

# Inclusivity towards legal research: A historical and future perspective

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## ***Abstract***

In order to research the South African law and understand how legal processes must transpire in contemporary South Africa, a historical perspective is firstly required. Historical knowledge gained assists both the academic and legal practitioner, engaged in legal research, to understand the development of South Africa's legal system as well as the external and internal influences affecting it. An inclusive perspective also empowers legal researchers to move beyond traditional research approaches, reaching for new frontiers. This article casts light on an integrative multidisciplinary research approach as a possible future perspective on legal research.

**Keywords:** Law; South African law; Legal research; Traditional legal research approaches; Integrative research; Integrative Multidisciplinary (IMD) research.

*A globalising world gives scholars today an even more significant opportunity to be present at the creation of a whole new genus of legal developments. - John Higan*

## **Introduction**

The aim of this article is to explore whether research in the legal sphere could be enhanced by adopting more inclusive research approaches. This is done by clarifying relevant concepts; outlining legal research up to date; and by, specifically, investigating the value of an integrative multidisciplinary approach for researching the law in future. Since the processes of legal research vary according to the country and the legal system involved,<sup>1</sup> this article contemplates the need for integrative multidisciplinary research pertaining to, specifically, South African law.

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<sup>1</sup> JM Jacobstein & RM Mersky, *Fundamentals of legal research*, 8th edition (UK, Foundation Press, 2002), p. 1.

## Conceptual clarifications

### *The law*

The law, in any given country, entails an entire body of rules of conduct<sup>2</sup> regulating human interactions, resolving disputes arising from such interactions<sup>3</sup> and governing individual and group behaviour within its borders.

In an attempt to understand the law, Portman<sup>4</sup> distinguishes between optimists who believe that humans shape legal education and thus the law which, in turn, shapes the world. Pessimists, on the other hand, contend that the law is outlined by political and economic forces due to the fact that the law is a system of social ordering, a cultural phenomenon, an intellectual enterprise and the subject or object of study in law schools.<sup>5</sup> As such, the law serves as the foundation for protecting and understanding both social and political relations.<sup>6</sup> It is, accordingly, imperative that legal researchers understand how legal resources relate to the legal (judicial authority) and political institutions (legislative authority) that create law.<sup>7</sup>

Whether optimists or pessimists, legal researchers are at *idem* that the law does not always function in a predictable way,<sup>8</sup> although its prime objectives are to create certainty and embody the fundamental principle of equality before the law.<sup>9</sup> This is mainly due to legal certainty always being counterbalanced by the need for sensitivity towards ongoing change and the fact that it should never be favoured at the expense of justice.<sup>10</sup> In support, Kunz<sup>11</sup> as well as Rose and Pryal<sup>12</sup> confirm that the law (a system of *revealed* truth) is a complex, ever-expanding and ever-changing learned professional discourse. Brimer and

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2 NM Shrestha, "Importance of legal research method for legal professionals" (Kathmandu School of Law, LLM-dissertation, 2008), p. 1.

3 CL Kunz, DA Schmedemann & MP Downs, *The process of legal research* 6th edition (New York, Aspen Publishers, 2004), p. 438.

4 J Portman (ed.), *Legal research: How to find and understand the law*, 15th edition (USA, NOLO, 2009), p. 4.

5 HW Arthurs, "Law and learning: Report on the Social Sciences and Humanities Research Council of Canada by the Consultative Group on research and education law, information division" (SS and HRC of Canada, Ottawa, 1983), p. 629.

6 NP Swartz "Thomas Aquinas: On law, tyranny and resistance", *Acta Theologica*, 30(1), 2010, pp. 145-157.

7 T Marshall, "Guide to research", Thurgood Marshall Law library to legal research (available at: [http://www.law.umaryland.edu/marshall/research\\_guides/TMLL\\_guide/chapter1.pdf](http://www.law.umaryland.edu/marshall/research_guides/TMLL_guide/chapter1.pdf). 2010-2011), as accessed on 6 December 2011.

8 J Portman, (ed.) *Legal research: How to find and understand the law*, p. 5.

9 I Currie & J De Waal, *The new constitutional & administrative law*, Vol. 1 (Landsdowne, Juta, 2001), p. 7.

10 PJ Thomas, "Old age, legal certainty and *cura debiliū personarū*", *Obiter*, 2005, pp. 187-694.

11 CL Kunz, DA Schmedemann & MP Downs, *The Process of legal research*, p. 438.

12 K Rose & G Pryal, *A short guide to writing about law* (Boston, Longman, 2011), p. xv.

Brimer,<sup>13</sup> similarly, explain that, what the law entails, only becomes clear once legislation is relied upon, interpreted, a precedent is derived and meaning is entrusted to it by courts.

Despite its dynamic nature, the law remains, as pointed out by Russo,<sup>14</sup> to be a reactive rather than a proactive force – thus relying on past actions in order to retain stability in its purpose. As that the law of today is a combination of old and new endorsements and decisions, the background to court decisions, legislation or constitutional provisions must be taken cognisance of when interpreting existing law.<sup>15</sup> Since a nation within its historical development constitutes the source of law,<sup>16</sup> historical information provides the context and backdrop for current legal topics and assists in regarding the law as more than simply a trade, but rather as a discipline with rich traditions.<sup>17</sup> Du Plessis,<sup>18</sup> correspondingly, indicates that an historical interpretation assists in placing any legal stipulation within the tradition from which it originated, thus understanding the context in which it is applied as well as its purpose. The same stance was also taken by the Constitutional Court in the matter of *Grootboom*<sup>19</sup> by considering the textual, social and historical context of socio-economic rights.

In view hereof, it is apparent that the historical development of the law is not only of use for historians, but also for legal researchers.<sup>20</sup>

### ***Legal research***

McMillan and Schumacher<sup>21</sup> point to the necessity of legal research in order to identify, study, interpret and synthesize data and to provide a deeper

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13 D Brimer & A Brimer, “The devil is in the definition – definitions and their limited use in legal problem solving”, *PER/ PELJ*, 7(14), 2011, pp. 174-185.

14 CJ Russo, “Legal research: The ‘traditional’ method, research that makes a difference: Contemporary methods for examining legal issues in education”, NOLPE monograph series, 56, Kansas: National Organisation on Legal problems of education, 1996, pp. 33-52.

15 M Imraan, “Interpreting law, not making it: Constitutional law”, *Without Prejudice*, 11(6), Jul, 2011, pp. 8-10.

16 MH Hoeflich, “Law and geometry: Legal science from Leibniz to Langdell”, *American Journal of Legal History*, 1986, pp. 95-121.

17 ML Cohen & KC Olson, *Legal research in a nutshell*, 9th edition (USA, Thomson West, 2007), p. 333.

18 L du Plessis, “Learned staatsrecht from the heartland of the rechtsstaat,” *PER*, 2005(1), pp. 1-30.

19 *Government of the Republic of South Africa v Grootboom*, 2001, (1), SA 46 (CC) paras 20; 94.

20 T Marshall, “Guide to research”, Thurgood Marshall Law library to legal research (available at: [http://www.law.umaryland.edu/marshall/research\\_guides/TMLL\\_guide/chapter1.pdf](http://www.law.umaryland.edu/marshall/research_guides/TMLL_guide/chapter1.pdf). 2010-2011), as accessed on 6 December 2011.

21 JM McMillan & S Schumacher, *Research in education: A conceptual introduction*, 5th edition (New York, Longman, 2001), p. 500.

understanding of legal concepts or past events when resolving arising legal disputes.<sup>22</sup> Studying the law within its historical context, moreover, enables legal researchers to illuminate the stable parts thereof and to distinguish general legal principles from the more extreme ones.<sup>23</sup>

As different people have different understandings of facts and factual events,<sup>24</sup> Ramanath<sup>25</sup> and Myneni<sup>26</sup> opine that legal research involves an investigation directed at discovering and studying particular facts, problems, or topics. Once the latter is identified, the legal researcher proceeds to seek, identify, retrieve and discover legal principles pertinent thereto in order to assist future legal and just decision-making<sup>27</sup> as well as efficient legal problem-solving.<sup>28</sup> Tellis,<sup>29</sup> consequently, defines research as formalized by a kernel of curiosity entailing a process of poking and prying with a definite purpose. This is done with the aim either to describe how the law functions or to prescribe changes to the law.<sup>30</sup> To this, Marshall<sup>31</sup> and Black<sup>32</sup> add that legal research includes a search for sufficient authority that can be applied meticulously to facts or issues within the ambit of the law. Cohen and Olson's<sup>33</sup> definition, in addition, brings legal research in line with the definition of the law, as stated above, by viewing it as a process of identifying the rules that govern human activity and finding sources that explain or analyse those rules.

