

Critical Analysis of Law:  
Interdisciplinarity, Contextuality, and the Future of Legal Studies  
Markus D. Dubber

Traditionally, the field of legal studies has distinguished between theoretical research and doctrinal analysis. Those who work on theoretical questions—about the nature of legal rules, for instance—rarely concern themselves with detailed questions arising from the application, and interaction, of specific legal rules found in actual statutes and court opinions. There has been a divide, in other words, between those who do “legal theory” and those who do “legal doctrine.”

*Critical Analysis of Law* (CAL), a contextual and interdisciplinary model for legal studies, takes a broadly contextual approach to legal studies and moves beyond entrenched distinctions and self-imposed limitations, pursuing critique and analysis, theory and doctrine, because both are essential interdependent aspects of the enterprise of legal studies as a discipline. Critique without analysis is baseless, but analysis without critique is pointless. The discipline of legal studies cannot come into its own if it remains at war with itself.

The distinctiveness of legal studies as a scholarly discipline will not emerge unless and until its practitioners come to see it in its contextuality, external and internal. External contextuality is true interdisciplinarity in the bilateral sense: the interaction between two disciplines (e.g., philosophy and law) rather than the use of one discipline as an opportunity for application of another (e.g., law as applied philosophy, economics, etc.). Internal contextuality is an intradisciplinary project that opens up critical space by regarding law from a particular perspective within the discipline (e.g., historical analysis of law, comparative analysis of law, etc.).

In legal studies, change is in the air. There is a growing sense that the scholarly movements of the late twentieth century have begun to run out of steam, become victims of their own success, or both. “Law & society,” “critical legal studies,” “law & economics” and so on have become the new orthodoxy, as now several generations of academics have been raised on their signal contributions. The time is ripe for exploring new directions in legal scholarship and teaching that build on, yet move beyond, the achievements of the recent past.

Interdisciplinarity has been an important aspiration of legal studies since the 1970s (Leff 1978). Along the way, the autonomy of legal studies has been challenged and, eventually, lost (Posner 1987). The incursions of other disciplines—such as sociology, history, and economics—into legal studies generated considerable anxiety, even as opening up fresh perspectives on the study of law contributed to an explosion in legal scholarship (with less noticeable changes in the teaching of law).

Critical analysis of law is a contextual model of legal studies for an era that embraces interdisciplinarity, while at the same time reconceiving and contextualizing it. Critical analysis of law insists on, and recovers, the autonomy of law as a discipline, while at the same time, regarding law as one discipline among others, and the interdisciplinarity of legal studies not as *sui generis*, but instead as a reflection of interdisciplinarity in all modes of scholarship and teaching. Here critical analysis of law can draw on a growing body of literature on interdisciplinarity in other disciplines and, more generally, as an approach to learning and teaching (Klein 2010; Sá 2008; Moran 2002; Weingart & Stehr 2000), as well as on recent attempts to better appreciate the role of interdisciplinarity in certain aspects of legal studies (for instance, law & society, legal theory, or legal history) (Lavi 2011; Menkel-Meadow 2007; Vick 2004; Tomlins 2000; Balkin 1996).

Critical analysis of law pursues a bilateral mode of interdisciplinarity, as distinguished from the hasty disciplinary foraging that characterized earlier modes. Over the last forty years, interdisciplinarity in legal studies has used basic tools of the social sciences (sociology and economics) to shake up the encrusted complacency of orthodox Legal Process and Jurisprudence (Positivism vs. Natural Law). This unilateral mode of interdisciplinarity simply applies the tools of established disciplines (again, primarily in the social sciences) to the raw material of “law,” which had remained unprocessed in the hands of amateur lawyer-scholars (Bradney 1998).

Bilateral interdisciplinarity requires two disciplines, rather than using the subject matter of one discipline as a testing ground for the other. This approach captures the sparks that fly when two disciplines come into contact (and perhaps even collide), each benefitting from the other, and in the end generating more light (and perhaps heat) together than each could by itself. It is a horizontal, rather than hierarchical, interdisciplinarity, reflecting mutual respect among equals rather than application of one’s superior wisdom, sophistication, expertise, or experience to another realm.

