as consumer and producer of dispute resolution and regulation

Cluster leaders: Annie de Roo and Rob Jagtenberg

This cluster continues to investigate RRL's overall central research question: "What do the changing trends of globalisation, privatisation and multi-culturalisation entail for the legitimacy of law as the order that is to curb power and provide a normative direction?"

The initiative for this cluster stems from work undertaken in subprogrammes III (briefly put: the role of the courts and other modes of dispute resolution) and IV (briefly put: inter-disciplinary perspectives). Here it was found that mere doctrinal legal analysis has no explanatory potential by itself. Another strategy is to focus on the actors involved in accessing, operating and shaping the law. An underexplored key player here is 'the citizen'. The concept of citizen is closely associated with 'nation-state' and 'national legal system', the validity of the latter concepts exactly being called into question in the RRL programme.

Key questions envisaged are: How do citizens as addressees or users of the law cope with overcoming obstacles to access the legal process? To what extent has privatisation (e.g. in social care systems) created such obstacles? Has the process of globalization ignited a counter-movement of localisation? If so, which role is envisaged for large cities/conurbations (like Rotterdam or e.g. Shanghai); is there scope for any local legal pluralism and would that mean the demise of the rule of law? Does localisation facilitate co-creation of regulation and dispute resolution by citizens and local government (e.g. burger-initiatief)? If so, what are the consequences of such local regulation and dispute resolution? Which constraints (set at national/global level) are to be reckoned with?

This cluster partly fits in with on-going NWO research on hybrid local governance (headed under the present RRL programme).

Subprogramme I

Decrypting the Public Power Paradigm in Denationalising and Privatising Legal Orders

This research project analyses the manner in which law constructs and ought to construct the exercise of public power. For purposes of this research project, we conceptualise law, or at least significant parts of law, as a means by which society constructs and reconstructs itself interactively and, as it were, constructs 'public space'. The most salient attribute of such a body of law is that it addresses the distribution of power in society, and in particular the abuse of power, as opposed to addressing delicts, torts, and trespasses only. Hence, public power is understood as power that ought to be exercised on behalf of and in the interest of society. These ideas provide the theoretical underpinnings of the project. What follows is a summary of the project. For further details see Annex I.

The aims of the research project are 1) to map the manner in which public power is exercised, including the role played by law in shaping that power, and 2) to identify and address shortcomings in the exercise of public power (in terms of input and output legitimacy) in the increasingly denationalising and privatising legal order.

The main tenet of this project is that, at subnational and supranational levels, not only states but also actors, both public and private, increasingly exercise public power, thereby fragmenting it. This fragmentation of public power raises numerous questions relating to the nature of that power and to the manner in which law is used to construct and reconstruct public space and society. We suggest that the nature of these shifts in public power can be analysed by identifying the most important dimensions of public power. These in our view are the 1) locus of public power (at what level and by whom); 2) the personal scope of public power (those purposely and not purposely affected); 3) the material scope in which public power is exercised

13

(policy field); 4) the form in which public power manifests (nature of the instruments used); 5) the effects, including effectiveness and efficiency, of the exercise of public power (output legitimacy); and 6) the conditions under which public power ought to be exercised (input legitimacy). It is this last dimension that represents the concept of the rule of law.

The aim of parsing public power in its various dimensions is not only to reveal the several variables defining public power but, more importantly, to gain an insight into the interdependencies between them. Such research will generate insight into how public space is being (re)constructed through law, and can become the starting point for legal research that explores ways in which the several dimensions defining public power, given their interrelationships, can be brought into balance.

Based on this research, we hope to determine how the legitimacy of the exercise of public power can be conceptualised along the lines of input and output legitimacy (dimensions 5 and 6). Our hypothesis, based on previous research, is that input and output legitimacy are largely pre-determined by the locus (dimension 1), the personal scope (dimension 2), and the form (dimension 4) of the exercise of public power, all of which of course manifest within a particular material field or fields (dimension 3). Our research thus far also suggests that input and output legitimacy are interdependent, and that to a certain extent there may be tradeoffs between the two.

We therefore seek to investigate the different dimensions of public power and how they interact with each other. As an underlying thesis, it is assumed that regularly in practice one dimension dominates in the institutional design for exercising public power, thereby influencing all other dimensions. Hence for example the choice for a certain form of public power may determine its effectiveness; the exercise of public power at a certain locus determines who is affected by it, as well as having an impact on the arrangements that are required to secure its input legitimacy; the involvement of private actors influences the form of public power and its legitimacy (input and output); and the effectiveness of a certain manifestation of public power may codetermine its legitimacy (output legitimacy). An important part of the project will focus on identifying these interrelationships and any trade-offs that may be associated therewith. Ultimately, the project seeks to identify how these interrelationships and possible trade-offs influence the legitimacy of the exercise of public power.