It is, accordingly, evident that legal research entails a systematic and analytic rather than mechanical process. Systematic inquiry is described by Russo<sup>34</sup> as a form of historical-legal research that is neither qualitative nor quantitative. It is rather a systematic investigation involving the interpretation *ex visceribus actus*<sup>35</sup> and the explanation of the law *per se*. As legal research is not a linear

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22 J Portman (ed.) *Legal research: How to find and understand the law*, p. 4.

23 L Friedman, "The roots of justice", S Halliday & P Schmidt, *Conducting law and society research. Reflections on methods and practices* (Cambridge, Cambridge University Press, 2009), pp. 50-58.

24 J Portman, (ed.) *Legal research: How to find and understand the law*, p. 5.

25 PA Ramanath, *Concise law dictionary*, Abridged edition (New Delhi, Law Publishers, 2001), p. 745.

26 SR Myneni, *Legal research methodology* (Allahabad Law Agency, Faridabad, Haryana, 1997), p. 3.

27 JM Jacobstein & RM Mersky, *Fundamentals of legal research*, p. 1.

28 CL Kunz & DA Schemedemann, *The process of legal research. Best guide to Canadian legal research* (Boston, Little, Brown & Company, 1989), p. 6.

29 C Tellis, 2008. "Principles of legal research fall" (Brian Dickson Law Library. September), p. 1.

30 K Rose & G Pryal, *A short guide to writing about law*, p. 2.

31 T Marshall, "Guide to research", Thurgood Marshall Law library to legal research (available at: [http://www.law.umaryland.edu/marshall/research\\_guides/TMLLguide/chapter1.pdf](http://www.law.umaryland.edu/marshall/research_guides/TMLLguide/chapter1.pdf).2010-2011), as accessed on 6 December 2011.

32 HC Black, *Black's law dictionary* (St Paul, West Pub. Co., 1968), p. 846.

33 ML Cohen & KC Olson, *Legal research in a nutshell*, p. 1.

34 CJ Russo, "Legal research: The 'traditional' method...", pp. 33-52.

35 *Within the four corners of the law or structural wholeness i.e. all the parts of the law must be studied.*

process, it entails, in its broadest sense, the following of an exact course of action.<sup>36</sup>

Due to the law being an evolving reality,<sup>37</sup> legal researchers should utilize a time line, taking cognisance of the past, present and future for a variety of purposes.<sup>38</sup> This was, for instance, necessary to provide for new legal concepts such as insolvency and bankruptcy for which the early Roman law made no provision. To deal with such sophisticated and complicated commercial legal issues, legal researchers had to turn to their Italian counterparts, who had already enacted laws and developed rules to govern conduct of trade, for guidance.<sup>39</sup> Constitutional and political reform in South Africa, in addition, necessitated pioneer legal researchers; while paying attention to South Africa's historical apartheid laws; to seek comparative guidance from, *inter alia*, the constitutional law of the United States of America – the oldest example of a modern-day constitutional democracy - in order to steer the law in a direction of giving effect to democratic principles.<sup>40</sup>

### ***Integrative multidisciplinary research (IMD)***

In order to facilitate insight into the use of a specific approach when researching the South African law, the clarification of various core research concepts merits explanation.

### ***Integrative research***

Conducting research in order to generate specialized knowledge, strictly within and limited to a specific discipline, has been criticized by people such as Aristotle, Bacon and Kant<sup>41</sup> and, more recently by Gibbons *et al.*<sup>42</sup> and

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36 D Kleyn & F Viljoen, *Beginner's guide for law students*, 3rd edition (Lansdowne, Juta, 2007), p. 331; J Gotschall, "Teaching cost effective research skills: Have we overemphasized its importance?" *Legal Reference Services Quarterly*, Taylor & Francis, 2010, p. 3.

37 ML Cohen & KC Olson, *Legal research in a nutshell*, p. 5.

38 K Maton, "Theories and things: The semantic of disciplinarity", F Christie & K Maton, (ed.) *Disciplinary: Functional linguistic and sociological perspectives* (Great Brittain, Newgen Imaging Systems Pty. Ltd., 2011), pp. 62-84.

39 J Calitz, "Historical overview of state regulation of South African insolvency law", *Fundamina*, 16(2), 2010, pp. 1-27.

40 L du Plessis, "Learned staatsrecht from the heartland of the rechtsstaat," pp. 1-30.

41 I Kant, *Critique of Pure Reason*, Translated by FM Müller (New York, Dolphin Books, 1961) p. 74.

42 M Gibbons, C Limoges, H Nowontny, S Schwartzman, P Scott, & M Trow, *The new production of knowledge: The dynamics of science and research in contemporary societies* (London, SAGE, 1994), p. 162.

Moran.<sup>43</sup> As a result, integrative research (combining academics and non-academics<sup>44</sup> from various academic disciplines into one research process<sup>45</sup>) has become popular.<sup>46</sup>

Different modes of disciplinary interaction include multidisciplinary, interdisciplinary and trans-disciplinary research.<sup>47</sup>

### ***Multidisciplinary, interdisciplinary and trans-disciplinary research***

Contrary to single disciplinary research, expiring within the boundaries of only one academic discipline,<sup>48</sup> multidisciplinary research draws on more than one discipline.<sup>49</sup> Multidisciplinary research emerges when different academic disciplines, in forming partnerships,<sup>50</sup> share a common research goal, although numerous disciplinary objectives are set. The aim is to exchange knowledge without crossing individual discipline boundaries in order to create new integrative knowledge and theory. The ultimate benefit herein lies in the fact that each participant discipline adds new knowledge from its own perspective,<sup>51</sup> thus allowing for a holistic picture pertaining to the mutual goal to emerge.<sup>52</sup>

In contrast to trans-<sup>53</sup> and interdisciplinary<sup>54</sup> research, a multidisciplinary

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43 J Moran, *Interdisciplinarity* (London, Routledge, 2002). p. 231.

44 Furthermore, such an approach allows Widespread interaction with the broader public (non-academic persons) are allowed for in order to ensure that all potential role-players are involved, bringing all in line with the advancements in a particular field of study. Wider participation, moreover, leads to research results being directly applied and publicised. E Cozzi, E Bosio, M Seveso, D Rubello & E Ancona, "Xenotransplantation as a model of integrated, multidisciplinary research", *Organogenesis*, 5(1), 2008, pp. 288-296.

45 G Tress, B Tress & G Fray, "Clarifying integrative research concepts in landscape ecology", *Landscape Ecology*, 20, 2005, pp. 479-493.

46 White Paper (1997) *South Africa. White Paper on Higher Education* Department of National Education, (Pretoria, Government Printer).

47 G Tress, B Tress & G Fray, "Clarifying integrative research concepts in landscape ecology", pp. 479-481.

48 G Tress, B Tress & G Fray, "Clarifying integrative research concepts in landscape ecology", p. 488.

49 E Cozzi, E Bosio, M Seveso, D Rubello & E Ancona, "Xenotransplantation as a model ...", pp. 288-296.

50 Queens University, "Integrated research teams (IRTs)" (available at: [www.queensu.ca/hmrc-create/research/html](http://www.queensu.ca/hmrc-create/research/html)), as accessed on 6 December 2011.

51 G Tress, B Tress & G Fray, "Clarifying integrative research concepts in landscape ecology", pp. 485, 488.

52 S Louw & R Reyneke, "Indikatore vir 'n maatskaplikewerk-intervensieplan vir straatkinders: Navorsings- en oorsigartikel", *Tjdskrif vir Geesteswetenskappe*, 51(1), 2011, pp. 214-237.

53 Transdisciplinary research involves academic researchers from different unrelated disciplines as well as non-academic participants to create new knowledge and theory and research a common question. It combines interdisciplinarity with a participatory approach (G Tress, B Tress & G Fray, "Clarifying integrative research concepts in landscape ecology", pp. 488).

54 Interdisciplinary research involves several unrelated (that they have contrasting research paradigms) academic disciplines in a way that forces them to cross subject boundaries. The concerned disciplines integrate disciplinary knowledge in order to create new knowledge and theory and achieve a common research goal (G Tress, B Tress & G Fray, "Clarifying integrative research concepts in landscape ecology", pp. 479-493).

approach follows a research process during which parallel disciplinary efforts are made without any real disciplinary integration. Each discipline remains to have its own objectives,<sup>55</sup> and to use its own research methods, theories and instruments<sup>56</sup> without the aim of setting up a joint framework of theory,<sup>57</sup> thus, remaining true to its own roots.<sup>58</sup> Van Eeden,<sup>59</sup> correspondingly, shows that the merits of each discipline remain the core element during the complete research process, thus, leading to valuable outcomes for each discipline. Notwithstanding, multidisciplinary research has the potential of integrating diverse skills and stimulating interdisciplinary collaboration to better understand a specific trend (natural and man-made processes) and to bring it closer to its practical application.<sup>60</sup>

As a result, multidisciplinary research approaches surpass the boundary of being merely disciplinary<sup>61</sup> and, accordingly, only enrich one disciplinary field. It rather directs to complete, holistic, representative and inclusive informative research results with the potential of contributing meaningfully to the understanding of a specific built environment.<sup>62</sup> This is achieved by critically exploring human behaviour within such an environment.<sup>63</sup> Society as a whole could benefit from an improved understanding of each of its component disciplines, and from the greatest possible involvement of each in

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55 P Van den Besselaar & G Heimericks, 'Disciplinary, multidisciplinary, interdisciplinary — Concepts and indicators'. Paper delivered at the 8th conference on Scientometrics and Informatics, Sydney, Australia, 16-20 July 2001.

