

ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION


Submitted: 26 Feb. 2026 / Reviewed: 15 May 2026 / Published: 6 July 2026

Globalisation: A Call for Contextualising Legal Research and Reframing Its Background Theory

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ABSTRACT

This article argues that globalisation poses a serious challenge to the traditional way of doing legal doctrinal research. Globalisation drives us towards comparison, creating comparative awareness; it creates the need to understand multidimensional legal orders; and it problematises the paradigm that the state is central to legal change. We argue that these three implications of globalisation challenge both the dominant theory of law, legal positivism, and the traditional methodology of legal research. Although our basic stance is that of theoretical and methodological pluralism, meaning that the choice of theory and methodology depends on the research problem and the approach taken to address it, we believe that it is not possible to address globalisation meaningfully with a legal positivist theory and a monodisciplinary methodology. The complexities of globalisation lead to interlinked, multidimensional legal orders that show gaps, lead to incoherence and give rise to controversies about meaning and interpretation. Dealing with these characteristics of 'global' law requires opening up legal theory to include a variety of sources and arguments and acknowledging the role of other actors than the state. It also requires contextualising legal research methodology because understanding the gaps, incoherences and controversies is only possible by relating legal orders to their historical, political, socio-economic and theoretical contexts.

Keywords: globalisation, legal positivism, legal research methods, law-in-context research, doctrinal research

The outline of this paper was first presented at the webinar "Globalization and Multidisciplinary Approaches to Research: Some Critical and Perspectival Issues", organised by *Athena* on 24 October 2025. We thank those present for their comments. We also thank an anonymous reviewer for their very helpful comments.

ATHENA

Volume 6.1/2026, pp. 1-37

Thematica

ISSN 2724-6299 (Online)

<https://doi.org/10.60923/issn.2724-6299/24309>



Introduction

This article argues that globalisation poses a serious challenge to the traditional way of doing legal doctrinal research in Civil Law countries. Since the introduction of the Napoleonic codes, most legal research in European Civil Law countries has traditionally had a strictly doctrinal character. Its core is the construction of a coherent legal doctrine on the basis of black letter legal sources. These sources have a clear hierarchy: the constitution, statutes, other regulations, and judicial case law, with a minimal role for customary law. This hierarchy, combined with other rules like *lex posterior derogat lege priori*, minimalizes the amount of inconsistencies, especially in more static societies. As a consequence, the scholarly construction of the positive law as a coherent doctrine may often be fairly uncontroversial, all the more so because the sources and interpretation methods of scholars are similar to those of judges. Where the judge is supposed to be no more than the *bouche de la loi*, the legal scholar does no more than systematize positive law.¹ It is in line with this idea that various jurisdictions explicitly allow for the work of doctrinal scholars (*la doctrine*) to be regarded as an auxiliary source of law – they state the law in a way similar to what judges would do.

Of course, traditional doctrinal scholars also give comments, write annotations, and give suggestions for new statutory rules or novel judicial interpretations. Even so, the scholarly culture is relatively uncritical and tends to minimise the need for interpretation and the role of controversy. This matches the absence of dissenting opinions in most Civil Law systems, and the tendency in many handbooks to restrict dissent in doctrinal discussions to non-discursive footnotes without much argument why this view should be rejected. In such a culture, which prioritises the description of legislation and

¹ See Montesquieu (1948), Book XI, Ch. 6: “Les juges de la nation ne sont que la bouche qui prononce les paroles de la loi, des êtres inanimés, qui n’en peuvent modérer ni la force ni la rigueur”. English translation: “[T]he national judges are no more than the mouth that pronounces the words of the law, mere passive beings incapable of moderating either its force or rigor”.

case law, legal positivism is easily assumed as the implicit background account of what law is. Moreover, because there is little need for going beyond the formal legal sources, theorising the basic idea of law and inclusion of philosophical or empirical research seem unnecessary. Even when criticising the current law, or when making suggestions for law reform, the primary basis for evaluations and recommendations is usually found in the coherence of the legal system itself and in its fundamental principles.

Of course, this is a simplified sketch. Many doctrinal scholars do more actively engage in, sometimes radical, criticism involving philosophical or empirical analyses. Some legal orders have a more positivistic scholarly culture than others; for example, in the Netherlands the influence of the legal theorist Paul Scholten (1934), who emphasised the need for interpretation and a sense of justice, may have contributed to a somewhat less positivistic culture. But we suggest that this general sketch adequately describes the dominant approach in Civil Law scholarship until recently.

In this article, we argue that globalisation poses a serious challenge to this traditional way of doing legal doctrinal research. First, globalisation posits a practical challenge to legal positivism as the implicit theory of law in doctrinal research, because law in a global context shows more gaps, inconsistencies, tensions and controversies due to its plural character and demands an appeal to other sources than black letter law. And second, globalisation requires more explicit attention to contexts of law and thus calls for a contextualisation of doctrinal research.

We have argued elsewhere that there are good philosophical reasons to reject legal positivism as the general theory of law (Van der Burg 2014; Taekema 2008). We have also argued that there are good methodological reasons for contextualising legal research generally, also when focussing on domestic law (Taekema and Van der Burg 2024). However, we want to make two more specific, practical arguments here with regard to legal research. We argue that if legal researchers take the phenomenon of globalisation seriously, legal positivism becomes increasingly less adequate and less relevant as a

conceptual base for doctrinal research. It may still be defended, but it is much more difficult and therefore less attractive to do so. Similarly, we argue that a purely black-letter-law approach in doctrinal research becomes less adequate and less relevant in light of globalisation.

The debate between legal positivism and its various opponents can be seen as one which cannot be won decisively on the basis of arguments only. Kuhn's remarks about different paradigms apply here too: "Though each may hope to convert the other to his way of seeing his science and its problem, neither may hope to prove his case. The competition between paradigms is not the sort of battle that can be resolved by proofs" (Kuhn, 1962, 148). What happens in the case of a paradigm shift is that it becomes increasingly more difficult for the old paradigm to deal with all kinds of anomalies and practical problems, and especially that novel problems arise with which the old paradigm cannot deal adequately. Although these can still be addressed by adding complex refinements (like the epicycles added to the Ptolemean model), the old paradigm becomes less attractive and it is abandoned.² Although the comparison between a natural science paradigm and the theoretical framework of legal doctrine should not be overstated, not the least because there have always been alternative theories of law competing with legal positivism, as a framing of doctrinal research legal positivism has shown its dominance in Civil Law countries. Thus, based on the idea of a paradigm, we claim that globalisation presents the paradigmatic theory of legal positivism with many phenomena that it can only address by making very complex adaptations that make the theory less simple, less adequate and less practically useful for doctrinal researchers.