This research project will enable the development of multidimensional insights into the public power paradigm and its decryption based on the six dimensions.

Developing such multidimensional insights requires decrypting these dimensions through case studies and thereby testing the hypotheses set out in Annex I. The case studies will provide insight into the manner in which public space and society is being (re)constructed. One of the questions to be explored in the case studies regards the consequences of, in practice, taking any of the dimensions as a point of departure for constructing public space. Due to the assumed interdependencies between the different dimensions, it is likely that public space will be constructed differently, depending on which of the six dimensions identified above is chosen as a starting point. In practice, whereas lawyers are prone to favor the sixth, the legal normative dimension (or input), policy-makers may very well favour another dimension, prioritising for example the cost-effectiveness of measures (or output). Whereas a legal normative approach may for example limit the exercise of effective public power, a law and economics approach may point to the effective exercise of public power, and a policy-maker's approach may result in the exercise of public power under conditions that do not ensure its input legitimacy. The same may hold true where public power is exercised by non-state actors. It is thus likely that – namely through case studies – interdependencies and possibly trade-offs between the different dimensions can be identified that highlight the disparities in the current public power paradigm.

In the course of the project, these disparities will be theorised and, where viable, options will be developed to address them with the aim of identifying possible roles for law in the (re)construction of a (new) equilibrium between the different dimensions characterising public power. It will provide insight into the possible ways in which public space can be (re)constructed in terms of both input and output legitimacy. This part of the research project will also involve a reconstruction of the dynamic elements that constitute the sixth dimension. It essentially focuses on the question of how can input-legitimised public power be conceived in normative terms, while at the same time evaluating the role of the other dimensions, given the fragmented manner in which public power is presently exercised. This step will involve a rethinking of the rule of law in denationalising and privatising legal orders.

While the research project has definite philosophical underpinnings regarding the role of law in the construction and reconstruction of public power, its primary focus is on legal research in a multi-disciplinary context. Differentiating between the six dimensions identified above, the first four are primarily factual in nature and

require legal but essentially descriptive (legal-analytical) methods of analysis. The fifth dimension requires empirical (e.g. socio-legal and economic) methods of research, whereas the sixth requires legal-analytical methods.

Subprogramme II

The new challenges of cultural, religious, and linguistic pluralism

Like most societies, the Netherlands is struggling with tensions and being presented with opportunities that result from cultural, religious, and linguistic pluralism. Of course, pluralism is not a new phenomenon. Throughout the centuries, states have dealt with pluralism in various ways, from straightforward oppression of minorities to state policies meant to protect and support threatened minorities. However, the traditional landscape has changed.

Increasing globalisation has not only led to uniformisation but has also added important layers of diversity: for instance, through the concomitant immigration. The revolution in information technology has not only led to greater transparency and mutual understanding but has also further diversified and enhanced fragmentation in the world, often bypassing established national borders and traditional institutions. This leads to the problem of how liberal-democratic societies respecting the rule of law can combine – in a world that is both more interdependent and more fragmented – the necessity of unity and coherence with the need to accommodate valuable diversity and legitimate minority interests.

We will focus on **three constitutive elements** of liberal democratic societies, which can help them deal with the tensions and opportunities of pluralism: 1) specific political institutions, 2) fundamental rights, and 3) civic virtues. As will become clear below, these three constitutive elements are closely interrelated, even though their study involves highly diverse 'methods'. Furthermore, each of these constitutive elements is confronted with particular challenges for which responses need to be identified.

Each of these elements is subject to intense debates, both academically and practically. In this subprogramme, we aim both to clarify these debates, by addressing conceptual and theoretical questions about pluralism, and to defend specific positions in these debates, arguing how to deal with pluralism in the legal and political domain.

This leads to a two-pronged central research question for this subproject:

To what extent and in what way do those three constitutive elements need to be reconceptualised and reconstructed so that they can deal more adequately with the conflicts and challenges of contemporary multicultural, multilingual, and multireligious societies, especially those in the Netherlands; and to what extent do we need to rethink our approaches and methodologies to fine-tune them to meet the new challenges of today.

The three constitutive elements and their challenges

1. Four ideals in the context of **political institutions** are highly relevant for dealing with diversity: representative democracy, constitutional pluralism, the separation of state and church, and state neutrality. These four ideals are interpreted in widely varying ways in different countries, and they are continuously contested and open to reinterpretation.