56 S Pyne, "Environmental history without historians", *Environmental History*, 10(1), 2010, pp. 72-74; S Baumgartner, C Becker, K Frank, M Muller & F Quaas, "Relating to the philosophy" and practice of ecological economics: The role of concepts, models, and case studies in inter- and transdisciplinary sustainability research", *Ecological Economics*, 2008, 67(3), 2008, pp. 384-393.

57 J Conrad "Limitations to interdisciplinarity in problem oriented social science research", *Journal on Transdisciplinary Environmental Studies*, 2002, 1(1), 2002, p. 15.

58 S Pyne, "Environmental history without historians", pp. 72-74.

59 ES van Eeden, "The 21st value of history and the history educator revised – a motivational discourse", *New Contree*, May 2006. p. 51.

60 E Cozzi, E Bosio, M Seveso, D Rubello & E Ancona, "Xenotransplantation as a model of integrated, multidisciplinary research", pp. 288-296.

61 ES Van Eeden, "A practical explorations of the feasibility of integrative multidisciplinary research from a broad ecohealth perspective in South Africa", *The Journal for Transdisciplinary Research in Southern Africa*, 7(2), 2011, pp. 253-272.

62 A built environment is an inter/multidisciplinary field linking disciplines such as the law, management, economics, technology and design. P Chynoweth, "The built environment interdiscipline: A theoretical model for decision makers in research and thinking", p. 26.

63 ES van Eeden, "A practical exploration of the feasibility of integrative multidisciplinary research ...", pp. 253-272; "Considering environmental history within the transdisciplinary methodology as research focus for today and tomorrow", *Interdisciplinary Science Review*, 36(4), December 2011, pp. 314-329.

its collaborative research agendas.<sup>64</sup>

### **South African Law: A perspective on traditional ways of legal research**

The South African law originated with the acceptance of the Roman-Dutch Law, having its roots in both Germanic customary law and Roman law,<sup>65</sup> since the establishment of a halfway house at the Cape in 1652.<sup>66</sup> As the Roman-Dutch Law was regarded by many to surpass all other legal systems,<sup>67</sup> it was followed to the letter. As long as the *Corpus Iuris Civilis*<sup>68</sup> was regarded as being the only valid law, jurists were interested only in existing rules.<sup>69</sup> As a result, legal practitioners for many decades resisted the influence of any other legal model or discipline.<sup>70</sup>

The pragmatic following of the Roman-Dutch law, together with the adoption of one of the assizes *iudicis est ius dicere sed non dare facere*-principle<sup>71</sup>- underscored by legal positivism which outmoded the natural law of method<sup>72</sup>- impeded any legal research at the early stages. Those who did endeavour to codify South African Law also failed.<sup>73</sup>

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64 P Chynoweth, "The built environment interdiscipline: A theoretical model for decision makers in research and thinking". Paper presented at the International Conference on Building Education and Research Hong Kong, April 2006, p. 28.

65 C Nicholson, "The relevance of the past in preparing for the future", *Fundamina: A Journal of Legal History*, 17(2), 2011, p. 101-114.

66 F Venter, *Regsnavoring: Metode en publikasie* (Cape Town, Juta & Kie, 1990), p. 23. See also Van Warmelo "The function of Roman-law in South African law 1958-1959", *Tulane Law Review*, p. 565; *Fairlie v Raubenheimer* 1935 AD 136; *Swadif (Pty) Ltd v Dyke* 1978 (1) SA 928 (A) 938; *Millman v Twiggs* 1995 (3) SA 674 (A) 679 680.

67 J Gauntlett, "Laudation for Tony Honoré", D Visser & M Loubser, (ed.), *Thinking about law. Essays for Tony Honoré* (Cape Town, Siberlink, 2011), pp. 1-6.

68 The codification of the Roman law by Justinianus in 1583. F Venter, *Regsnavoring: Metode en publikasie*, p. 169.

69 B Sirks, "Roman Law as emancipator and social instrument in the 19th century", D Visser & M Loubser, (ed.) *Thinking about law. Essays for Tony Honoré* (Cape Town, Siberlink, 2011), p. 7.

70 JA Faris, "The historical context of summary judgment in South Africa: Politics, policy and procedure", *Comparative and International Law Journal of Southern Africa*, 43(3), 2010, pp. 352-378.

71 Legal interpreters cannot move outside of the words used in texts. F Venter, *Regsnavoring: Metode en publikasie*, p. 155.

72 The natural law of method endeavoured to discover a method by which just rules could be devised to meet ever-varying circumstances. RWM Dias, *Jurisprudence*, 4th edition (London, Butterworths, 1976), p. 654.

73 J Gauntlett, "Laudation for Tony Honoré", p. 3.



Despite that the Cape was taken possession of by Britain in 1806, the local Roman-Dutch law remained in force as this country's common law.<sup>74</sup> Courts, for example, had to address any impediment confronted with, within the ambit of the Roman-Dutch Law.<sup>75</sup> Since it was accepted that legislation does not need interpretation, legal practitioners and judges, respectively, were limited to merely explaining facts and to apply the law as is,<sup>76</sup> thus not only inhibiting legal research but also integrative research prospects.

Subsequent to the South African War (1899 –1902), Britain took control of the entire South Africa. In 1910, a Union of South Africa was established. Flowing from this, the Cape's legal system was, in turn, followed by the British colony in Natal, and also, in many respects, by the Zuid-Afrikaansche Republiek (ZAR) and the Orange Free State (*Oranje-vrijstaat*), making the legal system more consistent.<sup>77</sup> This was achieved through both legislative improvement and the activities of the then new Appellate Division of the Supreme Court as the highest court country-wide.<sup>78</sup>

During this time it gradually became evident that the Roman-Dutch law, despite its development, could not cater for the needs of the modern society. Some fundamental defects of classical common-law procedure was, for example, its inability to test the factual basis of a defendant's defence without the issue being determined at a trial<sup>79</sup> and to provide for the State's expanding role in protecting the public interest.<sup>80</sup> It, moreover, did not allow for; *inter alia*, enrichment actions<sup>81</sup> as well as constitutional, administrative and various

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74 The common law is the civilian law – Roman law as interpreted by the Dutch writers of the 17th and 18th centuries. Thus originally, important primary sources of South African law were the treatises of authors such as Grotius, Johannes Voet, Simon Groenewegen and Johannes van der Linden. The common law was modified or expanded by statute. A Barratt & P Snyman, "Researching South African law. A Hauser Global law school program (available at: <http://www.llrx.com/features/southafrican.htm>, 2005), as accessed on 11 December 2011.

75 *Braun v Blom and Botha, NNO*, 1984 (2) SA 850 (A), p. 866B; MJ De Waal, "Honore's South African law of trust", D Visser & M Loubser (ed.), *Thinking about law. Essays for Tony Honoré* (Cape Town, Siberlink, 2011), pp. 38-49.

76 J Gerkens, "Legal certainty v legal precision: Some thoughts on comparative law," *Fundamina*, 16(1), 2010, pp. 121-129.

77 A Barratt & P Snyman, "Researching South African law..."

78 F Venter, *Regsnavorsing: Metode en publikasie*, pp. 31-36.

79 JA Faris, "The historical context of summary judgment in South Africa: Politics, policy and procedure", *Comparative and International Law Journal of Southern Africa*, 43(3), 2010, pp. 352-378.

80 J Calitz, "Historical overview of state regulation of South African insolvency law", pp. 1-27; D Milman, *Personal insolvency law, regulation and policy* (UK, Ashgate Publishing, Ltd., 2005), pp. 171; R Stein, "Water law in a democratic South Africa: A country case study examining the introduction of a public rights system", *Texas Law Review*, 83(7), June 2005, pp. 2167-2183.