Our main purpose in this article is not a critique of legal positivism, but an advocacy for a different understanding of doctrinal research. Although doctrinal research is traditionally often associated with legal positivism, we

² Or rather like in the quote from Max Planck (in Kuhn, 1962, 152): "a new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it".

argue that this is not necessary. A more interpretive and context-oriented theory of law can frame doctrinal research in such a way that problems of globalisation can be captured better. Rejecting the core of legal positivism, in the form of the sources thesis, does not imply that research that uses black letter law as the key component of its subject matter is useless. A good doctrinal analysis on the basis of black letter legal sources is still important – in our view, it remains the core of doctrinal research. However, it is not enough. If doctrinal scholars do not pay attention to the contexts of law, their work becomes less adequate and less relevant, because globalisation gives rise to more gaps, more inconsistencies and tensions, and more controversies, which cannot be accounted for without contextual understanding. Excluding contexts yields a less complete understanding of law and of its underlying dynamics. Our position is therefore that legal doctrinal research needs to take context into account to some extent.

Before we move on to our main argument, we should explain our understanding of legal positivism and of contextualisation. We focus here on mainstream legal positivism that can be summarised with the notion of the sources thesis: what the law is can be determined on the basis of social facts alone. “In the most general terms the positivist social thesis is that what is law and what is not is a matter of social fact” (Raz, 1979, 37). Or in the formulation of John Gardner: “In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits” (Gardner, 2001, 199). This thesis expresses that the sources of law can be identified on the basis of morally neutral criteria, and that this is sufficient to determine what is valid law.

Contextualisation of legal research implies that in legal research we go beyond black-letter law and include attention to the contexts of law. These contexts can be empirical, like sociopolitical, economic, and historical contexts, but they can also be theoretical (the underlying assumptions of the legal order and the core concepts) or normative (the moral, policy and cultural backgrounds of the law) (Taekema and Van der Burg 2024, Chapter 5).

Contextualisation is a matter of degree. It can mean that doctrinal researchers merely include some insights from other disciplines, for example, sociological or economic theories about the effectiveness and costs of certain instruments for law enforcement. We call this contextual doctrinal research. It can also mean that doctrinal theories actually use methods from auxiliary disciplines and engage critically with theories from other disciplines, for example, by doing interviews and surveys or a thorough philosophical analysis of theories of justice. We call this interdisciplinary doctrinal research (Taekema and Van der Burg 2024, Chapter 5).

We begin our analysis with distinguishing three implications of globalisation that have an impact on how to do legal research (Section 1). Then we show how these three implications of globalisation problematize using legal positivism as the main background theory for doctrinal research (Section 2). Next, we discuss the implications for doctrinal legal research and show that due to globalisation, contextualisation becomes more central (Section 3). In Section 4, we discuss more in detail what this means for legal research methodologies. We illustrate our analysis with a concrete example, namely, that of researching climate litigation (Section 5). We end with some conclusions.

1. Three Implications of Globalization

Globalisation is a very complex phenomenon, and we cannot discuss it completely. It can be provisionally summarised as the interconnectedness of societies across the globe in various ways, giving rise to transnational relationships between various actors that bring legal orders into contact with each other. It has many implications for law and for legal research. We merely want to focus on three implications for legal research. The first is that globalisation implies that scholars become aware of different legal orders with different presuppositions and different contexts. As a result of this comparative awareness, they cannot take their own legal order and its implicit

presuppositions about law and its various contexts for granted. The second is that some of those legal orders are not only distinct, but also partly integrated, like the legal order of the Council of Europe, that of the European Union, and the domestic orders of EU Member States. This phenomenon may be called multidimensional legal orders. As a result of this partial integration, there are many conflicts between legal norms that need to be addressed, and the content of the law becomes more indeterminate and controversial. This leads to a greater need for interpretation and reconstruction of legal orders; reliance on black letter legal sources alone becomes less adequate. The third is that globalisation is a phenomenon in which economic, political and social factors are major drivers of change. This not only implies that legal change needs to be related to these factors, but also that states and state law are changing shape and that other actors and their regulation are increasingly relevant. As a result, lawyers need to pay more attention to various contexts than when studying domestic legal orders (Berman, 2020, 11).

We do not claim that these are completely new phenomena. Comparative law has a long history; an example can be found in the work of Montesquieu. The problem of conflicting norms from different systems has long been the focus of international private law. Forms of global legal pluralism were predominant in Medieval times in Europe and in the Arabic and Ottoman empires, with their fragmented and overlapping political and legal orders. Good lawyers have always been aware of the need for an understanding of the contexts of law. We merely want to argue that the current phenomenon of globalisation presents challenges that need to be addressed by legal scholars, and that these three implications make a legal positivist understanding of law and a purely doctrinal approach less relevant and adequate.

We can formulate these challenges in a different way as well. In traditional doctrinal research, the focus is on knowledge, on detailed knowledge of what the relevant rules and principles are and how judges have interpreted them in case law. Of course, there is a need for a broader understanding of those elements in light of the system of law and of the underlying legal principles

and values. That may also require some understanding of the legal history and legislative history. Even so, the core of the law consists of legal sources which we can know. The challenges of globalisation require that we have a deeper understanding of a legal order in light of its historical, social and theoretical contexts. If we cannot explain why our own legal order has taken a certain trajectory, deviant from e.g. the French one or the European one, we do not fully understand it. Therefore, globalisation requires a shift in emphasis from knowledge of law to its understanding.³

1.1 Comparative Awareness

Globalisation confronts us with the existence of legal orders that differ from ours and thus makes us aware of their relevance. These can be domestic legal orders, but also international or supranational legal orders, such as those of the United Nations and the European Union. This comparative awareness implies that we come to see the possibility of alternatives to our own legal order and that we may begin to question legal notions that seemed natural before. Many legal bachelor students tend to take their own legal order for granted: it is simply a fact that it has formulated these specific rules. However, once they become acquainted with different legal orders, curious students and researchers may want to understand why these differences have arisen – in some cases, despite the fact that they all began with the same source, like the Napoleonic Civil Code. A further question may be whether the different legal orders may provide inspiration for law reform, for instance by transplanting certain notions into our own legal order (On legal transplants, see: Watson, 1993; Siems, 2022, Chapter 8.).