In the Netherlands, a model of consociational democracy has evolved as a response to its specific type of religious pluralism; in other countries we may find other regimes of toleration. State neutrality in the Netherlands has mainly been interpreted in an inclusive way, and the separation of state and church has been interpreted in terms that allow for various forms of cooperation between state and religious organisation. Although the Dutch formal political institutions are still largely based on a consociational model, pillarisation has largely faded away, with the exception of the tiny orthodox-protestant pillar. Phenomena such as secularisation and individualisation have led to a privatisation of traditional Christian and Jewish religious identities. This privatisation is at odds with the self-understanding of many orthodox Protestant and migrant religious groups. Moreover, there has been an influx of migrants with different religious and cultural backgrounds (not only Muslim but Hindu and evangelical Christian as well), and often also coming from countries with political regimes that are significantly different from the Dutch in being non-democratic, totalitarian, or partly theocratic. These developments put traditional interpretations of state neutrality and the separation of state and church into question. Contestations about the relations between church and state also play a role in several other countries, like France and Switzerland to name a few.

The critical reflection on and reconceptualisation of political institutions goes hand in hand with the reassessment of particular positions in international and European law. The general agreement that states need to be neutral in relation to religions cannot mask the great variety of conceptions of 'neutrality'. It is far from clear that all these conceptions can be easily reconciled with the prohibition of discrimination based on religion. Hence, it can be questioned to what extent it is appropriate to leave states a wide margin of appreciation regarding state-church relations. Furthermore, tensions can be identified between particular features of consociational democracy (sometimes used in post-conflict situations) on the one hand, and the basic principles of representative democracy as well as the prohibition of discrimination on the other.

2. Fundamental rights

Three 'categories' of fundamental rights are considered here, with special attention to the multiple ways in which they interact: namely, the prohibition of discrimination, general human rights, and minority specific rights. The interpretation of these rights is not static but constantly developing and evolving. These developments in turn influence the way in which these categories of rights interrelate.

Initially**, non-discrimination law** was focused primarily on formal, or mathematical, equality. Nevertheless, several techniques have since been distinguished that further substantive equality. At first glance, a more substantive equality approach to non-discrimination seems clearly beneficial to minorities and other vulnerable groups, especially insofar as the protection against discrimination is effective.

However, the extent to which international judicial and quasi-judicial bodies accept and use the various techniques embracing substantive equality is divergent. This is caused partly by the controversies triggered by these techniques and partly by the lack of understanding and underdevelopment of the underlying theories. Outstanding questions concern, among others, the legitimacy of positive action, the reach of duties of reasonable accommodation, and the implications and review model pertaining to the prohibition of indirect discrimination.

Furthermore, various challenges that derive from the perspective of philosophy and political science are related to perceptions towards the nondiscrimination framework as it has evolved, both nationally and internationally. Firstly, in many countries there are increasing signals that members of the majority

feel obstructed in their own way of life. Government action to combat discrimination can be regarded as illegitimate when it is perceived to interfere with fundamental freedoms, or when it is considered to discriminate against members of the majority group. Secondly, the influx of migrants with conservative views challenges liberal notions of equality for women and homosexuals. At what point does the accommodation of population diversity find its limits in equality principles?

These outstanding controversies and challenges require a rethinking both of the fundamental ideas behind non-discrimination law and of the concrete legal framework as it has developed.

General human rights such as the freedoms of religion, conscience, speech, privacy, and association are enshrined not only in constitutions but also in international conventions like the ECHR and the ICCPR.

In some respects, there seems to be a trend towards more minority-conscious interpretations of these rights. In other respects, however, certain important issues for minorities do not seem sufficiently protected by the current interpretation of general human rights. The rising immigrant population in particular poses several challenges in terms of religious and cultural diversity. The new religions call for more generous interpretations of the freedom of religion to do justice to their specific requirements such as cremation rituals, ritual slaughtering, special dress codes, and special holidays.

However, as a result of secularisation, individualisation, and the emergence of a broad majority consensus on progressive-liberal values, the secularised majority has become less empathic towards what they might perceive as eccentric religious minorities, and seems less willing to reinterpret classical rights in ways that may more adequately protect the new minorities. Moreover, the relatively new doctrine of the horizontal effect of fundamental rights increasingly leads to situations in which fundamental freedoms collide, especially with the prohibition of discrimination. As a result, fundamental rights now often seem to be perceived by various groups in society as part of the problem. In view of the above challenges in terms of interpretations and understandings of fundamental rights, both the basic ideals behind these rights and the relation between these rights need to be reconsidered. Such fundamental rethinking can only take place in connection with concrete cases in which the tensions become

most visible, such as the Wilders case, the Danish cartoons incident, or the acceptance of dress codes in public life.

Governments will usually cater to the majority, not only in terms of language, culture, and religion but also in terms of socio-economic participation. Hence, special consideration may seem necessary for minorities in order for them to realise their substantive equality vis-à-vis the rest of the population.