Interdisciplinarity thus reconceived, however, is only one aspect of the contextuality of critical analysis of law. It is external (*interdisciplinary*) contextuality, which parallels internal (*intradisciplinary*) contextuality. Internal contextuality in legal studies does not bring two disciplines into contact with each other; it instead contextualizes the study of legal norms, practices, and institutions by drawing on the general approach that motivates another discipline, without however bringing to bear that discipline’s fully developed methodological apparatus.

Consider, for instance, the distinction between two historical enterprises, one called “legal history” (taken here as an interdisciplinary enterprise), the other “historical analysis of law.” Historical analysis of law, regarded as an intradisciplinary enterprise, may place law within a historical context to perform some function or other—perhaps to test the legitimacy of a given legal norm in light of the principles said to underpin it or to construct its genealogy as a technique of governance—without regarding itself as the result of an interplay between the study of history and the study of law (Bechor 2007; Lindseth 2010; Dubber 1998). Historical analysis of law, in this internal sense, is often disparagingly compared to so-called “lawyers’ history,” in the sense of a tendentious account of legal developments that advocates for a certain norm or interpretation of a norm, as if the argument were addressed to a court. Professional historians (ordinarily scholars with a doctorate in history) often criticize internal historical analysis of law as not “real history.” They are right, of course; historical analysis of law, however, as an intradisciplinary project within legal studies does not set out to do “real history.” Its contributions may prove more or less valuable, but they deserve to be assessed on their own terms. In fact, historical analysis of law recently has emerged as a particularly vibrant mode of inquiry, to the point where one could speak of a *historical turn* in legal scholarship (Tomlins 2011). Historical approaches to law, therefore, would make for a useful point of focus for an exploration of the relationship between internal and external contextuality in legal studies.

Comparative law provides another illustration of internal contextuality in legal studies. Unlike historical analysis of law, it does not have an external analogue; there is no discipline of comparison as there is of history. Yet comparative analysis of law, like historical analysis of law, has expanded and transformed itself significantly in recent years. In the past, comparative law all too often has served as an opportunity for the dissemination of one legal system’s norms or processes to another; the traditional world of comparative law was clearly divided into producers and consumers. By contrast, the new comparative law, like the new model of

interdisciplinarity, is horizontal not vertical, egalitarian not hierarchical, bilateral not unilateral (Dubber 2006).

Comparative analysis of law, which is central to the contextuality of critical analysis of law as a model of legal studies, reflects the distinction between internal and external contextuality in another, narrower, sense. Traditionally, comparative analysis has been thought of only as a means of comparing one system's legal norms with another's (intersystemic comparison). The new comparative analysis, however, also explores the diversity of legal norms within a domestic context (intrasystemic comparison); country A's criminal law norms, for instance, can be analyzed not only by regarding country B's criminal law norms but also in light of country A's other legal norms—for instance, norms of tort law or victim compensation law that govern similar behaviour, conflicts or situations. Consider, for instance, the treatment of a physical attack from the perspectives of criminal law (focusing on the question of the accused's criminal liability for "assault"), tort law (the plaintiff's entitlement to damages from the tortfeasor for an "intentional assault"), and victim compensation law (the claimant's entitlement to state compensation for a "crime of violence").

Ultimately, the contextualization of legal studies thus implies its globalization, without however neglecting the importance of more local contexts. Critical analysis of law pursues contextualization at all levels and in all aspects of legal studies, within and among disciplines, within and among legal orders, countries, and systems.

Critical analysis of law as a contextual model of legal studies thus is both disciplinary and interdisciplinary, internal and external, domestic and global, doctrinal and theoretical, descriptive and normative. In this way, critical analysis of law reflects the tension between facticity and normativity inherent in—but not unique to—law, making possible, and encouraging, the diverse, unpredictable, risky, and occasionally exciting and illuminating explorations at the point of contact, and perhaps even conflict, between analytic frames of reference.