81 H De Jong, "The development of enrichment liability: Byzantine law in teachings of the Digest of Stephanus", *Fundamina*, 16 (1), 2010, pp. 29-39.

branches of commercial law.<sup>82</sup>

Consequently, legislative innovation was needed to identify legal rules unique to South Africa's circumstances. Such innovations were often based on English Acts and interpreted using relevant English precedent.<sup>83</sup> These were brought about due to superior court advocates and judges generally being educated in England and inclined, in applying the *stare decisis*-principle,<sup>84</sup> to rely on their English treatises. Legal practitioners, conversely, also often turned to other legal systems<sup>85</sup> for answers.

As a result, the ensuing South African legal system is regarded by many as a truly hybrid system.<sup>86</sup> The demand for new legal principles, led to an increase in legal research during the second half of the 19th century. This tendency expanded into the 20<sup>th</sup> century, especially during the lively debates that foreshadowed the first steps of constitutional democracy in South Africa. During this time, the German and Canadian law were dominantly used as sources for legal and constitutional comparison purposes.<sup>87</sup> Legal reform, necessitated by the acceptance of the Interim and Final Constitution of the Republic of South Africa in 1993 and 1996, respectively, was, additionally, highly influenced by German law as challenges faced by South Africa were in many ways comparable to those that faced Germany after the Second World War.<sup>88</sup>

More integrative research approaches also became popular in various fields of the law. In order to facilitate the reintegration of prisoners into society, Sagel-Grande<sup>89</sup> for instance, integrated criminal and constitutional law with the education sciences in order to accentuate the value of educating prisoners.

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82 L du Plessis, "Learned staatsrecht from the heartland of the rechtsstaat," pp. 1-30.

83 Precedent: Lower courts are absolutely bounded by the decisions of higher courts. F Venter, *Regsnavorsing: Metode en publikasie*, p. 143.

84 A common legal doctrine stating that judicial precedent should be followed. *Let the decision stand or abide by (prior) decided cases.*

85 During the nineteenth century, German jurists were probably the best in the world. J Gerkens, "Legal certainty v legal precision: Some thoughts on comparative law," *Fundamina*, 16(1), 2010, pp. 121-129.

86 PHJ Thomas, CG Van der Merwe & BC Stoop, *Historical foundations of South African Private Law*, 2nd edition (Durban, Lexis Nexis, 2001), p. 7. Roman law was regarded by the Romans as being a "unique legacy of the ancient western world" and as "the art of the good and the just".

87 L du Plessis, "Learned staatsrecht from the heartland of the rechtsstaat," pp. 1-30.

88 On 11 September 1995 the former president of South Africa, Nelson Mandela, in his address at a state banquet in honour of former German chancellor, Helmut Kohl, then officially visiting South Africa, for instance said the following: "We know that the challenges facing South Africa today are in many ways comparable to those that faced Germany after the Second World War. In as much as we benefited immensely from the support of the German people in the struggle against apartheid, we can learn much by drawing on your valuable experiences in reconstruction and development (available at: ANC 1995, <http://www.anc.org.za/ancdocs/history/mandela/1995/sp950911.html> 21 November), as accessed on 28 May 2012.

89 I Sagel-Grande, "Education in prison", *Acta Criminologica*, 15(1) 2002, pp. 93-98.

Education and law sciences were also combined into one research by Bray<sup>90</sup> in order explain how the fundamental right to human dignity should be upheld in the sphere of education. Bentovim and Tranter<sup>91</sup> as well as Müller,<sup>92</sup> in addition, used both clinical interviews (aimed at providing treatment to child victims, albeit not adhering to the requirements of legal interviews) and forensic interviews during their research, because of the value of information thus obtained to affect the outcome of trial during which child witnesses are necessary.

In his research on the use of cannabis in South Africa, Perkel<sup>93</sup> also indicated that the acceptance of legislation alone cannot deal effectively with societal problems. It was only by combining the medical science with the legal science, that this researcher was able to recommend ways to combat decriminalisation effectively.

### **Legal research in South Africa from the inside out**

Due to the fact that the law exists within a society for a society, it must facilitate social activities and be moulded to meet societal needs.<sup>94</sup> To ensure that the law indeed reflect a specific society's needs and aspirations, constant legal research is needed.

### ***The aims of legal research***

McConville and Chui,<sup>95</sup> as well as Tellis,<sup>96</sup> distinguish between academic and legal practitioners engaging in legal research. The academic researcher seeks an understanding of how the law works and how it affects society, thus piloting a comprehensive study<sup>97</sup> directed towards drawing valid conclusions

90 E Bray, "Constitutional values and human dignity: Its value in education", *Perspectives in Education*, 22(3), September 2004, pp. 37-47.

91 A Bentovim & M Tranter, "The sexual abuse of children and the courts", G Davies & J Drinkwater (ed.), *The Child Witness: Do the Courts Abuse Children?* (Leicester, British Psychological Society, 1988), p. 55.

92 K Müller, "Clinical and forensic interviews and the child witness", *CARSA*, 2(2), October 2001, pp. 8-14.

93 C Perkel, "Cannabis- the debate continues: A South African perspective", *South African Psychiatry Review*, 8, 2008, pp. 25-30.

94 A Watson, "Comparative Law and Legal Change", *The Cambridge Law Journal*, 37, 1978, pp. 313-336.

95 M McConville & WH Chui, *Research methods for law* (Great Brittan, Antony Rowe, Ltd., 2001), p. 1.

96 C Tellis, "Principles of legal research fall," p. 14.

97 Comprehensiveness is made easier by Information and Communication Technology giving researchers access to a wide range of both national and international primary and secondary legal sources. T du Plessis, "Legal research in a changing information environment", *Potchefstroom Electronic Law Journal*, 10(1), 2007, p. 43.

and making suggestions on how to improve the law in the form of critical pieces of work.<sup>98</sup> The legal practitioner, on the other hand, endeavours in establishing why the law says what it says (the practice of law)<sup>99</sup> in order to provide clients with accurate advice,<sup>100</sup> opinions and specialized knowledge regarding the authority, rules and procedures relevant to their questions.<sup>101</sup> Their research is, accordingly, more narrowly focused and deadline-driven, providing end results in the form of, for example, memoranda of law.<sup>102</sup>

Whether of an academic or a more practical nature, legal research aims at recommending solutions to existing societal problems or at solving already solved problems in an enhanced way. In broad, legal research enables the legal system to function effectively.<sup>103</sup>

In order to progress towards the aim of establishing whether legal research can be conducted by means of more inclusive approaches, traditional legal approaches need to be firstly scrutinized.

### **Research modes of inquiry**

Historically, legal researchers followed two broad approaches, namely a *black-letter-law*- or *law-in-context*-approach. Both these traditional approaches are of a primarily authority seeking<sup>104</sup> and interpretative nature,<sup>105</sup> employing single disciplinary methods.<sup>106</sup>

#### ***Black-letter-law or doctrinal approach***

In following a *black-letter-law* approach, focus is profoundly placed on the law itself as an internal self-sustaining set of principles and values derived from legislation and determined case law which needs to be analysed and

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98 K Rose & G Pryal, *A short guide to writing about law*, p. 42.

99 D Kleyn & F Viljoen, *Beginner's guide for law students*, p. 330.

100 NM Shrestha, "Importance of legal research method for legal professionals", p. 172.

101 CL Kunz, DA Schmedemann & MP Downs, *The Process of legal research*, p. 3; SM Noordin, "Legal research skills: how competent are out lawyers?", *The law review*, 2008, pp. 75-85.

102 K Rose & G Pryal, *A short guide to writing about law*, p. 42.

103 NM Shrestha "Importance of legal research method for legal professionals", p. 321.

104 CL Kunz, DA Schmedemann & MP Downs, *The Process of legal research*, p. 6

105 JM McMillan & S Schumacher, *Research in education ...*, p. 497.

106 CJ Russo, "Legal research: The 'traditional' method ...", pp. 33-52.

explained.<sup>107</sup> Previous court decisions are re-assembled into a consistent framework in search of order, rationality and theoretical cohesion.<sup>108</sup> This approach is referred to by Murphy and Roberts<sup>109</sup> as doctrinal legal research encompassing expository<sup>110</sup> and legal theory research concerning itself with analysing existing legal rules. Researchers following this approach, accordingly, aim at answering questions related to *what the law is*. This is done in order to clarify any ambiguities within existing legal rules, determine the relationship between them and arrange them in a coherent manner.