Minority specific rights are granted to persons belonging to minorities in their capacity as members of minorities, in addition to the prohibition of discrimination and the general human rights in the sense of human rights for everyone. There is a recurrent debate about these rights, both in legal philosophy and in international law. Central questions here are: To what extent are minority specific rights important and legitimate? And what is their contribution beyond the level of protection flowing from general human rights? Answers to these questions are connected with the way in which these three categories of rights are interpreted. To the extent that general human rights and the prohibition of discrimination are interpreted in a minority conscious way, further philosophical, legal, and empirical analyses are necessary to determine what this implies for the need and justification of special rights for minorities.

Various other challenges confront the existing framework of minority specific rights. Firstly, hardly any minority specific rights focus on religious issues. This is particularly surprising in view of the fact that thinking in terms of minorities originated in the wake of religious wars and of special measures that were considered necessary for religious minorities.

A controversial issue of minority protection, and one that is pressing in the current era of globalisation, is whether immigrants can also qualify as minorities, or what are termed 'new' minorities. A closely related question is whether these new minorities would have the same rights as traditional minorities. The importance of a sliding-scale, context-specific approach has been put forward but has not yet been made more concrete.

A critical reflection on the underlying rationale of minority rights in relation to the developing interpretations of minority rights, general human rights, and the prohibition of discrimination is necessary for a satisfactory answer to the challenges and questions raised in terms of the fundamental rights approach.

3. Civic virtues

The rise of new conservative orthodoxies both among migrant Muslims and among evangelical Christians is often perceived as a threat both by other minorities and by the secular liberal majority. Many citizens feel that their national identity – as they construct it – and traditional norms and values are threatened. This has presented a clear challenge to the image of the Netherlands as a tolerant society, and has led to calls for a revitalisation of Dutch identity, of norms and values, and of tolerance. But it also requires an understanding of the interplay between religious orthodoxies and a secular liberal society in which religion has largely been privatised. Similar tensions may be found in other countries. These changes require a rethinking not only of traditional civic virtues in the light of changing societal conditions but also of their relation with law and political institutions and their relative autonomy.

Civic virtues such as moderation, tolerance, and self-restraint can enable the larger society to live with differences. As law can only regulate some of the more intensive conflicts, a smoothly functioning society also requires at least some of these civic virtues, both at the level of individuals and at the level of their cultural and religious organisations. Moreover, civic virtues cannot be disconnected from the institutionalisation of a multiplicity of discourses and their transparent interaction. Debates on civic virtues and on civil society are sometimes politicised and used by politicians instrumentally, which can lead to tensions between the political perspectives on civic virtues and the perspectives of citizens. It is important to understand and uphold the relative autonomy of civic life against law and politics against those tendencies of instrumentalisation, as this relative autonomy is essential for a vital society. Studying civic virtues, therefore, will help us understand the limits of the law from an external perspective.

Methodological issues

In different countries, divergent understandings, interpretations, and implementations of these approaches can be found. This reality makes the use of a comparative approach particularly important. Furthermore, a solid understanding of these approaches, the challenges they are confronted with, and the identification of possible and adequate responses requires a multidisciplinary and interdisciplinary perspective. The composition of our research group is particularly suited to conduct

multidisciplinary research. The disciplines covered concern law, legal theory, legal and political philosophy, and ethics. We also combine different levels of the legal and political order: while several researchers start from the national perspective and draw wider circles both comparatively and internationally, others start from international law and focus this perspective on the evaluation of national laws and practices.

A starting point will be, of course, traditional legal and political-theoretical hermeneutic methods, to construct current positive law and political theory (both nationally and internationally), to criticise them in light of the new challenges, and to reconstruct alternative interpretations. An important part of the research will involve an analysis of the aforementioned recent developments and tensions that challenge political, legal and social institutions. A crucial role in the subprogramme will be played by the philosophical analysis of the underlying ideals and ideas in light of these developments and in confrontation with controversial and topical cases. Studies in the history of ideas and in comparative legal culture may contribute to a better philosophical and legal understanding of these institutions. These latter findings can then be used to construct the basic theoretical framework against which current international legal norms and case law can be critically evaluated.

The close interaction between the different members of the group will contribute to the desired cross-fertilisation of the findings of the different disciplines. This in turn will lead to a richer understanding of the interrelation of the three approaches, the challenges they are confronted with, and the identification of possible responses. In a similar vein, the cross-fertilisations of particular national and international achievements are expected to entail a richer understanding of the challenges and a broader range of mechanisms that can be drawn upon.

Subprogramme III

Rethinking the Judicial Guarantee of the Rule of Law in a Globalising and (De)juridifying Legal Context

Research topic

How can the rule of law be upheld in a legal context that is characterised by the trends of globalisation and privatisation? This question needs to be addressed in the current context of increased transnational interconnections between legal entities, as well as

the increased delegation of government tasks and powers to private agencies. In this context, traditional perspectives on the enforcement of the rule of law by the three classic branches of government (legislative, executive, and judicial) no longer suffice. A rethinking of the position of the three branches under the rule of law is therefore called for, taking into account the changes that currently affect the position of these branches.

