A legal approach to assessing Spatial Data Infrastructures

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Abstract. A good legal framework is vital for the development of a well-functioning Spatial Data Infrastructure (SDI). This chapter describes the tools offered by legal scholarship to assess an SDI and describes three levels of assessment. The first level is of compliance and describes whether specific elements of the SDI obey the law. The second is coherence which looks at the interaction between all the rules making up the legal framework for the SDI. Finally there is the quality level which attempts to determine whether the legal framework reaches its goal of stimulating the development of the SDI.

13.1 INTRODUCTION

In the debate on SDI assessment increasing attention is being given to the ‘human’ factors of success or failure, including the legal conditions (see e.g. Onsrud et al., 2004; Masser 2006). Legal aspects are often linked with organisational, institutional or policy indicators for SDI assessment. This aspect has the benefit that law is not treated as an isolated event, but addressed in combination with political or socio-economic influences. However, there is also a drawback — the specific characteristics of a legal approach to SDI assessment remain
non-explicit and unfamiliar, holding the danger of the SDI community either over or underestimating their importance.

Understanding how an SDI is assessed from a legal point of view requires an insight into a lawyer’s or researcher’s approach to legal issues or questions. In the assessment of an SDI from the legal point of view, one can generally distinguish between three levels of assessment. On the first level, the compliance of the SDI with existing legislation is examined. Secondly the assessor looks at the coherence of several laws, regulations and practices that apply to an existing situation or phenomenon, in this case an SDI. On the third level, and finally, an evaluation of the legal framework underpinning the SDI will be conducted and which, aims to determine whether the SDI reaches the goals that have been set for it. These three levels of assessment will be addressed in the following sections of this chapter. First, however, the chapter takes a short look at the concepts of legal research and methodology.

### 13.2 A LEGAL APPROACH – WHAT IS THAT?

The debate on the specific characteristics and scientific value of law is quite old and it is complicated by the fact that the term *law* is used in two different meanings. On the one hand, it is the schooling in, or the study of, a subject consisting of legislation and legal practice; while on the other hand ‘the law’ is also the subject itself of that study. The latter type of study is usually referred to under the term *jurisprudence*. This jurisprudence has a peculiar position in that it is not only the science of law, but also a source of law for legal practitioners (Gutwirth, 2007).

What does a legal researcher do more than just describing existing legislation and occasionally choosing between different possible interpretations of that legislation (Van Hoecke, 1996)? While some may doubt it, law can actually be considered as a *science*, a corpus of *knowledge*, and not just a craft (Van Hoecke, 1996; Ulen, 2002; on the contrary see Balkin, 2006). Next to legal practice there is activity aimed at developing a body of reliable and robust knowledge of the law. Of course this legal science differs greatly from experimental science with its tests and tubes, or earth science with its field research, or even social sciences, where methods of statistical and qualitative research are essential. Each of these sciences has its own rules of truth and validation which is no different for law. The work of a legal researcher or scientist typically consists of creating a
systematic state of the art of important and pertinent legal developments, followed by an analysis of these developments and the possible consequences and perspectives to inform future legislation or case law. However, it is only fairly recent that legal scholarship has moved towards a more science-like discipline. The reason for this shift is twofold. First, the traditional idea that legal systems are national and cannot be compared is slowly giving way to general theories of law that apply across boundaries and that can be put up for validation by the entire scientific community, such as law and economics or ‘contractarianism’. Secondly, empirical work is increasingly considered a vital part of legal science, due to the view that the consequences of a law should form part of evaluating the worthiness of the law. If the effectiveness of a law is a criterion for its worth, then the effects of the law have to be measured (Ulen, 2002).