Doctrinal research, for example, led to the establishment of South African insolvency law as it was shaped both in essence and methodology by a mixture of influences deriving from periods of Dutch and British colonial domination, and thus reflects legal philosophies and principles, coherently similar to that of English laws.<sup>111</sup>

As such, doctrinal research is not concerned with empirical investigation or experimentation, but with the analysis and manipulation of theoretical legal concepts. The aim hereof is to discover and develop legal doctrines for publication in textbooks or journal articles. Although it is rarely used as a practical basis for legal analysis, it does provide insights into the nature of legal methodologies employed by academics and legal practitioners.<sup>112</sup> The methodologies employed, however, differ from those of the applied sciences as they are more accurately categorized, in social terms, as techniques of qualitative analysis aiming at describing and explaining a phenomenon.<sup>113</sup>

### ***Research modes of inquiry***

Qualitative modes of research inquiry are broadly divided into two main areas, namely interactive and non-interactive modes. Legal research, being predominantly *analytic research*, is normally of a non-interactive mode as

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107 P Chynoweth, "The built environment interdiscipline ...", p. 30.

108 M McConville & WH Chui, *Research methods for law*, p. 1.

109 WT Murphy & S Roberts, "Introduction to the special issue of Legal scholarship", *Modern Law Review*, 50(6), 1987, pp. 677-687.

110 ARK Van Hoecke, (ed.) *Methodologies of legal research: Which kind of method for what kind of discipline?* (Oregon, Oxford & Portland, 2011), p. viii.

111 J Calitz, "Historical overview of state regulation of South African insolvency law", pp. 1-27. See also JW Wessels, *History of the Roman-Dutch Law* (UK, The Lawbook Exchange, Ltd., 2011), p. 661; E Bertelsmann & CJ Nagel, *The Law of Insolvency in South Africa*, 9th edition (Lansdowne, Juta, 2008), 999 pp. at pp. 6-17.

112 M McConville & WH Chui, *Research methods for law*, p. 1.

113 JW Creswell, *Research design: Qualitative, quantitative and mixed method approaches*, 3rd edition (USA, SAGE, 2009), p. 183.

the aim is to investigate historical concepts and events through an analysis of documents (comparative nature) employing an emergent research design.<sup>114</sup> The latter is necessary as legal researchers need to formulate flexible research strategies to guide them to continuously re-evaluate their research methodology and consider alternative research approaches.<sup>115</sup> The need for conducting analytic legal research of a comparative nature in South Africa to yield constitutional change,<sup>116</sup> as indicated earlier, as well as in making provision for, *inter alia*, homosexual relationships - a socially constructed phenomenon that came to the fore during the dramatic economic and social shifts in the Western world during the 19<sup>th</sup> century<sup>117</sup> - is evident. Analytical research has, thus far, enabled the South African legal system to change from historical apartheid laws to include democratic principles and to guarantee fundamental rights to all its inhabitants.

As analysis, rather than data collection,<sup>118</sup> constitutes the core of legal research, the inclusion of a methodology section within a doctrinal research publication serves no purpose.<sup>119</sup> As such, doctrinal research is in line with the subjective, argument-based methodologies used in the humanities.<sup>120</sup> Research methods are not consciously learned or employed as in the case of scientific methods.<sup>121</sup> Legal analysis skills and principles are instead refined at an instinctive level through exposure to the research process, in order to develop sound legal arguments.<sup>122</sup> Due to this, legal research is often criticized as lacking methodology, as being based on opinion alone, or even of not being research at all.<sup>123</sup> Conversely, while the utilization of an explicit methodology

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114 JM McMillan & S Schumacher, *Research in education...*, p. 418, 500.

115 CL Kunz, DA Schmedemann & MP Downs, *The Process of legal research*, p. 6.

116 See the well known decision of *S v Makwanyane*, 1995, 3, SA 391 (CC), regarding the death penalty.

117 P De Vos, "On the legal construction of gay and lesbian identity and South Africa's transitional constitution", *South African Journal on Human Rights*, 1996, p. 267.

118 The collection of empirical data lies at the core of scientific research in both the natural (mathematics, physics, chemistry) and social sciences (philosophy, arts). TA Schwandt, "Three epistemological stances for qualitative inquiry: Interpretivism, hermeneutics and social constructivism", NK Denzin & YS Lincoln, (eds.) *Handbook of Qualitative research*, 2nd edition (London, SAGE, 2002).

119 P Chynoweth, "The built environment interdiscipline...", p. 30.

120 Methodologies used in the natural and social sciences encompass more detached data-based analysis.

121 JW Creswell, *Research design: Qualitative, quantitative and mixed method approaches*, 3rd edition (USA, SAGE, 2009), pp. 6-7.

122 C Albertyn, "Gendered transformation in South African jurisprudence: Poor women and the Constitutional Court", *South African Law Journal*, 128(4), 2011, pp. 659-685.

123 P Chynoweth, "The built environment interdiscipline...", pp. 35-37. See also WR Mills, "Shape of the universe: The impact of unpublished opinions on the process of legal research", *NYL Scholar Journal. Int'l & Comp. L.*, 2003, pp. 59-76; PD Callister, "Beyond training: Law librarianship's quest for the pedagogy of legal research instruction", *Law Library Journal*, 95(1), 2003, pp. 7-45; T McDonnell, "Playing beyond the rules: A realist and rhetoric-based approach to researching the law and solving legal problems", *UMKC Law Review*, 67, 2008, p. 286.

during scientific research ensures legitimacy, legal researchers need to demonstrate an understanding and adherence to the accepted principles and norms of their professional discourse in order to attain credibility for their research results.<sup>124</sup>

The validity of legal research findings is moreover, as pointed out by Schwandt,<sup>125</sup> totally unmoved by the empirical world as it rests upon developing agreement within the legal profession itself, rather than on the application to any external reality. It is with this in mind that Du Plessis<sup>126</sup> refers to legal research as a fundamental skill unique to the legal profession.

Following a traditional doctrinal approach to legal research is, however, criticized by various authors. Critique offered by Chynoweth<sup>127</sup> is based on the argument that doctrinal research, *per se*, cannot provide absolute accounts of the law in contexts for which the application of legal rules is predominantly a prerequisite. It can, for example, not explain, predict or even understand human behaviour by way of merely prescribing legal rules which dictate how human beings ought to behave. To overcome this hurdle, legal researchers could learn from the behavioural sciences by following multidisciplinary research approaches.<sup>128</sup> In light of the fact that documents, such as legislation and policies, must be studied in their traditional as well as contemporary form, legal researchers could moreover benefit from collaboration with the historical sciences.<sup>129</sup> In underscoring the importance of the historical sciences for the law, Watson<sup>130</sup> shows that, although legal rules can easily be transplanted from one legal system to another, a historical approach is essential to ensure that such transplantations and modifications are significantly meeting the reception society's needs.

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124 GS Goodman, "The Child Witness: Conclusions and Future Directions for Research and Legal Practice", *Journal of Social Issues*, 40(2), 1984, pp. 157-175.

125 TA Schwandt, "Three epistemological stances for qualitative inquiry: Interpretivism, hermeneutics and social constructivism", NK Denzin & YS Lincoln (eds.), *Handbook of qualitative research*, 2nd edition (Thousand Oaks, SAGE, 1991) pp. 189-213.

126 T du Plessis, "Legal research in a changing information environment", p. 43.

127 P Chynoweth, "The built environment interdiscipline...", pp. 29, 30.

128 HF d'Errico, R Yates & Z Jacobs, "Emergence of modern human behaviour: Middle Stone Age engravings from South Africa", *Science*, 295(5558), 2002, pp. 1278-1280.

129 DS De Villiers, "Old 'documents', 'videotapes' and new 'data messages' – a functional approach to the law of evidence (part 2)", *TSAR*, 4, 2010, pp. 720-735.

130 A Watson (1978), "Comparative Law and Legal Change", *Cambridge Law Journal*, 37, 1978, pp. 313-336.

Although a doctrinal approach is extensively used by South African courts,<sup>131</sup> and international legal researchers<sup>132</sup> to adhere to legal ethics<sup>133</sup> and promote public interest, McConville and Chui<sup>134</sup> criticize such an approach as being *intellectually rigid, inflexible* and *inward looking*. Christie and Maton,<sup>135</sup> to the contrary, defend the *inward looking* notion of doctrinal research as it provides for cumulative knowledge-building, the generation of mutual justification for judgments and collective identities. These authors do not, however, ignore the importance of an outward-looking approach in broadening intellectual coalitions and enabling ideas to be re-contextualized from other perspectives to refresh the ways of viewing and thinking about problems circulating within a discipline.

Another critique against doctrinal research, as encompassing legal theory, is brought forward by Murphy and Roberts<sup>136</sup> as well as by Halliday and Schmidt.<sup>137</sup> These authors opine that, whereas doctrinal research discourages exploration and interdisciplinary participation, it has, thus far, failed to provide noteworthy explanations, make valuable contributions to or present justification of what the law is or ought to be. The adoption of a law-in-context approach is consequently suggested.<sup>138</sup>

### ***Law-in-context approach***

By following a law-in-context approach (also referred to as socio-legal research),<sup>139</sup> legal researchers aim at finding solutions; with the potential of

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131 *S v Van der Westhuizen*, 1989, 1, SA 468 (T) 472D-E; *S v Pausen*, 1995, 1, SACR 518 (C) 526g.