Firstly, the branches of government have to deal with the trend of globalisation. Glenn defines this trend as the tendency toward world domination of specific regimes.[7] In this respect, the legislator and the executive have to give direction to the increased influence of European and international law: for example, through the implementation of treaty provisions into national law. Globalisation obliges the judiciary to redefine its position in the enlarged context of interaction with courts and regulators at different levels. This interaction contains a vertical aspect regarding the interaction of national courts with European or international courts. It also contains a horizontal aspect, concerning the mutual interaction between courts at a similar level (national or international). It is not clear yet how these effects of globalisation should be assessed in the light of the traditionally state-based conception of the rule of law.

Secondly, the branches of government are faced with the trend of privatisation. This trend demands that the legislator and the executive give direction to deregulation. Increasingly more tasks are handed over to private agencies: for example, in the fields of public transport and telecommunication. This leads to questions regarding the guarantee of transparent decision-making and accountability. The judicial branch is faced with changes concerning the delimitation of its domain vis-à-vis private dispute settlement structures. Here as well, an assessment in the light of the rule of law is required. A further specification needs to be put forward here. Within the legal framework, privatisation is connected with the trend of (de)juridification, which concerns the process of legal formalisation or deformalisation of societal interaction.[8] In the present-day context, this process particularly affects the judicial function. The

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[7] H.P. Glenn, *Legal Traditions of the World* (Oxford: Oxford University Press 2007), p. 49.
[8] Concerning the different dimensions of 'juridification', see L.C. Bichner & A. Molander, 'What is Juridification?', Arena Centre for European Studies, University of Oslo, Working Paper No. 14, 2005. See also G. Teubner (ed), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labour, Corporate, Antitrust and Social Welfare Law* (New York: Walter de Gruyter 1987).

trend of privatisation of dispute settlement corresponds to the process of dejuridification. At the same time, juridification of conflict resolution takes place through the growth of non-judicial dispute settlement bodies in the field of public law and human rights law. Hence, (de)juridification appears to be a more appropriate term to cover all changes that currently affect the branches of government.

Given the described developments, the question arises as to whether and how the branches of government will be able to continue to carry out their roles under the rule of law. This subprogramme aims to reconceptualize the relevant elements of the rule of law with regard to this question. The point of departure for this research is the constitutional frame of reference: namely, the set of fundamental norms that determine the role and the functioning of the state institutions under the rule of law. Special focus will be on the judicial branch, which has become increasingly central in the guarantee of the rule of law. In fact, the expansion of constitutionalisation and of mechanisms of judicial review in the last decades has led to the empowerment of the judicial branch in its relation to the legislative and the executive branches. The 'third branch of government' can now truly be considered to be the ultimate guardian of the rule of law. We will examine whether adaptions to the constitutional framework are necessary – and if so, which ones – in order to enable the courts and the other institutions of government to fulfill their functions in a globalising and (de)juridifying legal context.

Research questions
The central research question is the following:

To what extent do the role and reasoning of institutions of government, in particular the courts, change under the effects of globalisation and (de)juridification, and how should these possible changes be assessed in the light of the constitutional frame of reference for the guarantee of the rule of law?

This subprogramme's focus will be threefold. In the first part, focus will be on the institutional aspects of judicial decision-making. The second part will examine the argumentative aspects of judicial decision-making. Finally, the third part will address the role of the judiciary in relation to the other branches of government, focusing on

the demarcation of their respective roles with regard to the guarantee of the rule of law.

1. Institutional aspects of judicial decision-making

A first point of inquiry is the *judiciary's role as an institution*: namely, its definition as an established organisation in the political and social life of a community. In this respect, judicial organs have to deal with changes that influence their traditional role under the rule of law. Firstly, these changes concern the demarcation of the judicial domain. On the one hand, a trend of dejuridification affects the judiciary's role as an institution in the balance of powers. The search for alternatives to dispute settlement by courts reduces the judiciary's intervention in dispute resolution. Dejuridification is apparent for example in the increased referral of cases to out-of-court settlement. These alternatives encompass private dispute settlement structures, including arbitration and methods of alternative dispute resolution (ADR). On the other hand, juridification takes place through the growth of non-judicial public dispute settlement structures. This trend of juridification has developed independently of dispute settlement by courts. It encompasses quasi-judicial organs such as the Human Rights Committee, the European Committee on Social rights, and the Committee on the Elimination of Racial Discrimination, which have developed in their own way but increasingly resemble judicial dispute settlement. Autonomous administrative authorities with dispute settlement competences also fall within this category. These developments of dejuridification and juridification give rise to inquiry in the light of the rule of law.