This position can be linked to Holmes Jr’s view that legal science is, or should be, intrinsically linked to the developments and needs of society. As Holmes Jr states in *The path of the law*, “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past” (Holmes Jr., 1897). In other words, law, and the study of, should not be seen as separate from its societal goals and its consequences on reality. However, when the study of the law in its context leads the legal researcher to take a normative standpoint on how the law *should* be interpreted, there should be an awareness that this is not a scientific thesis but a socio-political choice that may be, but is not always, grounded on empirical or any other evidence, but sometimes merely on deductive reasoning (Van Hoecke, 1996; Ulen, 2002).

If law is a science, does this entail that it has its own methodology? Few lawyers will be found to reject the notion that law has a distinctive methodology, as to do so “would remove any rationale for the de facto institutional monopoly that lawyers enjoy in trying cases and representing clients for large sums of money” (Balkin, 2006, p. 158). Balkin distinguishes between an ‘internalist’ and an ‘externalist’ approach to law. The former implies that on the one hand there is a set of arguments, approaches, skills and forms of knowledge distinctive to law; and on the other hand that these arguments, approaches, skills and forms of knowledge are more or less sufficient by themselves to decide legal questions. The externalist approach argues that discussions of law are incomplete without the
knowledge and skills of other disciplines, such as natural and social sciences and humanities. Even though Balkin only explicitly refers to legal practice, this approach can be extended to legal research or theory (Balkin, 2006, p. 161-162).

Van Hoecke uses another categorisation, stating that legal methodology consists of a description and a classification of currently valid law. A description also includes determining which rules are currently in force, and whether they conflict with a rule that is on a higher hierarchical level. Any description inevitably implies an interpretation of the law, whether it is an unconscious, commonly accepted interpretation or — exceptionally — a new, original interpretation. Secondly, a classification of law holds a number of aspects: 1) the technical systemising of legislation to obtain a coherent unit based on a number of general principles; 2) including this legislation in a larger system containing case law, jurisprudence and basic principles of law; 3) demarcating between different legal systems and determining which legal system is applicable and 4) the adaptation of the legal system to its social goals, technical developments and changes in the political views of society. Acceptance of these descriptions, interpretations and classifications is not based on objective certainties or evidence, but on a subjective consensus, or more or less generally accepted personal opinions. This acceptance should always be determined by the social context in which the legal system is functioning (Van Hoecke, 1996).

The categorisation that is used in this chapter includes Van Hoecke’s point of view, but argues that a legal study or assessment includes not only a study of the law itself but also links to how that law is applied in reality. The approach is explained in the light of the legal assessment of an SDI.

13.3 A LEGAL APPROACH TO SDI ASSESSMENT

A distinction can be made between three levels of legal assessment of an SDI, based on different criteria: compliance, coherence and quality. The object of the assessment depends on the level and the criterion that is being applied. On the compliance level, the legal researcher looks at an existing phenomenon, or the behaviour of people or organisations, and how these can be classified under an existing law or regulation. This review includes Van Hoecke’s first step of describing the law and determining whether it is currently in force. Coherence assesses the relationships between different laws and regulations,
referring to the hierarchy of norms and rules of preference between the applicable legislation (what Van Hoecke referred to as the “technical systemisation of legislation to obtain a coherent unit”, p. 406-407). Finally, quality looks at the legal system applicable to the SDI in its entirety, and attempts to determine whether it reaches its goal, that is facilitating and supporting the implementation and use of the SDI, which in its turn can contribute to any number of policy goals relating to environment, emergency response, housing, transport, economy, health care etc.