In order to answer these why-questions, we cannot avoid going into the contexts of law. For example, to explain differences between legal rules, we need to understand not only the legal history of the different legal orders, but the history of those countries and regions in general. Although the historical

³ For the distinction between knowledge and understanding, see Elgin (2017, 9-14); Taekema and Van der Burg (2024, 8-9).

context cannot explain all of the differences, it will explain key elements. This not only requires understanding legal history, but also an understanding of the social and political contexts. To take an example, if researchers study the law on euthanasia, and look to the Netherlands for inspiration, they need to know something about its pluralist history and its orientation towards consensus and compromise, and about how health care is organised in the Netherlands, with a strong role for primary health care providers. (See, e.g., Otlowksi, 2000; Battin, 1994.) One cannot understand Dutch euthanasia law without taking these various contexts into account. Researchers may then find that they also need to better understand the contexts of their own legal order to explain why it has taken a different trajectory. This is even more important when they want to analyse whether some elements of the Dutch euthanasia law could and should be incorporated in their own legal order.

Although a thorough study of historical and socio-political empirical contexts is needed to conduct serious comparative work, there are other dimensions that should not be overlooked. The implicit presuppositions and fundamental principles and values of a legal order are also highly relevant in understanding the differences. For example, are notions of consensus and compromise central to the political system or is it a winner-take-all system? (For these different approaches to democracy, see Lijphart, 1999). This may be relevant when analysing whether and, if so, how a referendum should be introduced in a consensus democracy like the Netherlands. What is the background understanding of natural persons in the legal order? Whether this is a more individualistic or community-based understanding is highly relevant to understand the way a bill of rights may function in a North-American or Asian legal order.

Of course, all the above is well-known among comparative lawyers. Comparative lawyers have always emphasised the need to take contexts into account (Van Hoecke, 2004 and 2011; Siems, 2022; Samuel, 2014). If we do not understand the societal context, its history, its political and moral backgrounds, we cannot fully comprehend the law. Moreover, we must make

our own implicit presuppositions explicit and critically evaluate them, to avoid bias and error in the interpretation.

The most general point of this implication of globalisation is that we become aware of differences, and that we can see (elements of) other legal orders than our own as alternatives. The different legal orders may function as a lens to better understand our own order. This implies that, in order to understand our own legal orders better, we also have to pay attention to its contexts. This requires a contextualisation of doctrinal research.

1.2 Multidimensional Legal Orders

Traditional comparative law focuses on comparing two or more separate domestic legal orders, such as English law and German or Italian law. French law is not part of Dutch law and vice versa – even though French interpretations of the *Code Civil* are relevant for discussions on the interpretation of the Dutch *Burgerlijk Wetboek*.⁴ However, many legal orders today are more strongly intertwined. The prime example of this intertwining is found in the context of the European Union (Amentbrink, 2008). EU law is part of the law of EU Member States, and national judges are also European law judges. In many legal systems, the European Convention of Human Rights is also directly legally binding, like in the French or Dutch legal order, or has been converted into national law, for instance in the UK's Human Rights Act. Many other examples can be given in International Law or the regional systems of other parts of the world.

We live in a situation of global legal pluralism: a person is subject to numerous legal orders that are partly independent and partly intertwined (Berman, 2012 and 2020). These legal orders will often overlap and may sometimes conflict. In some cases, especially in Europe, the description

⁴ In the nineteenth century, the Dutch civil code was initially merely a translation of the French *Code Civil*. When a new civil code was accepted in 1838, it was still strongly inspired by the French one. A similar point can be made in the common law, where judges may quote interpretations by courts from other common law jurisdictions.

multi-level or multi-dimensional⁵ legal orders is an apt description: the orders are so strongly intertwined that they can no longer be understood in isolation but have to be seen as parts of a complex larger whole (Nuñez, 2024). The relationship between the legal order of the Council of Europe, the EU legal order and domestic legal orders is a clear example of multidimensional legal orders. However, even if they overlap and may contain almost identically formulated norms, the interpretation of a norm may vary, depending on the legal system in which it is embedded. Similar words may be false friends, similar rules may be interpreted more literally or more teleologically in different legal cultures. Moreover, this intertwining is not static; there is a dynamic interaction between these legal orders and each of them is continually changing in its own way.

Traditional doctrinal research is considered as giving a clear and coherent exposition of the current law, based on a set of authoritative black letter texts with an accepted hierarchy in the legal sources. However, in multidimensional orders such an exposition can only result in a partly coherent doctrine. There are too many gaps, inconsistencies, tensions and controversies. The metaphor of law as a tapestry is helpful here (Amaya, 2015), which we develop as follows. Positivist doctrinal research aims to present the current law as a coherent tightly woven tapestry with a clear realistic representation of a scene. It may be open-textured, resulting in some indeterminacy at the penumbra (Hart, 1994, 128-136). Multidimensional orders are more like a postmodern tapestry made of different materials, containing many gaps and fabrics with different textures which leaves the art lovers to their own interpretations to make sense of it. A traditional doctrinal approach guided by the ideal of coherence cannot do justice to this, as it is often impossible to construct a coherent doctrine of such a multidimensional

⁵ The term multidimensional is less common than multi-level, but it captures the interconnections better: it is not always a matter of distinct hierarchical levels (Amentbrink, 2008, 25). Consider e.g. that the EU and the Council of Europe do not stand in a hierarchical relationship.

phenomenon. A coherent picture will necessarily be reductive, leaving out important characteristics.

Moreover, in order to even identify possible gaps and tensions in the combination of various legal orders, scholars must understand the interpretive legal cultures of each order, its underlying principles and values and its contexts. They have to be able to interpret each legal order meaningfully, and as argued above, this requires more than merely black letter law. The more interpretive the task of legal scholars is, the more it is essential to include contexts. Therefore, in multidimensional legal orders even traditional doctrinal scholars need to pay more attention to contexts.

This need for contextualisation is even stronger if scholars do not want to restrict themselves to construction of the legal doctrine, but also want to critically evaluate and provide recommendations for legal reform or improvement. (Taekema and Van der Burg 2024, Chapter 7; Jacobsen, 2002, 142-146) Evaluation without taking account of the contexts is sometimes possible, for example, when there are conflicts between black letter law rules of a domestic legal order and the European Convention of Human Rights in which case a doctrinal source can be used to provide a framework for evaluation. Usually, however, evaluation requires understanding the contexts, for example, of the different historical trajectories of the relevant legal orders, of the bureaucratic and political realities behind regulations, and of the differences between societies. A tax rule that works well in the Dutch context may not work at all in the Italian context because of different monitoring and enforcement institutions and cultures. This need for contextualisation is even stronger if one wants to provide recommendations for reform.

The phenomenon of multidimensional legal orders requires a significant degree of contextualisation to understand and evaluate the interactions of such orders. In this respect, the phenomenon requires a research attitude that goes beyond basic comparative awareness. In comparative law, the degree of contextualisation can sometimes be limited under specific conditions, namely if one focuses on specific norms in largely similar legal orders with a common

pedigree. Both in comparative law and in the study of multidimensional legal orders, however, a broader contextualisation is usually needed to fully understand the development and interpretation of legal norms (Mak, 2015). For the doctrinal construction of multidimensional orders, some degree of contextualisation is necessary to understand how the various legal orders relate and to analyse whether they conflict or not.