In fact, the complementing trends of dejuridification and juridification have distinct effects on the organisation of conflict resolution. With regard to private dispute settlement, the question emerges as to how this form of out-of-court settlement of disputes relates to the rule of law concept, in particular the principle of access to justice. What types of cases can or cannot be taken out of the judicial domain? The proliferation of non-judicial public dispute settlement structures calls for a similar inquiry in the light of the principle of access to justice. How do these structures of dispute settlement develop and how do they relate to judicial dispute settlement? Finally, the question arises as to how the trends of dejuridification and juridification can be understood from a broader perspective, which links the legal rule of law concept to insights from other disciplines. What explanations can be found for

the (de)juridification of conflict resolution under the rule of law? Research in this subprogramme will be carried out to establish which is the judicial domain and to what extent the political branches of government can mark out this domain through legislation and regulations. Within the rule of law framework, in particular the principles of access to justice and of the publicity of judicial decision-making will be presented for consideration.

Secondly, the relationship between judicial organs is evolving. In the shifting scales of an evolving global context, national courts are obliged to reconsider their relationship to courts in other jurisdictions. Supreme courts and constitutional courts are increasingly searching for ways to reinforce their role in the development of the law and the protection of the rule of law at the national level. Globalisation of judicial decision-making is also manifested in the 'transnational judicial dialogue': that is, the interaction between courts in different jurisdictions, among others through judicial networks. These developments raise questions concerning the legitimacy of this type of inter-institutional dialogue within the rule of law framework. They also place the focus on the ability of courts to develop judicial leadership in a multi-level legal order.

Research within this part of the subprogramme focuses on the institutional arrangements for the courts in the context of globalisation. A number of questions arise. What is the role of the highest national courts in this global context? Are adaptations to the institutional arrangements for these courts required to enable them to claim their position and to interact with courts in other jurisdictions? Does the globalisation trend include harmonisation of the institutional arrangements for the judiciary: for instance, concerning judicial appointments, the guarantees for securing independence and impartiality, and the instruments that regulate judicial accountability? What different attitudes of judges themselves can be distinguished with regard to globalisation and its effects on the position of highest national courts? To what extent can lessons be drawn from historical experiences concerning the interaction of courts with judicial organs and regulators in other legal systems?

2. Argumentative aspects of judicial decision-making

Regarding the *judiciary's working methods*, judicial deliberations and judicial reasoning are affected by the related trends of globalisation and the Europeanisation of judicial decision-making. These developments call for a rethinking of judicial

decision-making under the rule of law. This rethinking exercise revolves around the balancing of legal certainty and predictability on the one hand with the arguable character of law on the other hand.

Since the 1950s, Europeanisation has been apparent in the growing influence of EU law and the European Convention on Human Rights (ECHR) in European legal systems. As a part of this trend, the case law of the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) has become increasingly important as a source of reference for the judicial decision-making of national courts in member states. For example, provisions of the European Convention on Human Rights (ECHR) are invoked and discussed in many cases. Tensions arise out of this trend as concerns the relationship between courts. How should national courts deal with the changing frames of reference for their decision-making introduced by the development of the European legal orders? Should the Strasbourg model be integrated more in the national legal system? How can legal certainty and predictability be ensured in the multi-level system in which national law and European rules interact?

Globalisation in a more general sense, referring to the influence of foreign legal materials on judicial decision-making, has effects on the content as well as the form and style of judicial decisions. Courts increasingly take inspiration from comparative legal sources: for example, by looking into the way in which a complex or controversial case was dealt with by a judge in another jurisdiction. This is apparent in particular in the deliberations and reasoning of supreme courts and constitutional courts. These developments raise questions with regard to judicial decision-making under the rule of law. From a theoretical perspective, the legitimacy of the courts' decision-making is at stake. To what extent do foreign legal materials classify as legitimate sources for judicial decision-making in the light of the rule-of-law requirements of legal certainty and predictability? Which standard of soundness should judicial argumentation meet under the rule of law, in particular as regards the justification of the decision? From a more practical perspective, attention should be paid to the need expressed by courts concerning guidelines for the use of comparative legal reasoning in their decision-making. Which courts engage in this kind of legal reasoning and which ones do not? Which courts are referred to most often? To what extent can the similarities and differences between the form and style of comparative legal reasoning of different courts be explained?