13.3.1. Compliance

Essentially compliance assesses whether a certain situation, behaviour or fact follows the rules that are applicable to its operation. The SDI as a whole is not the object of this assessment, but only its separate elements. These elements are weighed against the law and either considered as in line or in contradiction with it, entailing that the situation or behaviour is considered illegal and needs to be changed to comply with the law. To determine whether such a situation or behaviour complies with the law, a clear description of this law and its consequences is needed. As was mentioned above, such a description automatically includes an interpretation of the rule. Whether compliance is reached therefore, also depends on the interpretation given to the law. Normally, this interpretation is straightforward and compliance is easy to determine. However, in some cases the law may be unclear and lead to different possible interpretations which complicate the compliance assessment process. Often this complication is due to developments in science and technology that were not or could not have been foreseen at the time the legislation was drafted. For instance, the European directive on public access to environmental information distinguishes in its charging policy between the consultation and the supply of information. At the time of the directive’s conception it only addressed the consultation of documents on site and viewing services on the Internet were not considered. Does this therefore mean that the use of an internet viewing service is a consultation or a supply of environmental information? If one uses a teleological interpretation, or interprets the term in its everyday meaning, consultation implies that the user can learn the content of a document, but not obtain his or her own physical copy that can be consulted afterwards. Therefore a viewing service would imply the consultation of environmental information (Janssen and Dumortier, 2007). Comparable problems occurred when applying intellectual property rights in the information society (should a
website be considered as a reproduction or a publication under copyright legislation?), new developments in media (is a blogger a journalist?), telecommunications (is on-demand TV a broadcasting service or a telecommunications service?) etc.

When assessing elements of an SDI on their compliance with the law, there are three types of law that need to be taken into account. First, there are laws, regulations and other binding rules that refer directly to SDIs, geographic information infrastructures, spatial data etc. A prime example is the INSPIRE directive (Directive 2007/2/EC of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community) and its transposing legislation to the Member States. These laws and regulations are embedded in a legal framework containing rules that will apply to the SDI – not as such, but because it or its elements also fall under a different category of facts, situations or behaviours to which other existing legislation applies. The first type of legislation applies to data or information in general, and it may also be applicable to spatial data, if it fits the criteria. For instance, if spatial data falls under the definition of government information, it is subject to freedom of information or access legislation. If spatial data is sufficiently original to be considered a copyrightable work, it will be protected by copyright. If a spatial database shows a substantial investment in the obtaining, presentation or verification of its contents, it will fall under the *sui generis* database right (Janssen and Dumortier, 2006). If spatial data is also considered personal data because it regards an identified or identifiable person (for instance an address), its collection and use will have to comply with the European and national rules on the processing of personal data and the protection of privacy. Numerous other examples can be imagined. The second type of legislation is even more general. Some legislation will apply to an SDI because it may relate to any interaction between people, or any situation in everyday life. Ready examples concern liability, contract or torts law, procedure, competition law etc.

Each element of the SDI has to comply with all the laws and regulations that are applicable to the SDI. Problems will not exist if the lawmaker, when developing new rules, has taken account of all existing legislation and has fitted these new rules seamlessly into that existing framework. However, this coherence is not always the case. An element of the SDI may be subject to laws and regulations that contradict each other or, at the other end of the spectrum; it may not be subject to any rule at all because there is a gap in the law. These
types of situations are addressed by the level of assessment that deals with coherence.

13.3.2. Coherence

The second level of the legal assessment of the SDI deals with the coherence between all the different rules that are applicable to that SDI. Therefore the coherence criterion is not used to assess the SDI itself, or facts, situations or behaviours that are part of the SDI, but it deals with the assessment of the legal framework in its entirety underpinning the SDI.

The question that needs to be asked when determining the coherence of the legal framework underpinning the SDI is simple: do the applicable laws complement or contradict each other? Answering this question is a two-step process. First, one needs to have an oversight of all the laws and regulations that are in force and that apply to the SDI. The second step is to assess whether these laws and regulations complement or contradict each other. This assessment includes applying basic rules of legal interpretation to the legal framework.

The first step: an overview of the applicable legislation. In order to assess whether the legal framework is coherent, one needs to have an overview of all the components of the framework. For an SDI, the set of laws and regulations can be very wide and diverse, involving rules on data, coordination, standards, software etc. In addition, these rules and regulations can take many different forms: legal acts adopted by parliament, executive orders or decisions, cooperation agreements, memoranda of understanding, informal arrangements etc. Therefore the applicable legal framework can be considered from many different points of view and moreover, the definition of an SDI and its objectives will also influence the legal framework that is applicable. If a broad definition is adopted, it may entail an increase in the number of rules that need to be taken into account. For this chapter, a data-centric point of view is adopted, because this is a good example of the applicability of multiple rules at the same time.