1.3 Beyond the State-centric Paradigm

Traditional Civil Law scholarship fits in what may be called a state-centric paradigm. (Van der Burg 2025) The sovereign state is the dominant actor on a territory. It has the monopoly of force, is the most powerful actor, and is the ultimate source of (almost) all law. The constitution is supposed to provide the legislature with law-making power, and all other law-making power is (indirectly) derived from this, through lower regulations and court-made law.⁶ We submit that this was never a fully adequate paradigm, but in 19th century Europe it was adequate to a certain degree. At least, if we exclude the reality in the various colonies, where legal pluralism was widespread and where colonial states frequently did not have the same degree of control over society as they had in their European territory (Benton, 2020).

Globalisation undercuts this paradigm in various ways. Comparative awareness may make us realise that there are other domestic legal orders, and that some of these may not be so centralised and state-focussed. For example, they may depend more on customary law, or they may contain a more fragmented dispersion of legal authority, like in confederations and empires. This undercuts the automatic claim of the state-centric paradigm that this is the only way to think of law, and it may lead to questioning some of the implicit presuppositions of a legal order. Multidimensional legal orders and global legal pluralism are a more radical challenge to the state-centric paradigm as they acknowledge international and supranational law, and

⁶ The hierarchy of sources resembles that of Hans Kelsen's pyramidal model of the law, in German *Stufenbau der Rechtsordnung*. See Kelsen, 2020, 73 ff.

provide more recognition to customary law, *lex mercatoria*, self-regulation and contracts. In multidimensional legal orders, the state is no longer the primary, let alone the only source of law. Even so, we should pay attention to variation here: legal orders may be internally diverse, as in federal systems, they may be state-centric and relatively closed to international and global law, or some other variation.

The most radical challenge to the state-centric paradigm, however, goes beyond the law. The power of national states to control society, through law and other means, has diversified. Many multinational companies have a budget that is far higher than that of most states. Digitalisation adds to the irrelevance of state power; companies and users can easily avoid state restrictions and taxes. Economic processes and digitalisation are often more important forces in social change than state law. National law is not very effective in controlling these processes, and even the law of strong states or the European Union is often only partly effective. Moreover, neither national states nor international law seem to have much traction in violent conflicts like those in Gaza, Ukraine or Sudan.

The conclusion is that a purely doctrinal analysis is less adequate in today's legal context. In order to regulate hate speech on the internet, lawyers need a deep understanding of how the internet works in all its variations and subnetworks. In order to regulate international trade, lawyers need a deep understanding of economic processes. Here, contextualisation is essential: it is not some form of domestic law or international law that controls the development and regulates society. Global developments have a dynamic of its own, and law has sometimes only a backseat in the development. Doctrinal researchers need a thorough understanding of economic and social phenomena before they can even start thinking about how the law might work – if at all – to regulate these phenomena.

There is another reason why contextualisation of doctrinal research becomes more necessary. In the globalising world, law is quite dynamic. There is a greater need for advice by legal scholars on how to understand the

trends, and how to try to steer developments in more desirable directions. Legal scholars can play an important role in guiding and criticising law reform, and we suggest that they should be willing to take on that responsibility (Taekema and Van der Burg 2024, Chapters 7 and 14). When they do, they need a thorough understanding of society's problems, of the underlying moral and political values and of the various contexts of law.

2. The Increasing Irrelevance and Inadequacy of a Legal Positivist Framing

In the previous section, we have distinguished three implications of globalisation that are highly relevant for doctrinal research. The common thread is that they require a more explicit interpretation of law in order to construct the legal doctrine, and that they therefore require a more explicit study of contexts. Thus, globalisation requires a more contextual understanding of legal doctrine.

These three implications also have implications for legal positivism as an often implicit theory in doctrinal research. The core idea of legal positivism is the sources thesis: for the determination of what the law is, appeal to the merits of law or morality is not required. Social facts, in particular authoritative decisions by legislatures and courts, suffice.

Our general claim is that interpretation is always an essential part of constructing legal doctrine; it is never pure exposition. These interpretations are a key part of legal doctrine, which implies that a focus on specific sources, facts and decisions is too narrow a view of law. Legal materials such as legislative texts and sets of norms show gaps and controversies, and there may be competing interpretations. For example, a constitution can be interpreted in light of its original meaning,⁷ or in light of present-day

⁷ And even the interpretation of 'original meaning' may differ. See the debate between textualists and originalists about the interpretation of the American constitution (Solum and Bennett, 2011).

circumstances. Both interpretations may be defensible in certain contexts, but they may conflict. The choice for one particular interpretation is ultimately a normative one – even if many positivists seem to deny that it is. If someone sees a constitution as a living document, this first of all implies a descriptive claim that this is more adequate in accounting for the functioning of the constitution – which requires contextual reasoning. Secondly, it implies that the interpretation as a living document is a better way of achieving the values enshrined in the constitution. Of course, an originalist view makes the opposite claims. For this normative choice, we therefore must appeal to political and moral theories about the underlying values of the constitution. And thus, a full interpretation requires more than merely an appeal to social facts. This implies that a positivist framing is not adequate to capture the work of doctrinal legal scholarship.

Arguing from a positivist stance, a reply might be to say that in case of a controversy, scholars must simply accept that they cannot determine what the law is. It is up to the judge to decide such a case as they choose; judges have discretion. In a legal positivist view, it may be true that the law cannot be completely determined on the basis of social facts, but that is not a serious problem, because the amount of hard cases and interpretive controversies is usually minimal. Moreover, these are no longer hard cases once the judges have decided. Case law serves to minimise the gaps in other sources. In our view, in doctrinal scholarship even when it only concerns domestic law, controversies and gaps need to be accounted for more elaborately than a positivist theory tends to acknowledge. We would argue that in many cases in which a clear meaning of sources is supposed, this may still be questioned. Interpretive controversy is a core feature of judicial practice, especially in the context of higher courts which are the main focus of doctrinal scholarship. In landmark cases, the court could have decided otherwise. Before the court case there were two defensible interpretations – if that had not been true, the case would not have presented a novel insight, and students and scholars would not have paid attention to the case. Therefore, in our view, a hermeneutic or

interpretive concept of law is a better starting point to account for law's openness than legal positivism.

The debate between positivist and interpretive theories is not decided by this feature of law, and a positivist may still defend the view that social facts determine law by viewing interpretive controversy as a minor feature of law. However, this stance becomes more difficult to maintain when the implications of globalisation are taken into account. Each of the three implications that we discussed above generates a need for contextualisation, implies that there are more controversies and gaps, and requires more choices of interpretation. To account for law in a global setting, legal positivism is a less attractive theory because it does not sufficiently engage with law's contexts.