3. The role of the judiciary in relation to the other branches of government

The impact of current developments justifies giving attention to the *role of the judiciary in the balance of powers.* Most visibly, the increased influence of international and European law has empowered national judiciaries to strike down legislation that violates convention rights. Particularly in legal systems based on the sovereignty of parliament, this development has induced a profound change in the relationship between the judiciary and the legislator. The courts no longer restricted by a prohibition of constitutional review in their assessment of legislative acts. Moreover, the diminished 'inviolability' of legislative acts has eased the introduction of mechanisms of constitutional review into legal systems that traditionally had great resistance to this form of judicial review. An example is the introduction of the Human Rights Act 1998 in the UK, which gives competence to the UK Supreme Court to declare Acts of Parliament incompatible with fundamental rights protected by the ECHR. Another example concerns the French constitutional revision of July 2008 regarding the introduction of constitutional review in individual cases.

More generally, this trend of globalisation has an influence on the ways of communication between the judiciary and the other branches of government. The application of foreign legal materials by national judges draws attention to the tension between the legislative and the judicial function with regard to the interpretation of the law. Discussions from the perspective of the rule of law boil down again and again to the central question concerning the demarcation between legislative law-making and judicial law-making. To what extent can the legislator provide for general rules that only need to be applied by the judiciary? To what extent can and should the judiciary be allowed to engage in law-making? With regard to the executive branch, a global trend is discernible in the sense that judicial remedies against administrative actions have gained growing importance over the last decades. The question arises as to how far this type of judicial review may reach. In other words, to what extent is the judicial branch competent to strike down administrative actions? To what extent are judicial remedies effective on the basis of their scope (review *ad tunc* or *ad nunc*) and content ('marginal' or 'full' review)?

A large subtheme in this part of the research concerns the roles played by the different branches of government regarding the protection of human rights. In the present-day context, a multitude of human rights catalogues exists, including the ECHR, the Charter of Fundamental Rights of the EU, and provisions of national

constitutions. In addition, there are many ways to enforce these rights: for example, through procedures before the national courts or before the ECtHR and the ECJ. The question emerges as to how this development should be assessed in the light of the rule of law concept. Should the role of the courts concerning the protection of human rights be allowed to develop further or should it instead be restricted? What role does the legislator play in the protection of human rights and to what extent should this role be reinforced? To what extent do the roles of the judiciary and the legislator complement each other and to what extent do they interfere with each other? How can a balance be struck between the different mechanisms for protecting human rights, both at the judicial and legislative level, as well as at the national and international level? Which guidelines does the rule of law concept offer for answering these questions?

Research methodology
The research in this subprogramme will combine a legal analysis with insights from a range of other disciplines. Research into the institutional aspects of judicial decision-making will make use of insights from legal history, social history, conflict psychology, and institutional economics. The argumentative aspects of judicial decision-making will be analysed on the basis of legal theory, argumentation theory, normative pragmatics, constitutional law, and social history. Finally, the role of the judiciary vis-à-vis the other branches of government will be looked at from the perspective of constitutional law, international law, legal theory, and political science. In this way, a better understanding will emerge regarding the position of the guardians of the rule of law and the evolution of their position under the effects of historical, political, and societal trends.

Comparative legal research is essential throughout this subprogramme, and will feature in the majority of the research projects. This comparative perspective is included, among others, in projects concerning a comparison between western legal systems, which share a similar conception of the rule of law. Part of the research will include a comparison between legal systems that do not necessarily share the same conception of the rule of law, thus calling for a reflection on the western conception of the rule of law as opposed to the understanding of the rule of law in non-western legal systems (e.g. China).

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Subprogramme IV

Interdisciplinary Rule of Law Research: Methodological and Conceptual Aspects

In this research project, we address the approach taken in the research programme as a whole, by asking what it means to take an interdisciplinary approach to rule of law research. Research on the rule of law, as challenged by developments of globalisation, privatisation and multiculturalisation, is a field in which legal questions are difficult to isolate from political, economic, or philosophical questions. Each of the identified trends encompasses a range of dimensions that influence each other. In globalisation, for instance, we see how economic developments, such as the changing economic force of China, change political and legal discussions as well. When we look at privatisation, for instance in the form of the alternative dispute resolution, questions of legal legitimacy become connected to psychological and sociological questions regarding the need for such alternatives. Problems of multiculturalism, such as the relationship between state and religion, are not simply questions of constitutional law but also of moral and political philosophy. Theoretically, there are important connections between the rule of law as a legal concept and related concepts in political theory, philosophy, and ethics. However, both empirical and theoretical connections of law to other disciplines raise questions about the appropriate methods for such interdisciplinary research and more fundamentally, about the kind of interdisciplinarity involved. Hence, it is vital to reflect upon these issues within this research programme.