From the point of view of an SDI as an infrastructure of which the main purpose is to make data available, a distinction can generally be made between two types of laws and regulations: on the one hand, there are laws and regulations (as part of a wider category of policy, which also include decisions and strategies that are not embedded in formal legislation) that promote the availability of spatial data in an
SDI, while on the other hand a number of rules hinder this availability of spatial data (Janssen and Dumortier, 2007). Underlying these two types of legislation are rules that are more related to the procedural aspects in the relationships between different elements or stakeholders of an SDI, for example legislation regarding competition or cooperation. Such cooperation may include rules on coordinating bodies or structures, or procedures for cooperation agreements etc. The following figure is a simple representation of the legal framework for an SDI, from a data-centric point of view. The figure does not encapsulate all rules that will apply, as listing these would go beyond the scope and purpose of this chapter, so it only refers to the laws that come into play on most occasions.

![Figure 13.1: Legislation affecting an SDI (adapted from Janssen and Dumortier, 2007)](image_url)

The rules that promote the availability of spatial data in an SDI can be divided into three categories: laws providing access, laws allowing re-use and laws that organise data sharing. The distinction between these three categories lies in the purpose of its use. First, if a natural or legal person intends to obtain a document or information in order to exercise his democratic rights or obligations, we consider this is as access. Therefore access mainly involves democratic or political purposes, and is generally laid down in national freedom of information or access legislation (Janssen and Dumortier, 2007). On an international level examples of such access are the 1998 Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters, or the 2003 European Directive on public access to environmental information (Directive 2003/4/EC on public access to environmental information).
Second, the authors’ concept of re-use is based on the definition in the PSI directive — use for commercial or non-commercial purposes outside of the public task (Directive 2003/98/EC on the re-use of Public Sector Information). This re-use entails a purpose that goes beyond the democratic purpose of ‘checking up’ on an elected government representing the citizens and could be considered ‘economic’ rather than political or democratic. Third, we use the term data sharing for the delivery, and obtaining of, spatial data for the purpose of performing a public task. Generally, sharing will involve the exchange of data between public bodies. However, if private companies are entrusted with the provision of a public service, some of their dissemination or the obtaining of data may also fall under the concept of data sharing (Janssen and Dumortier, 2007).

In the category of laws that limit the availability of spatial data in an SDI, at least the following rules should be mentioned. First, the privacy of the individual has to be protected against the publicity of personal information or of data about his/her whereabouts or location. European examples of legislation protecting privacy are article 8 of the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR), the 1995 European Directive on the processing of personal data (Directive 95/46/EC on the processing on the protection of individuals with regard to the processing of personal data and on the free movement of such data), and the European directive of 2002 on privacy and electronic communications (Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector). Second, the security of the nation may also be at stake if data on the location of so-called ‘critical infrastructures,’ or data on environmental hazards or emergencies, are made available to the wrong parties. Rules that address these issues can be found in the exceptions to the national freedom of information legislation or in secrecy acts. Third, liability worries bring the spatial data providers to very strictly controlling what happens with their data as their concern is not only for deliberate misuse of their data for illegal purposes, but also for users basing decisions on this data, while the accuracy or fitness for the purpose cannot be fully guaranteed. The rules for liability and the possible waivers thereof are laid down in national contract or tort law. A fourth limitation can be found in intellectual property rights. The goal of intellectual property rights (IPR) is to stimulate innovation and the dissemination of information, by rewarding authors who create original works for their effort and to enable them to control the
exploitation and use of their work (Laddie et al., 2000, Janssen and Dumortier, 2006). This control and the financial benefits it may bring lead the holders of the intellectual property rights to keep a very close eye on who can use their spatial data. The rules of these rights can be found in international copyright treaties, such as the 1886 Berne Convention for the Protection of Literary and Artistic Works and the 1996 Agreement on Trade Related Aspects of IPR (TRIPS), and in European directives on copyright and database rights (for example the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society; Directive 96/9/EC on the legal protection of databases) and in national IPR legislation.