First, comparative awareness. The first problem that arises in the context of comparative law, is that the theory of law a researcher holds needs to match the character of the legal orders being studied. Although legal positivism may be put forward as a universal theory of law, this overlooks the variations between legal orders on, for instance, the centrality of legal values and principles, the weight attached to case law, the place of customary law, or the openness of legal norms.⁸ Thus, comparative awareness makes us aware that we cannot take the implicit presuppositions of our legal order for granted, and that the existence of alternative interpretations is not limited to a small set of particular cases about specific rules. The differences in interpretation extend to the level of the basic elements of the legal order and the boundaries of that legal order. Comparative awareness opens up the possibility that theories of law themselves may differ from one context to another, thereby questioning the abstract and universal claims of legal positivism (compare Giudice, 2015). Although this point does not automatically lead to an interpretive theory as the alternative, it requires recognition of a plurality of possible theories of law. Once we have acquired a comparative awareness, we tend to discern

⁸ Some of the theorists who emphasize variation and non-universal scope of theories still use positivist ideas, see Twining, 2009, 18-31.

many more gaps and controversies, and thus the positivist image of only a relatively small area of discretion becomes less adequate as a description of a legal order fraught with gaps and controversies.

Second, multidimensional legal orders require a more thorough contextualisation and recognition of the relevance of other sources (Cotterrell, 2018, 89-102). One of the core consequences of multidimensional legal orders is that there are many interpretive conflicts between norms belonging to different orders, between which there is not always an uncontroversial hierarchical order. In order to make sense of these interactions, it is not enough to consider only formal sources. Once contractual relations, state practice, customary law, soft law, and emerging social and legal norms are acknowledged as relevant, expositions on the basis of only state law, and especially black letter state law, are seen to be fragmented, incoherent and incomplete. A theory of law that prioritises state law and authoritative sources misses the contribution of these other forms of law and yields an incomplete account of multidimensional legal orders. Legal positivism uses the model of one domestic legal order and may extend its theory to account for the relationship between international law or a European legal order and domestic law.⁹ However, such an account, starting from a limited sources thesis, treats these orders as separate, at best linked by specific rules that govern their interactions. Such a picture misses the intertwining and dynamic interactions between these, most importantly the mutual influence the orders comprised in multidimensional legal orders have on each other (Krisch, 2021). The interactions and conflicts may be at the core of a legal order, for example, about whether a state court or a European court is the ultimate authority,¹⁰ or whether the double role of many councils of state (as court and

⁹ One example is Michaels, 2021, who builds on Hart's idea of secondary rules to introduce tertiary rules which specify the relationships between legal orders. We side with authors who see the relationships and interactions as more complex, including partly integrated legal orders.

¹⁰ FCC, Order of October 14, 2004, 2 BvR 1481/04, BVerfGE 111, 307 (translation available at <http://www.bverfg.de/e/rs20041014_2bvr148104en.html>) ("Görgülü").

as legislative advisory body) violates the *trias politica* and the right to a fair trial.¹¹

This means that legal positivism becomes less adequate and relevant in multilevel legal orders. Its concept of what the law is excludes the controversies and gaps and relegates them to mere discretion of judges. As a result, the scholarly doctrine as interpreted by scholars will have more gaps and controversies and will provide less certainty.

Third, the decreasing adequacy of the state-centric paradigm implies that doctrinal scholars need to pay more attention to social and economic phenomena. The engine of legal dynamics is no longer primarily seen as a politico-judicial one, but is to be found in the economy and society at large. If this is where the changes are taking place, then legal scholars should also pay attention to the dynamics beyond the law. Of course, socio-legal scholars, and legal realists, have argued so for a long time; compare the famous quote by Eugen Ehrlich: “the centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself” (Ehrlich, 2002, Foreword). What is new, is that even for those trying to do hard-core doctrinal analysis, the need to study both empirical and normative contexts can no longer be denied. Here even more than when analysing the implications of multidimensional legal orders, a deeper understanding of contexts is unavoidable. When the contexts are so central in co-determining legal developments, understanding the law and its dynamics is impossible without a thorough contextual analysis. This means that many non-legal sources and normative contexts are necessary to interpret the law and that arguments need to be given to justify normative choices in these interpretations. This implication of globalisation stresses the need for interpretation in light of contexts and thus makes the sources thesis increasingly untenable.

¹¹ ECHR 28-9-1995, ECLI:NL:XX:1995:AG0214 (Procola).

In our view, there is a range of non-positivist theories that offer more defensible alternatives to legal positivism. These theories range from more classical legal philosophy (Fuller; Dworkin) to interdisciplinary theories building on socio-legal research (Cotterrell). What we see them as having in common is an interpretive or hermeneutic understanding of law that accepts that interpretive controversies are at the heart of legal scholarship (and judicial practice) (Taekema and Van der Burg 2024, 36-42). What these theories share is an understanding of law as a value-laden order that needs to be understood not only descriptively in terms of facts but as including interpretations of law's principles and values. Although the extent to which other sources are acknowledged differs between them, the complexity of law and legal interpretation is part of the account. Interpretive theories of law try to account for the interactions between legal norms, the openness of legal orders and competing interpretations of what law means. Thus, we see the hermeneutic understanding of law as a shared feature of such theories of law, even though the other parts of the theory may differ quite a bit.

Interpretivism in this broad sense provides a better base for doctrinal scholarship than legal positivism as it suggests that scholarship can also play a role in case of controversies and gaps. For scholarship to advance ideas on plausible interpretations, doctrinal scholars need to delve into the contexts. And moreover, they need to do normative analysis, because in the end value judgments will provide the normative arguments that can help to determine which interpretation is the best. In this way, the most practically useful way of doing doctrinal scholarship in the global context requires a non-positivist stance. Thus, legal positivism becomes not only less adequate, but also less attractive for doctrinal scholars.

3. The Need for Law-in-context Research

These three implications of globalisation imply that doctrinal scholars need to go beyond mere doctrine. We need more contextualisation, we need to put

interpretive controversies more to the fore, and we need to go beyond state law and include analysis of underlying social and moral practices. In order to make sense of these implications in research, interpretive theories of law are preferable to the positivist theory that is usually implied in doctrinal research. To make this work practically in doctrinal research projects, we need to do law-in-context research.

Law-in-context research in a global context requires a more explicit methodological reflection and a more elaborate research design. We have suggested elsewhere that, in general, legal scholars should pay more attention to methodological reflection (Taekema and Van der Burg 2024). Our claim here is, however, more specific; namely, that the implications of globalisation make this even more necessary. This is visible in all elements that should be included in a good research design.¹² In this section, we discuss each of these elements in turn.