132 HT Edwards, "The growing disjunction between legal education and the legal profession", *The Michigan Law Review*, 91, 1992, pp. 34-42.

133 J Cohen, RAH Robson & A Bates, "Ascertaining the moral sense of community: A preliminary report on an experiment in interdisciplinary research," *Journal of Legal Education*, 8(2), 1955, pp. 137-147.

134 M McConville & WH Chui, *Research methods for law*, p. 5.

135 F Christie & K Maton, "Why disciplinarity?" F Christie & K Maton, (ed.), *Disciplinarity: Functional linguistic and sociological perspectives* (Great Brittan, Newgen Imaging Systems Pty. Ltd., 2011), pp. 1-12.

136 WT Murphy & S Roberts, "Introduction to the special issue of Legal scholarship", *Modern Law Review*, 50(6), 1987, pp. 677-687.

137 S Halliday & P Schmidt, *Conducting law and society research. Reflections on methods and practices* (New York, Cambridge University Press, 2009), p. 3.

138 See for example, the following case law: *S v Langa*, 1998, 1, SACR 21 (T); *S v Ngwenya*, 1998, 2, SACR 503 (W); *S v Mthethwa*, 2004, 1, SACR 449 (E); *S v Ndhlovu*, 1997, 12, BCLR 1785 (N); compare *S v Sebejan*, 1997, 1, SACR 626 (W); *S v Orrie*, 2005, 1, SACR 63 (C); as well as the obitercomments by Van der Merwe J in *S v Zuma*, 2006, 3, All SA 8 (W).

139 R Banakar & M Travers (ed.), *Theory and method in socio-legal research* (Imprint Oxford, Portland, Or, Hart Publishing, 2005), p. 11.



being generalized for casual explanations or principles;<sup>140</sup> to existing societal problems rather than addressing abstract philosophical questions about the law itself.<sup>141</sup> By itself, it recognizes that the law can either be a contributor to or solution for societal problems.<sup>142</sup> The law is, therefore, studied as a social entity bringing about social justice,<sup>143</sup> which necessitates research of a more epistemological nature.

Legal rules are therefore not merely considered for what they are, but, by way of an external enquiry, evaluated for their effectiveness in achieving specific social goals (research *about* law).<sup>144</sup> This implies that the operation of the law, as such, is not only questioned, the underlying philosophical, moral, economic and political assumptions *vis-à-vis* the law are also scrutinized<sup>145</sup> to obtain equilibrium between rules and the social context in which they exist.<sup>146</sup>

Accordingly, the law-in-context approach acknowledges the importance of viewing legal rules within their historical and social context and thus requires of legal researchers to take cognisance of and understand the context (extraneous matters) to which legal rules relate.<sup>147</sup> The contextual nature of this approach is underscored by the purposive (text-in-context) approach, taking regard of the contextual framework of legislation including social factors and political policy directions when interpreting statutes.<sup>148</sup> Such an approach was already successfully taken by the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*,<sup>149</sup> *Chagi v Special Investigating Unit*,<sup>150</sup> *Van Vuren v Minister for Correctional Services*,<sup>151</sup> and the *South African Police Service v Police and Prisons Civil Rights Union*.<sup>152</sup>

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140 JM McMillan & S Schumacher, *Research in education ...*, p. 519.

141 BH Bix, "Can theories of meaning and reference solve the problem of legal determinacy?," *Ratio Juris*, 16(3), 2003, pp. 281-295.

142 M McConville & WH Chui, *Research methods for law*, p. 1.

143 L Biggs, "The application of section 197 of the Labour Relations Act in an outsourcing context (part 1)", *Obiter*, 29(3), 2008, pp. 425-452.

144 F Cownie, *Legal academics: Culture and identities* (Oxford & Portland, Hart Publishing, 2004), p. 55.

145 M McConville & WH Chui, *Research methods for law*, p. 1.

146 C Botha, *Statutory interpretation: An introduction for students* (Cape Town, Juta, 2005), p. 72; *S v Zuma*, 1995, 2, SA 642 (CC).

147 P Chynoweth, "The built environment interdiscipline...", p. 30.

148 C Botha, *Statutory interpretation...*, p. 51.

149 2004, 7, BCLR 687 (CC); 2004, 4, SA 490 (CC), par 73.

150 2009, 3, BCLR 227 (CC); 2009, 2, SA 1 (CC), par 14.

151 2010, 12, BCLR 1233 (CC), par 47.

152 2011, 9, BCLR 992 (CC); 2011, 6, SA 1 (CC), par 30 and 39.

The aim of a law-in-context approach to legal research is generally to facilitate legal reform, either in the law itself or in the manner of its administration.<sup>153</sup> Research results are, hence, presented as academic arguments open for criticism and not as final, pure academic knowledge or explicit facts.<sup>154</sup> In view hereof, this kind of legal research has, since the 1960s, been, and remains to be the dominant form of academic legal research.<sup>155</sup> Examples hereof include research conducted by Yeshanew,<sup>156</sup> regarding minimum core individual legal entitlements and obligations, Baimu<sup>157</sup> on compelling the State to, amongst others, provide free medical services, Budlender<sup>158</sup> on the implementation of socio-economic rights and by Pieterse<sup>159</sup> with regard to the judicial enforcement of rights in polycentric matters.

In order to understand the law in its wider context, Verhulst and Price<sup>160</sup> as well as Ward *et al.*<sup>161</sup> opine that a more refined and nuanced understanding of the massive social changes taking place in a society, can only be obtained by way of comparative and more inclusive research.

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153 C Botha, *Statutory interpretation...*, p. 72;

154 HW Arthurs, "Law and learning: Report on the social sciences and humanities research Council of Canada by the Consultative Group on research and education law, information division" (Social Sciences and Humanities Research Council of Canada, Ottawa, 1983).

155 R Card, "The legal scholar", *The Reporter: Newsletter of the Society of Legal Scholars*, 25, 2002, pp. 5-12.

156 SA Yeshanew, "Approaches to the justiciability of economic, social and cultural rights in the jurisprudence of the African Commission on Human and Peoples' Rights: Progress and perspectives," *African Human Rights Law Journal*, 11, 2011, pp. 317-340.

157 E Baimu, "The government's obligation to provide anti-retrovirals to HIV-positive pregnant women in an African Human Rights context: The South African Nevirapine Case", *African Human Rights Law Journal*, 2, 2001, pp. 170-71.

158 G Budlender, "Socio-economic rights in South Africa: Facing the challenges of implementation", 1999, 1(4) *ESR Review*, 1(4), 1999, pp. 15-16.

159 M Pieterse, "Coming to terms with judicial enforcement of socio-economic rights", 20 *SAJHR*, 20, 2004, pp. 383-417.

160 S Verhulst & ME Price, "Comparative media law and policy: Opportunities and challenges", DK Thussu, *Internationalizing Media Studies* (UK, Routledge, 2009), p. 131.

161 CL Ward, L Artz, J Berg, F Boonzaier, S Crawford-Browne, A Dawes, D Foster, R Matzopoulos, A Nicol, J Seekings, AB Van As, E Van der Spuy, "Violence, violence prevention and safety: A research agenda for South Africa", *South African Medical Journal*, 102(4), April 2012, pp. 215-218.

## **Integrative multidisciplinary (IMD)<sup>162</sup> approach in legal research in South Africa: A future perspective**

Because of the intrinsic evolving nature of the law, as previously indicated, constant guidance from academics and legal practitioners, who produce knowledge through research, is of the utmost importance for the effective functioning of the law.<sup>163</sup> Those endeavouring to research contemporary South African law are, apart from this, also presented with unique challenges as this country's legal system has undergone significant transformation during recent years, especially due to constitutionalism.<sup>164</sup>

### ***Unique contemporary challenges***

The acceptance of the final *Constitution of the Republic of South Africa*, Act 108 of 1996 is viewed by the author of this article as the most distinguished element affecting legal research in South Africa since 1996. Due to the fact that the Constitution is bestowed with supreme authority (section 2), its acceptance had profound consequences for all facets of the South African law.