The second step: assessing the relationship between the applicable legislations. When the first step of identifying the rules that are applicable to the SDI is completed, the second step is to determine whether there is any contradiction between these rules. If there is no contradiction, the legal framework is coherent. If contradictions are found, the assessment needs to be continued to determine the elements causing the incoherence of the framework.

Contradictions can exist on different levels. First, they can appear in the wording of the laws and regulations that are being examined, but there may also be contradictions relating more to the spirit of the law rather than the actual wording, which can be harder to detect. Such contradictions may also be more challenging to change than a literal or textual alteration as they represent different points of view that have grown through discussion between different stakeholders at a certain point in time. Second, some contradictions between rules may not be black or white. Especially when there are contradictions as to the spirit of the law, there may be ‘grey zones’ which depend strongly on interpretation and circumstances. Lastly, problems of incoherence may also be caused by gaps in the legislation, rather than contradictions.

In any case, the fact that contradiction exists between two or more rules applicable to the SDI does not automatically mean that the legal framework is incoherent. A number of basic principles of law attempt to provide a solution for situations where two rules have to compete with each other to apply. The following rules are most important:

The first basic principle deals with the hierarchy of norms. This hierarchy may be determined explicitly in the constitution, but in most
systems of law it is based on the particular type of source from which the norms derive (Shelton, 2006). For instance, the constitution, which represents fundamental values of society, is a higher norm in the hierarchy than a law voted by a parliamentary assembly. In its turn, such a law is a higher norm than administrative orders, which can take the form of Executive Orders, Royal Decrees etc. This hierarchy has two consequences. On the one hand, the norms that are lower in the hierarchy have to be interpreted in accordance with the higher ones. On the other hand, if such conformity through interpretation is not possible, and there is a conflict between the norms, the higher level rule will prevail: the constitution over the law, the law over the implementing orders, etc. With regard to the relationship between European Community law and the national law, the European Court of Justice has established the basic conflict rule in the milestone case *Costa v. E.N.E.L* (1964) ECR 585: whenever a national rule conflicts with a rule of Community law, the rule of Community law has precedence, irrespective of the status of the rule of national law in the national legal order and irrespective of whether the Community rule is one of primary or secondary law (Lenaerts and Corthaut, 2006). However, not all constitutional courts of the Member States have accepted this approach without a fight (see e.g. Bell, 2005; O’Neill, 2002).

In some cases, however, the assessment of the legal framework for an SDI will involve rules from the same level of the hierarchy. In these situations there are two other principles of precedence that may be of assistance. The first principle, *lex specialis derogat legi generali*, entails that the rule with the smaller field of application to precede the rule with the wider field of application. Therefore, a law that specifically addresses spatial data held by the public sector will have precedence over a law that is directed to public sector information in general. Following the second principle, *lex posterior derogat legi priori*, a recent rule has precedence over an older rule with the same field of application. If the legislator makes a new rule that applies to a situation where there already was a rule in place, it is assumed that he/she implicitly means to abolish this older rule and replace it by the new one. Using these two principles a certain level of coherence of the legal framework can already be safeguarded.