3.1 Research Objectives

The first element of a research design is the formulation of research objectives. We may discern five objectives of legal research: doctrinal reconstruction, comparison, explanation, evaluation and recommendation. In traditional doctrinal research, the primary research objective is that of a systematic reconstruction of current law as a coherent doctrine. In the Anglo-Saxon world, this is often called exposition. This objective can be at the core of a research project, but we should acknowledge that there are often gaps, tensions and controversies. This is especially true for multidimensional legal orders, as we have shown above. Therefore, it is better to reformulate this research objective as the systematic reconstruction of legal doctrine for a legal order, subfield or topic as a more or less coherent doctrine, including the gaps, inconsistencies and controversies.

¹² For these elements, see Taekema and Van der Burg 2024, Chapter 3.

Globalisation makes other research objectives relatively more important. Obviously, comparison between legal orders (both horizontally and vertically) will be more frequently an objective of a research project. Moreover, as the result of increased comparative awareness, we will often want to question why a legal order has taken a certain course, and why certain rules were formulated as they have been. This requires more attention to explanation. And finally, as law in a global context is more dynamic, legal scholars may play an important role in commenting on legal developments and sometimes on giving advice on how to improve the law; thus, the objectives of evaluation and recommendations for law reform become more important.

3.2 State of the Art

Before embarking on a project, researchers must identify what we know, and what not, and what the most important practical and theoretical problems are. That is why they should pay attention to the state of the art. After all, research should aim at novel insights, not at reproducing what we already know. The state of the art in a doctrinal project should at least involve an elementary description of the current law, and of the main doctrinal accounts of the topic, a discussion of the theoretical justifications for the current law, and an identification of the main problems and controversies.

In standard research into domestic law, the state of the art is usually described very briefly or even not at all. If there is a prevailing doctrine that every reader of a law journal is supposed to know, it may seem redundant to describe it, and the same holds for the theoretical justifications – they can usually be taken for granted as there is often a broad consensus among the leading scholars in a field. Globalisation, however, changes this. As there are more gaps, tensions and controversies, it is important to identify these explicitly when describing the current law and the different views taken by legal scholars. In multidimensional legal orders, there is not simply one coherent set of underlying principles and theoretical presuppositions; there

may be different sets from contributing legal orders and scholars may disagree about the way these can be transferred and combined. In addition to a more elaborate set of scholarly opinions, the dynamics of globalisation and the continuous legal development in response to that also lead to many practical problems.

3.3 Theoretical Frameworks

Theoretical frameworks are the theories that researchers use in the explanation and evaluation of their research topic. For example, explanatory theories may explain (and justify) why there are various safeguards of due process or free speech in the current law. They may also explain the core concepts. Moreover, normative theoretical frameworks may be the basis for normative standards to be used in evaluation and recommendation.

Again, going beyond one domestic legal order makes this more complex. Due to different historical developments and different theoretical accounts developed in domestic contexts, it is likely that various legal orders have different underlying explanatory theories. Human rights in the United States may be partly explained by natural rights theories such as John Locke's, whereas in France, explanatory theories of human rights will refer mostly to French Enlightenment philosophers. To explain the international human rights treaties, we cannot ignore the horrible experiences of World War II and the scholarly reactions to it. Even if scholars want to focus on domestic law, comparative awareness may lead them to question whether the theories that have been taken for granted in their own legal order are still the best ones to use, as they become aware of alternative theories developed in other countries. Moreover, for evaluative theories, notions associated with other legal orders may provide inspiration for new normative frameworks, and thus for evaluations and recommendations for legal reform.

Obviously, this holds more strongly when scholars do not restrict themselves to one domestic legal order, but study multidimensional legal orders. As there are more relevant legal orders, with international and

supranational legal orders being an amalgam of different legal traditions, there may be a plurality of available theories to explain and to evaluate those legal orders, and we must more explicitly choose and develop theoretical frameworks. Moreover, as they cannot simply accept the – often implicit – dominant interpretation of legal concepts in only one of these legal orders, they may need to discuss the alternative interpretations that have been developed in different legal orders.

3.4 Research Questions and Subquestions

In traditional doctrinal research, there are very similarly structured or not even explicit, research questions. The research objective is that of exposition of the current law on a certain field, and that objective is considered to provide sufficient guidance for the researcher. Alternatively, the (implicit) research question may be simply what has changed in the current law as the result of recent court cases or new legislation.

As a result of globalisation, this will no longer do. Researchers have to focus their research and justify this focus and, as its corollary, what they are excluding. Why, in a comparative study, focus on these specific three countries rather than others? Should they include soft law and various international orders or not? How do they select their sources, given the abundance of academic publications? Why focus on specific problems rather than on others, when there are so many gaps, tensions, and controversies? Simply describing “the current law” in multidimensional orders without any structuring principles and questions is simply not feasible. Formulating research questions and subquestions is therefore essential for demarcation, for focus, and for an adequate planning. This makes it possible to be selective with regard to which legal fields and which legal orders are included, which additional sources, like soft law and insights about social and moral norms, may need to be included, and in the abundance of academic literature, how to select what can be considered relevant.

3.5 Collection of Research Materials

For traditional doctrinal scholars, the collection of sources may seem to be the easy part, especially when case law and regulations can easily be found with the help of electronic databases and search machines. From the start of their legal studies, lawyers have been taught what the legal sources are, namely treaties, the constitution, legislation and lower regulations, case law and, perhaps, customary law. Once the research questions have been formulated, they know what they have to search for.

If one embarks on comparative law, collection of sources is much harder for two reasons. First, the relative importance of each of these sources may vary among legal orders, and so may the possibility of interpreting them and sometimes overruling them. Second, comparative lawyers know that they need to consult additional sources, like custom, social and moral norms, as well as information about the empirical and theoretical contexts. Here again, the importance of carefully formulated research questions comes to the fore. In highly dynamic multidimensional orders, they may also want to discern trends and controversies, for which dissenting opinions, advisory opinions of attorney generals as well as academic literature may be crucial. They also may need to study contracts, wills, termination agreements and cases of lower courts to get comprehensive information. As there is an abundance of relevant materials, researchers really need focus and selection, and thus they must explain and justify which sources they use and which not.

3.6 Methods

In traditional doctrinal research, scholars, often take the implicit methods of judges as their standard. Again, lawyers have been taught those methods during their academic studies; they know how to interpret the various legal texts. Standard arguments can be made on the basis of formal doctrines on sources and interpretation and argumentation can be limited to issues on how best to connect developments to the existing system and doctrinal state of the

art. However, the combination of sources and methods of interpretation becomes more complex in the global setting.