Various existing legislation, firstly, had to be and is still continuously being reviewed and amended in order to bring it in line with constitutional imperatives and to clarify particular issues upon which disagreement exists. Seeing that the Constitution, through subsection 39(2), obliges courts to develop common law and bestows on them the power to declare legislation unconstitutional if they exceed constitutional authority or conflict with constitutional provisions through section 172,<sup>165</sup> the judiciary and administrative agencies<sup>166</sup> of South Africa have, secondly, become much more active in the law-making process.<sup>167</sup>

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162 The IMD model has been developed by Elize S van Eeden. In this model it is suggested that intensive research cooperations among disciplines starting from the disciplinary, progressing to an interdisciplinary and then a transdisciplinary phase. See ES van Eeden, "Considering environmental history within the transdisciplinary methodology as research focus for today and tomorrow", *Interdisciplinary Science Review*, 36(4), December 2011, pp. 314-329.

163 K Rose & G Pryal, *A short guide to writing about law*, p. 2.

164 L du Plessis, *Re-interpretation of statutes* (Durban, Butterworths, 2002), p. vii.

165 The Constitution limits the power of both the State and the Legislature. The legal authority of the Constitution is important to take cognisance of as it is the supreme law of South Africa, section 2. This entails that any action or law inconsistent therewith is invalid.

166 They are empowered by statute to promulgate regulations carrying the force of law, to issue and interpret rulings and to adjudicating disputes.

167 A movement away from the *iudicis est ius dicere sed non dare* principle compelling courts to merely interpreting the law without making law.

Judges are, moreover, compelled by section 39(1)<sup>168</sup> of the Constitution to decide all cases based on the constitutional values of democracy, human dignity, equality and human freedom.<sup>169</sup>

The Constitution (sections 39(1)(b) & 233), thirdly also requires of courts, and indirectly of legal researchers, to take international law into account. As such, legal practitioners must realize that the law is embedded in larger networks of social relations and that it cannot escape being influenced by its broader contexts.<sup>170</sup> It is in view hereof, evident that trans-jurisdictional instruments, such as Conventions on Human Rights, increasingly penetrate domestic legal systems and stimulate those responsible for operating national systems to have regard for wider consideration.<sup>171</sup> McNamara,<sup>172</sup> correspondingly, shows that a formal legislative codification of human rights and a legal environment (culture) must be provided in which human rights can be respected and enforced.

The advent of the constitutional dispensation in South Africa consequently presents legal researchers with new opportunities for developing and enriching common law, for researching constitutional issues and for discovering the relationship between constitutional law and other legal fields.<sup>173</sup>

Apart from constitutionalism, current legal researchers are also met head-on by, amongst others, globalization<sup>174</sup> which urges them to pay attention to alternative perspectives and consider their relevance to local situations.<sup>175</sup> Researchers must recognise that external influences, such as globalization, has led to a decrease in the importance of disciplinary boundaries and the recognition that scientific research can no longer be conducted in a vacuum.<sup>176</sup> Seeing that humans across all spheres share a complexity of societal problems, researchers must come to realise the need for combining research methods

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168 The Constitution has changed the *context* of all legal thought and decision-making in South Africa; *Holomisa v Argus Newspapers Ltd.*, 1996, 2, SA 588 (W).

169 *Matiso v Commanding Officer, Port Elizabeth Prison*, 1994, 4, SA 592; *Du Plessis v De Klerk*, 1996, 5, BCLR 658 (CC).

170 A Dane, "The need for clarity on whether 'suspects' may rely on section 35 of the Constitution of the Republic of South Africa, 1996: A comparative law analysis", *Comparative and International Law Journal of Southern Africa*, 43(2), 2010, pp. 239-259.

171 M McConville & WH Chui, *Research methods for law*, p. 2.

172 L McNamara, *Human rights controversies: The impact of legal form* (UK, Routledge, 2007), p. 2.

173 T du Plessis, "Legal research in a changing information environment", p. 44.

174 Globalisation: The intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa (A Giddens, *The runaway world: How globalisation is reshaping our lives* (London, Profile Books, 2002), p. 6.

175 M McConville & WH Chui, *Research methods for law*, p. 1.

176 J Mouton, *Understanding social research* (Pretoria, Van Schaik, 2009), pp. 53-55.

and strategies in a more inclusive manner.<sup>177</sup>

The information and technology explosions of recent years, moreover, have profoundly affected both the law<sup>178</sup> and legal research.<sup>179</sup> In contrast to legal sources being contained in small and predictable sets in the past, they are now presented in massive volumes and in a variety of formats (printed and electronic) in which they can be accessed.<sup>180</sup> The number of court cases has also escalated in years and the amount of legislation and regulations has expanded in both scope and volume. This necessitates researchers to evaluate and verify the various formats of legal sources available to them painstakingly.

From what has been said thus far, it becomes evident that researching the law is now, more than ever before, more pervasive, complex and demanding. In this regard, Kunz<sup>181</sup> as well as Nicholson<sup>182</sup> caution that access to more research pathways to travel, requires present-day legal researchers to possess a much greater range of skills and competencies than was ever expected from their law-focused predecessors<sup>183</sup> which by no means implies that legal research has become easier.

### ***Legal research meeting contemporary challenges***

Traditional research methods, as such (seeking to predict how a court will rule based on precedent) are therefore no longer sufficient. They do, for example, not allow researchers to move beyond the law in order also to consider the attitudes, values and beliefs of those affected by legal decisions as prescribed by section 1 of the Constitution. As a result, legal researchers are compelled to turn to other modes of inquiry to complement their findings. IMD approaches could be the answer as legal methods and other forms of research serve essentially the same purpose – they are all interested in arriving at a better understanding of the research question at hand. The difference lies only in the fact that the primary source of information in legal research is the

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177 CJ Russo, “Legal research: The ‘traditional’ method...”, pp. 33-52.

178 L Haupt, “The importance of protecting children against the dark side of the internet: A legal perspective”, *CARSA*, 2(2), October 2001, pp. 21-29.

179 L Meintjes-Van der Walt, “Tracing trends: The impact of science and technology on the law of criminal evidence and procedure”, *The South African Law Journal*, 128(1), 2011, pp. 147-171.

180 U Valentine, “Legal research as a fundamental skill: A lifeboat for students and law schools”, *University of Baltimore Law Review*, 39, 2010, p. 175.

181 CL Kunz, DA Schmedemann & MP Downs, *The process of legal research*, pp. 6, 7.

182 C Nicholson, “The relevance of the past in preparing for the future”, p. 101-114.

183 M McConville & WH Chui, *Research methods for law*, p. 1.

law itself.<sup>184</sup>

Legal researchers, especially, must take cognisance of the fact that legal disputes can have massive social overtones affecting an entire society.<sup>185</sup> As a direct result, it becomes apparent that legal disputes can no longer be resolved on the basis of the law alone. Courts and legal researchers alike will also have to rely on research data (non-legal analysis) obtained from other disciplines.<sup>186</sup> They moreover need to realise that the law, as embodied in legislation and policies and enforced in courts, requires that a wide spectrum of issues such as social, political, economic and environmental concerns need consideration. The latter, as pointed out by Dovers,<sup>187</sup> presents unique intellectual challenges as it leads to the realisation that more integrative capacity is essential in order to understand and to legally give effect to the interactions between highly complex, non-linear, and often closely interdependent human and natural systems. As such, legal researchers need to integrate diverse disciplinary perspectives to enable them to cut across previously distinct sectors when informing policy making processes.

Marshall<sup>188</sup> emphasizes that legal researchers must ensure that they do not merely have to be accurate reporters of their research results, but that they must also be good interpreters and analysts, taking care of and considering society's interests. The law is, all the same, a wide-ranging field of research as it touches nearly all aspects of human relationships.<sup>189</sup> With reference to legislation and policy development to be in line with the Constitution, Berridge<sup>190</sup> emphasizes the need of the legislative authority and policy makers to have access to clear narratives in various fields of communities. Judges, similarly, have to ensure that their decisions always consider the common law principle of *contra bonos mores*. In doing so, they ensure that the shared morals, opinions and interests<sup>191</sup> of a community are taken into consideration

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184 CJ Russo, "Legal research: The 'traditional' method ...", pp. 33-52.

185 *Brown v Board of Education, Topeka* 347 U.S. 483 (1954); and more recently *Lee v Weisman* U.S. 115 S. Ct. 2386 (1995).

186 CJ Russo, "Legal research: The 'traditional' method...", pp. 33-52.

187 S Dovers, "Clarifying the Imperative of Integration Research for Sustainable Environmental Management", *Journal of Research Practice*, 1(2), 2005, pp. 1-19.

188 T Marshall, "Guide to research", Thurgood Marshall Law library to legal research (available at: [http://www.law.umaryland.edu/marshall/research\\_guides/TMLL\\_guide/chapter1.pdf](http://www.law.umaryland.edu/marshall/research_guides/TMLL_guide/chapter1.pdf), 2010-2011), as accessed on 6 December 2011.

189 K Rose & G Pryal, *A short guide to writing about law*, p. 2.

190 V Berridge, "History matters? History's role in health policy making", *Journal for Medical History*, 52(3), 2008, pp. 324-326.