Therefore, the project's central research questions are the following: *How should interdisciplinary legal research be understood, and what are the consequences of taking an interdisciplinary approach for the methodology of rule of law research?*

Our theoretical base is that law is best characterised as a discipline on the crossroads of the humanities and the social sciences. Law traditionally shares its methods of reasoning with the humanities, but is also assessed as a means to solve social problems. Because law's affinities are both with the humanities and the social sciences, a study of interdisciplinarity in relation to law needs to include both. Ideally, an interdisciplinary approach to the rule of law should aim to integrate all the relevant disciplines into a coherent theory. However, methodologically such an all-

encompassing theory is problematic: in what way are these disciplines to be combined, and for what purpose and in which terms? In order to cope with such problems, we see two ways of using interdisciplinarity fruitfully: on the one hand, by applying a problem-oriented approach, inspired by pragmatist philosophy of science, in which the problem to be studied determines the extent to which other disciplines need to be incorporated; on the other hand, by implementing a more theory-driven approach in which the basic principles and methods of two disciplines are examined for possibilities and obstacles for cooperation.

The meaning of interdisciplinarity and the possibility of interdisciplinary research are confusing and hotly debated topics.[9] One of the tasks that will be taken up in this research project is to clarify the meaning of interdisciplinarity in relation to the discipline of law. This includes charting the methodological difficulties of combining law with other disciplines. An important topic is to consider how the discipline of law itself is changed by the continuing attention to interdisciplinary research and interdisciplinary problems in legal practice. We will consider these questions in general and in relation to specific other disciplines such as ethics, literary studies, argumentation theory, and psychology.

More specifically, we will focus on:
1. Reconceptualising the **academic discipline of law** in combination with the perspective of other disciplines, in order to understand in what way the discipline of law already contains elements shared with another discipline or should incorporate elements derived from the other discipline. In legal scholarship there are recurring debates about the scholarly or scientific nature of legal research. Combining a legal perspective with that of another discipline gives such debates a special urgency: what are the things that we are combining? Doing interdisciplinary research also requires a sense of disciplinarity and an awareness of the differences in approach between disciplines. We will address these questions in general as an exercise in legal theory with input from philosophy of science. However, by looking at specific combinations

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[9] See e.g. J.M. Balkin (1996), 'Interdisciplinarity as Colonization', *Washington and Lee Law Review* 53, p. 949-970; D. Vick (2004), 'Interdisciplinarity and the Discipline of Law', *Journal of Law and Society* 31, p. 163-193; N. Luhmann (1991), *Die Wissenschaft der Gesellschaft*, Frankfurt a.M.: Suhrkamp.

such as law and literature, we expect to gain a clearer understanding of both the disciplinarity of law and the interdisciplinarity involved in combining it;

2. Studying the **practice of law** by using the perspective of another discipline in order to clarify what goes on in legal practice and to propose improvements of legal methods and professional behaviour. Interdisciplinarity is not only a matter of academic research in which different disciplines are involved, but also of bringing other disciplines to bear upon problems of legal practice. In legal practice, the need for input from other disciplines is clear, although interdisciplinary issues are usually relegated to the factual domain. Here, we want to examine how interdisciplinarity bears upon the professional practice of law itself. Examples are research on legal argumentation, in particular judicial reasoning, and research on mediation as a practice influenced by both law and psychology. We will examine how our understanding of these practices changes as a result of an interdisciplinary approach;

3. Tackling the underlying issue of the changing **relationship between legal practice and the academic discipline**, which can also be studied fruitfully by comparing law to other domains such as ethics. Legal research has always been closely bound to the practice of law, but this is changing. There is a growing self-awareness of law as a truly academic discipline, although it is not clear what the academic character consists of. We aim to pursue this question in a comparative manner, by drawing on debates in other disciplines in the humanities such as ethics and literature;

4. Exploring the relationship between **interdisciplinary research and comparative law**. In comparative law, there has long been an awareness of the need for a broader view of law, by including legal culture, history, and sociology, in order to understand and possibly overcome differences in legal doctrine and practice. However, it has proven difficult to apply this insight to the practice of comparative legal research. This has led some to reassert the value of doctrinal comparative research.[10] Here we approach the relationship from two directions, by reflecting on the use of

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[10] E.g. Jan M. Smits, Redefining Normative Legal Science: Towards an Argumentative Discipline, in: F. Coomans, M. Kamminga & F. Grünfeld (ed.), *Methods of Human Rights Research*, Antwerp-Oxford: Intersentia 2009, pp. 45-58.

interdisciplinary methods in comparative law and by reflecting on comparative methods of interdisciplinary research;

5. Theorising the relationship between **interdisciplinary research and the innovation of law**. As noted in the introductory text, giving an account of the influence of trends such as globalisation and privatisation entails developing a theory of how law can cope with the dynamics caused by these trends. Our hypothesis is that the innovation of law that is necessary to make this possible will be most successful when built upon interdisciplinary research, both by comparing innovation in other domains with law and by integrating interdisciplinarity in innovative approaches to regulation.

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