In a comparative perspective, methodological explicitness becomes even more important. Each legal order may have different methods of interpretation and even if they basically use the same methods, the relative weight of each method may vary. The European Court of Human Rights (ECtHR) notion of a living doctrine and a dynamic interpretation is obviously different from the originalism that is currently popular in the United States. More importantly, a scholar is not bound to the interpretation methods of a court: US scholars can claim that in their view, originalism is an inadequate method and European scholars can reject the notion of a living doctrine – provided they present good arguments for their position. Especially in multidimensional legal orders, the prevailing interpretation methods between the constituting orders may differ and lead to conflicting interpretations. It is the responsibility of scholars to explicate those differences before they choose which ones are the most adequate – again, on the basis of arguments.

3.7 The Use of Auxiliary Disciplines

Although we argue that doctrinal scholarship needs to move beyond classic legal sources to include contexts, this does not necessarily require specific use of other disciplines. Contextualisation can remain at the level of using insights from existing scholarly work, so does not require engagement with other disciplines' methods. The kind of contexts to study and the extent of engagement depend on the research objectives and questions. Empirical studies to understand the social context or the economic consequences are always relevant to doctrinal research and so are historical studies or philosophical analyses, but the role they have in a research project may vary.

However, as we already noted, comparative approaches often require more research into the various contexts of a legal order, and thus often a more elaborate use of auxiliary disciplines. Obviously, this is even more necessary when we take the third implication of globalisation seriously; then the

elaborate study of other disciplines cannot be missed. If researchers include auxiliary disciplines in their research, they need to explain why, and which methods they will use to study those disciplines, and how they will incorporate the contextual insights in their doctrinal research.

3.8 Evaluations and Recommendations

As we have argued above, globalisation results in more gaps, tensions and controversies, and thus a need for addressing these. Legal scholars may not only provide evaluations, identifying the gaps, tensions and controversies, but also recommendations on how to solve them. It is likely that this will more often be the case than in traditional doctrinal research.

3.9 Methodological Pluralism

Global legal pluralism brings also specific challenges to doctrinal research. It requires working across different legal traditions and scholarly backgrounds, as different legal orders have different research cultures, different orientations towards legal methods, and to law. The clash between those different research approaches from the various legal orders may require that we develop ways to address methodological pluralism.

4. The Contours of a Law-in-context Project: An Example

In our view, a good way to get a sense of the implications of a methodological approach is to show how it may work in the context of a concrete research project. This is what we aim to do in this section: what does a law-in-context research project concerning a legal problem with a global character look like?

The example we use is that of climate litigation. We choose this project because climate change is probably the most obviously global problem we experience in current times: both the causes and consequences are spread out across the globe. In recent years, starting around 2015, many cases concerning

climate change have been initiated in various domestic legal systems.¹³ In addition, international human rights courts have decided climate cases, while the International Court of Justice (ICJ) delivered an advisory opinion in 2025.¹⁴ Thus, it seems fair to state that climate litigation has been on the rise. We argue that climate litigation is a good example of a topic that clearly plays out in the context of global legal pluralism. This has to do with the range of legal instruments, the range of actors and the multifaceted global context.

While the ecological problem is clearly global in nature, this does not automatically mean that it is also regulated globally. For climate cases, the situation is such that the problem is addressed by a variety of legal instruments with global reach, most notably the UN Framework Convention on Climate Change (UNFCCC) and its subsequent Protocols and Agreements and the international human rights treaties. However, most countries also made their own policies against global warming, which are partly related to the UNFCCC system but also have specific domestic elements using national laws. In addition, climate change is connected to human rights law (Fraser & Henderson, 2022). Altogether, we can describe the relevant law for these cases as multidimensional legal orders.

The actors that may be involved in climate cases vary. Many climate cases concern claims of individual citizens, or other affected individuals, against states in order to force those states to take more action against climate change: mitigation, or to protect against the consequences of climate change, adaptation. However, most cases are brought by non-governmental organisations, sometimes submitting the case together with a group of individuals. An increasing number of cases is not brought against a state, but

¹³ One of the first was the *Urgenda* case in the Netherlands (Supreme Court, 20 December 2019, *Urgenda v The State of the Netherlands*, ECLI:NL:HR:2019:2007). For an overview, see *The Climate Litigation Database* of Columbia University: <https://www.climate-casechart.com/>.

¹⁴ E.g. ECtHR, 9 April 2024, *Verein Klimasenioren v. Switzerland*; ICJ, 23 July 2025, *Advisory Opinion on Obligations of States in respect of Climate Change*.

against private actors, in particular against multinational companies.¹⁵ As already pointed out, a variety of different courts is involved.

To understand climate cases, it is necessary to use scientific knowledge about climate change and the possibilities for mitigation and adaption, and to have a sense of the economic and technological challenges of addressing climate change. It is therefore a field in which not only legal scholarship is contextual, but even the courts themselves reference climate science and other relevant knowledge extensively.

These three dimensions of multidimensional legal orders, a range of public and private actors and intertwinement of law with different contexts, require a law-in-context approach to research climate litigation. One of the key points of law-in-context research is the need to make choices: to specify which contexts to include, of course, but also how to conceptualise law in the multidimensional world of global problems. For this, conscious choices in relation to the state of the art, key concepts and theoretical frameworks are crucial.

In the case of climate litigation, the *state of the art* requires discussion of competing theories, competing approaches to understanding different legal orders, and identification of gaps and controversies in applicable law and in legal theories. In the field of climate law, there is a strong international debate about the global responsibilities of states for climate mitigation and adaptation. An example is the advisory opinion of the International Court of Justice specifying common but differentiated responsibilities for states on the basis of climate change treaties and on the basis of customary law and legal principles. Discussion of the state of the art therefore requires explanation of the developing relevance of environmental legal principles. It also requires attention for the relationship between treaty law and customary law. In addition, there is also a significant debate about the rule of law aspects of

¹⁵ E.g. the case in Germany, Hamm Higher Regional Court, 28 May 2025, *Luciano Lliuya v. RWE AG*, or the case in the Netherlands, Court of Appeal The Hague, 12 November 2024, *Shell v Milieudefensie*, ECLI:NL:GHDHA:2024:2100.

courts interfering in political matters such as climate policy, linking to theories of state sovereignty (Schoukens, 2024). So, one point of departure to study this could be the framework of international environmental principles, another could be a separation of powers theory. A third perspective would be to turn to climate litigation as strategic litigation, with civil society organisations as a key actor (Rose, 2024). This brings in another body of literature. Thus, the approach chosen in the particular research project needs to specify the perspective that is taken and the literature and legal issues that are key to that perspective. In the following, we take these three possible perspectives as a starting point: international environmental principles, separation of powers, and strategic litigation. The objective here is primarily to show what choices are involved depending on the direction taken.