191 E Labuschagne, *Triangular law lexicon* (RSA, B & D Printers, 2004), p. 559.

when deciding on what legal rules should achieve.<sup>192</sup>

In as much as both law and legal advocacy, in this regard, rests heavily on assumptions about human behaviour, it must be realised that the understanding of human behaviour is, at the very least, incomplete.<sup>193</sup> As a result, the outcome of human behaviour cannot be understood clearly by way of traditional legal thinking only. Legal researchers also need to study human phenomena in order to understand the motives and reasons behind human actions that influence their past, current and future behaviour.<sup>194</sup> In view of this, Blasi and Jost<sup>195</sup> recommend that legal researchers attend to all potentially relevant social orderings in selecting jurors and developing advocacy strategies when endeavouring to study, explain and/or change humans into law-abiding citizens.

To fully satisfy contemporary societal needs, legal researchers may have to interact with other disciplines such as the behavioural sciences which could bring more insights into human behavioural trends. Considering that the law relies on an explicit psychology of rational choice, legal researchers may attempt to develop process models of human thinking and behaviour that rest on more complete, empirically satisfying foundations in collaboration with the behavioural sciences in order to explore the consequences of these models for law.<sup>196</sup> Results obtained by legal researchers are, in turn, equally important to enrich research outcomes conducted in the human and social sciences as outlined by van Eeden.<sup>197</sup>

If researching the law is simply demoted to the dry covers of legal documents, MaCauly<sup>198</sup> cautions that a gap between theory and practice will arise. A more critical enquiry and empirical exploration approach is thus needed. In this regard, research conducted by Heinz and Laumann<sup>199</sup> indicates that the law

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192 K Rose & G Pryal, *A short guide to writing about law*, p. 39.

193 G Blasi & JT Jost, "System justification theory and research: Implications for law, legal advocacy, and social justice", *JSTOR: California law review*, 94(4), 2006, pp. 1119-1168.

194 P Winch, *The idea of a Social Science. And its relation to Philosophy* (London, Routledge, 2002), p. 160.

195 G Blasi & JT Jost, "System justification theory and research: Implications for law, legal advocacy, and social justice", *JSTOR: California Law Review*, 94(4), 2006, pp. 1119-1168.

196 G Blasi & JT Jost, "System justification theory and research...", pp. 1119-1168.

197 ES van Eeden, "A practical exploration of the feasibility of integrative multidisciplinary research from a broad ecohealth perspective in South Africa", *The Journal for Transdisciplinary Research in Southern Africa*, 7(2), December 2011, p. 263.

198 S MaCauly, "Non-contractual relations in business", S Halliday & P Schmidt, *Conducting law and society research: Reflections on methods and practices* (Cambridge, Cambridge University Press, 2009), pp. 14-25.

199 JP Heinz & EO Laumann, "*Chicago lawyers*": *The social structure of the bar* (USA, Russell Sage Foundation, 1982), pp. 59-71.

can indeed be studied by way of a quantitative analysis incorporating multiple perspectives – providing support structures for analytical thought - and requiring instinct and expression to reach analytical results. While van den Besselaar and Heimericks<sup>200</sup> also demonstrate that law of evidence has become more multidisciplinary in nature, Van Eeden<sup>201</sup> emphasises that following a multidisciplinary approach may provide superior research because of its all-inclusive nature and potential to provide diverse perspectives.

The work of Engel,<sup>202</sup> similarly, signifies the use of legal research taking a more multidisciplinary approach in showing how cultural practices can give life and meaning to the law by endeavouring to understand legality through the eyes of regular people better. In addressing the fundamental human rights of prisoners, Mubangi,<sup>203</sup> moreover accentuates the importance of historical research in apprising the functionaries of the prison system, the police and the judiciary as important links in the chain of the criminal justice system.

Justice Chaskalson<sup>204</sup> points to the fact that the Constitution offers a vision for the future. It envisages a society in which the basic needs of all are met and in which social justice and respect for human rights prevail. Chaskalson however cautions that all, concomitantly, has the obligation to realise these goals. Pertinent to obtaining social justice during legal processes, the author agrees with Ellis<sup>205</sup> indicating that an innovative, IMD research approach is essential as it allows for the law to be studied in a much broader, social and political context.<sup>206</sup>

## **Conclusion**

The law is recognized by Rose and Pryal<sup>207</sup> to be an interdisciplinary field

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200 P van den Besselaar & G Heimericks, "Disciplinary, multidisciplinary, interdisciplinary — Concepts and indicators", Paper delivered at the 8th conference on Scientometrics and Informatics, Sydney, Australia, 16-20 July 2001.

201 ES van Eeden, "Environmental history within a revitalized integrative research methodology for today and tomorrow" *Interdisciplinary Science Reviews*, 36(4), December 2011, pp. 314-329.

202 D Engel, "The oven bird's song", S Halliday & P Schmidt, *Conducting law and society research: Reflections on methods and practices* (Cambridge, Cambridge University Press, 2009), p. 83-93.

203 JC Mubangi, "Prisons and prisoners' rights: Some jurisprudential and historical perspectives", *Acta Criminologica*, 14(3), 2001, pp. 120-129.

204 Mr Justice Chaskalson, Bram Fischer lecture Johannesburg Civic Theatre, 18 May 2000, *The Sunday Independent*, 21 May 2000, pp. 1-2.

205 A Ellis, "Baby rape: Why does the law not protect them?", *Journal for Judicial Science*, 28(1), pp. 59-75.

206 M McConville & WH Chui, *Research methods for law*, p. 5.

207 K Rose & G Pryal, *A short guide to writing about law*, p. xv.



of enquiry, *per se*. Systematic interpretation of the law is an instance of contextualization.<sup>208</sup> It calls for obtaining a holistic and logical view by also taking cognisance of extra textual circumstances.<sup>209</sup>

By analysing the South African law from a historical perspective, this article highlighted the fact that traditional research approaches such as the black-letter-law-approach is no longer sufficient.

As the South African law evolved beyond the pragmatic following of the Roman-Dutch law, more emphasis was gradually placed on following a law-in-context approach enabling legal researchers to recommend applicable new innovations to shape the law in order to adhere to the unique circumstances of this country's citizens.

Recent development in the sphere of the South African law, with specific reference to constitutionalism, furthermore indicated a dire need for more ground-breaking approaches to legal research.

Although authors, such as Naveh and Lieberman,<sup>210</sup> propagate the replacement of conventional discipline-orientated scientific paradigms altogether, the author of this article advocates that innovative integrative research approaches should rather be taken additionally in order to enhance single disciplinary research approaches. This is based on the premise that researching the law in a too wide-open context may lead to the qualities of exploratory methods being taken excessively and unguided or unclear objectives being set, thus negating the theoretical and authoritarian benchmarks of any legal system.

In this article, after conducting a literature review on integrative research approaches, the author suggests that an IMD approach can be successful for future legal research pertaining to the South African law.

An IMD approach is recommended as it recognises the deeper meta-theoretical language of a disciplinary nature, allowing for knowledge

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208 A Dane, "The need for clarity on whether 'suspects' may rely on section 35 of the Constitution of the Republic of South Africa, 1996: a comparative law analysis", *Comparative and International Law Journal of Southern Africa*, 43(2), 2010, pp. 239-259; GE Devenish, "Department of Land Affairs v Goedgelegen Tropical Fruits - a triumph for teleological interpretation, an unqualified contextual methodology and the jurisprudence of ubuntu", *South African Law Journal*, 125(2), pp. 231-240.

209 L du Plessis, *Re-interpretation of statutes*, p. 227. See also V Naidoo, "Revisiting administrative 'capacity' in the context of public service transformation" *Journal of Public Administration*, 1(44), December 2009, pp. 991-1010.

210 Z Naveh & A Lieberman, *Landscape ecology. Theory and application*, 2nd edition (New York, Springer, Berlin & Heidelberg, 1984), pp. 345.

integration and abstraction within various disciplines.<sup>211</sup> Knowledge thus generated has more general application within and across specific disciplines. Such an approach permits researchers to remain true to precedential judiciary and appreciate the boundaries of the law as a substantive discipline in its own right, while also taking notice of societal changes and how people in general experience and view the law.

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<sup>211</sup> See ES van Eeden, "Considering environmental history within the transdisciplinary methodology as research focus for today and tomorrow", *Interdisciplinary Science Review*, 36(4), December 2011, pp. 314-329; R Moore, "Making the break, disciplines and interdisciplinarity", F Christie & K Maton (ed.), *Disiplinarity: Functional linguistic and sociological perspectives* (Great Brittan, Newgen Imaging Systems Pty. Ltd., 2011), pp. 88-105.