Critical analysis as contextuality in legal studies thus both resembles and differs from contextuality in other disciplines. The analytic aims and methods are the same as elsewhere; law, however, is not merely fact, but also norm, and legal studies is not merely analytic, but critical. Critical analysis investigates not only the functioning of a legal order, to better understand it or even to improve its operation. In the end, it interrogates a legal order's legitimacy, tests its normative mettle, not merely its operation. Legal studies is not only a social science or a *Geisteswissenschaft*, but also a normative enterprise. Just what kind of enterprise it is, and whether it can be usefully conceptualized as a science, and not merely an applied science—as the German *Rechtswissenschaft* has assumed for centuries, though recently with diminishing confidence—remains to be seen (Kindhäuser 2009; Schröder 2001).

[June 2012]

### References

- Balkin, J.M. 1996. "Interdisciplinarity as Colonization." 53 *Washington & Lee Law Review* 949.
- Bechor, Guy. 2007. *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932 to 1949)*. Leiden: Brill.
- Bradney, Anthony. 1998. "Law as a Parasitic Discipline." 25 *Journal of Law & Society* 71.
- Dagan, Hanoch & Roy Kreitner. 2011. "The Character of Legal Theory." 96 *Cornell Law Review* 671.

- Dubber, Markus. 2006. "Comparative Criminal Law." In Mathias Reimann & Reinhard Zimmermann eds., *Oxford Handbook of Comparative Law* 1287. Oxford: Oxford University Press.
- . 1998. "Historical Analysis of Law." 16 *Law & History Review* 159.
- Kennedy, W.P.M. 1934. "Law as a Social Science." [1934] *South Africa Law Times* 100.
- Kindhäuser, Urs. 2009. "Die deutsche Strafrechtsdogmatik zwischen Anpassung und Selbstbehauptung." 121 *Zeitschrift für die gesamte Strafrechtswissenschaft* 954.
- Klein, Julie Thompson. 2010. "A Taxonomy of Interdisciplinarity." In Robert Frodeman et al. eds., *The Oxford Handbook of Interdisciplinarity* 15. Oxford: Oxford University Press.
- Lavi, Shai. 2011. "Turning the Tables on 'Law and ...': A Jurisprudential Inquiry into Contemporary Legal Theory." 96 *Cornell Law Review* 811.
- Leff, Arthur. 1978. "Law and." 87 *Yale Law Journal* 989.
- Lindseth, Peter. 2010. *Power and Legitimacy: Reconciling Europe and the Nation-State*. Oxford: Oxford University Press.
- Menkel-Meadow, Carrie. 2007. "Taking Law and \_\_\_ Really Seriously: Before, During and After 'The Law'." 60 *Vanderbilt Law Review* 555.
- Miller, Geoffrey P. 2011. "Law and Economics versus Economic Analysis of Law." NYU Law and Economics Research Paper No. 11-16.
- Moran, Joe. 2002. *Interdisciplinarity*. London & New York: Routledge.
- Posner, Richard. 1987. "The Decline of Law as an Autonomous Discipline: 1962-1987." 100 *Harvard Law Review* 761.
- Sá, Crespo. 2008. "'Interdisciplinary Strategies' in U.S. Research Universities." 55 *Higher Education* 537.
- Schröder, Jan. 2001. *Recht als Wissenschaft: Geschichte der juristischen Methode vom Humanismus bis zur historischen Schule (1500-1850)*. Munich: C.H. Beck.
- Tomlins, Christopher. 2011. "The Consumption of History in the Legal Academy: Science and Synthesis, Perils and Prospects." 61 *Journal of Legal Education* 139.
- . 2000. "Framing the Field of Law's Disciplinary Encounters: A Historical Narrative." 34 *Law and Society Review* 911.
- Vick, Douglas. 2004. "Interdisciplinarity and the Discipline of Law." 31 *Journal of Law & Society* 163.
- Weingart, Peter & Nico Stehr, eds. 2000. *Practising Interdisciplinarity*. Toronto: University of Toronto Press.