As a direct corollary to the question of what to discuss in the state of the art (and the complexity of this), there are also choices to be made about core concepts in the research. In the example of climate litigation: Let us say that we start from the literature on the actors that bring these cases. Do we frame this as strategic litigation, as public interest litigation, as a form of legal mobilisation? (Handmaker, 2026). Such a core concept already specifies the research approach and the scope of inquiry. Therefore, the discussion of concepts brings us immediately to the point of theoretical frameworks.

If we define a *theoretical framework* as a specified part of a theory or combination of theories that guides the aim and research question, it is apparent that it makes a difference whether climate litigation is approached as an international law problem, a separation of powers problem, or a strategic litigation problem. Each of these frameworks would lead to a different approach, using different literature and leading up to different specific research questions.

Yet even though the framework guides the research approach and question, more narrowing down of *research questions* is needed especially for global issues. To name a few: How to view international law in this context – does this only cover environmental law or general institutional questions as well?

What theory of separation of powers is used to frame the issue of courts versus political actors: a functional separation between three state powers or an idea of balancing powers between a variety of institutions? How to focus strategic litigation research: should we ask a comparative question on different courts or actors, or a normative question on the legitimacy of using courts for activism?

When we turn to these research questions, we already see that certain *methodological choices* are implied. Depending on the focus and question chosen, the applicable methods will differ and will need to be specified further. The strategic litigation angle demands looking at the actors that start these cases – how to approach them and their tactics? This requires socio-legal research. Not always empirical work in itself (this is a field in which others have done a lot) but at the very least secondary sources reporting on the empirical data. The question on international environmental principles demands considering the doctrinal acceptance of such principles but also requires looking at emerging principles. For this, studying soft law documents as well as court judgments and *travaux préparatoires* of relevant treaties is important, and of course the debates in the literature about the way the law is developing. Moreover, it requires philosophical reflection on when and how a principle becomes part of law. The question of climate courts in the separation of powers context requires studying constitutional doctrines, and possibly, if human rights courts are involved, also theories about the specific role of human rights courts in this field. To get a good sense of the legitimacy of court decisions, political theory and constitutional historical contextualisation are needed to understand the particular issues arising in the jurisdictions studied. For each specified question, a different range of sources and contexts need to be addressed, which yet may all be characterized as going beyond the sources of state law. This type of contextual research often involves auxiliary disciplines to support parts of the argument, and the kind of support needed will differ depending on the research perspective and question.

The issue of determining the research question is also related to the research objective that is chosen. Although one *research objective* can still be that of systematic reconstruction of current law, the objectives in this field will often include explicit evaluation and recommendations for law reform. For each of the perspectives taken, some form of normative argument is implied. Looking at the issue of international environmental principles, an important issue arises in the evaluation of the court decisions: do the courts go far enough in their interpretation and application of these principles? A particular issue for which courts can be criticised is the minimal attention to intergenerational justice, i.e. the interests of future generations. Given the long-term effects of climate policies, should this principle not be more central to the decision making? For the question of principles, both evaluation and recommendation for better use of the principles are key research objectives. The issue of the proper role of courts in relation to other state powers is itself fundamentally a normative issue: what kind of stance of the court is legitimate considering its relationship to legislative and administrative institutions and responsibilities? Here, the focus is mainly on evaluating court decisions in light of their broader consequences. For the strategic litigation angle on climate cases, a normative question is less obvious than in the others, because there is also a large set of interesting questions that are more socio-legal and which focus on explanation as an objective. For instance, why do NGOs choose to pursue cases in particular jurisdictions? How do companies respond to climate cases in their field of business? However, asking a normative question is certainly an interesting option: how to evaluate the use of courts as an avenue for climate activism? For this, normative standards are necessary in order to evaluate the advisability of going to court. Again, choices need to be made: from a legal perspective, this may include ideas of a procedural rule of law that could lead to an assessment in terms of access to justice (Waldron 2011). But a socio-political set of standards would lead to a more bottom-up assessment about which actors and cause could benefit from court interference, an interdisciplinary law-and-social-science evaluation. What

counts as success of litigation, only a change of policy or also a change of citizen's attitudes? When is litigation counterproductive?

We conclude that this discussion of the climate litigation example shows more broadly that the study of a global legal problem entails a complexity that needs to be managed by making careful choices. Our discussion here is necessarily limited, but we think it makes it clear that globalisation, including the associated research problems, leads us away from a concept of law based on a restricted set of sources, it requires engagement with various contexts of the law, and it leads not only to legal pluralism but also to methodological pluralism.

Conclusions

Legal scholarship is a discipline with a strong tradition of doctrinal work that responds to new practical and theoretical problems with the use of doctrinal methods. In this article, we have argued that the limits of legal doctrinal scholarship as a separate disciplinary approach are reached when we need to address problems of globalisation.

Globalisation drives us towards comparison, creating comparative awareness; it creates the need to understand multidimensional legal orders; and it problematises the paradigm that the state is central to legal change. We argue that these three implications of globalisation challenge both the dominant understanding of law, based on legal positivism, and the traditional methodology of legal research. Although our basic stance is that of theoretical and methodological pluralism, meaning that the choice of theory and methodology depends on the research problem and the approach taken to address it, we believe that it is not possible to address globalisation meaningfully with a legal positivist understanding of law and a monodisciplinary methodology.

Most importantly, we find that the complexities of globalisation lead to legal orders that are not only interlinked or multidimensional but also show

gaps, lead to incoherence and give rise to controversies about meaning and interpretation. Dealing with these characteristics of “global” law requires opening up legal theory to include a variety of sources and arguments and acknowledging the role of other actors than the state. We argue that this requires moving away from positivist starting points to interpretive ones, which enable researchers to genuinely connect law to a broader range of arguments. It requires contextualising legal research methodology because understanding the gaps, incoherences and controversies is only possible by relating legal orders to their historical, political, socio-economic and theoretical contexts.

In terms of research approach, a law-in-context methodology is both ambitious and modest. It is ambitious because it opens up legal doctrinal scholarship to a set of problems that requires leaving the comfort zone of traditional methods and sources and to look at various contexts and other scholarly disciplines. It is modest because it acknowledges the importance of making choices to limit the scope of research to what is still feasible. A law-in-context project does not equal being comprehensive in dealing with a problem: that is impossible. It does require justifying the choices made and doing thorough research to answer the specific question chosen. With such an approach, researchers can make meaningful contributions that, together with the work of others, improve our understanding of law in today’s world.

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