Unfortunately, the principles of precedence that were mentioned above cannot ensure, however, the full coherence of the legal framework for an SDI. They have exceptions and no rule establishes when to apply the principle and when to apply the exceptions
Moreover, while it is clear which law is the more recent one of two, it is not always easy to determine which law or regulation is the *lex specialis* and which is the *lex generalis*. For example, the European directive on public access to environmental information is applicable to *environmental information*, while the INSPIRE directive applies to spatial data. Both contain rules on access of the citizen to information held by public authorities. Considering the wide definition of environmental information on the one hand, and the general description of spatial data and the large number of categories of spatial data that are subject to the INSPIRE directive on the other hand, the question rises of which category is the narrower one. While not all the categories of spatial data listed in the INSPIRE directive seem to immediately qualify as environmental information, the fact that they are considered necessary for public authorities to perform their public tasks relating to the environment indicates that most of them should be considered environmental information. However, the definition of environmental information also covers laws, treaties, conventions etc. that relate to the environment, or policies or cost-benefit analyses regarding the environment, which cannot directly be considered spatial data under the INSPIRE directive. Therefore the two definitions overlap, but one does not encompass the other completely and, as a result, there is no real relationship of *lex specialis* and *lex generalis*.

Assessing the coherence of the legal framework for an SDI is not always clear cut and has an impact on the level of compliance. If the legal framework is not coherent, it is impossible for any situation or behaviour to be fully compliant. If it is subject to different rules that contradict each other, obeying one rule will imply breaking the other. This entails that the person or organisation responsible for compliance will have to decide which rule it prefers to comply with. This decision will depend on the priorities of the organisation, but also on the enforcement procedures and the penalties for non-compliance. Towards the third level, whether or not a framework is coherent does not always provide guarantees of its quality. Even though the legal framework may be fully coherent, therefore without any contradictions between all the applicable rules, this coherence does not mean that the framework fulfils its purpose, that is facilitating the development and use of the SDI.
13.3.3 Quality

The third level of assessment of an SDI lies on the borderline between law and policy. This third level assesses the quality of an SDI. Put very simply, quality refers to whether an SDI reaches the goals that have been set for it, or more specifically, whether the legal framework underpinning the SDI contributes to reaching its goals. These goals may be defined by the assessor in terms of efficiency, effectiveness, social benefits, a wider exchange and use of spatial data, improved policy making etc. The quality of the legal framework, and hence of the SDI, will increase when it gets closer to reaching these goals. Determining these goals and assessing whether or not the legal framework has a beneficial or detrimental effect on them, is an evaluation that strictly goes beyond the current tools and methodology of a legal researcher. However, as ULEN points out, recently legal scholars have been exploring empirical social inquiries, and the number of law schools devoting attention to training students to understand and perform quantitative empirical or experimental work is rising (Ulen, 2002).

Moreover, the legal scholar is not completely without tools derived from the law itself. Even though the values that are considered important in society are usually translated into political decisions taken by those elected to represent these values, some values are considered to be so fundamental and widely accepted that they are translated into fundamental, or human, rights. These human rights are generally considered to be universal, that is they belong to each of us regardless of ethnicity, race, gender, sexuality, age, religion, political conviction, or type of government (O’Byrne, 2003). Any assessment of the SDI and the legal framework that supports it will have to consider whether they contribute to the safeguarding of these human rights. Therefore, the protection of these rights and freedoms will precede the protection of other rights and interests that are considered less fundamental to the human nature.

Two basic human rights mainly come to mind when discussing the legal framework for an SDI, the right to privacy and freedom of information. The right of the individual to privacy is acknowledged in article 8 of the ECHR, which recognises the right to respect one’s private and family life. The most important aspect of privacy with respect to an SDI is the so-called ‘informational privacy’, that is the right of the individual to know and control what happens with information relating to his or her person. On the European Union
level, this informational privacy is protected by the European Directive on the processing of personal data and its transposing legislation. Freedom of information is guaranteed as an inherent part of freedom of expression in article 10 of the ECHR. However, it is only very recently that the European Court of Human Rights has been hinting that this freedom of information might include a right of access to state-held information (Hins and Voorhoof, 2007). Until this line of reasoning is developed fully by the Court, access to public sector information, one of the main issues in an SDI, in many European Member States is still based on the constitution. Therefore, accessing public sector information may not be a ‘human right’ recognised by the ECHR, it is still deemed sufficiently fundamental to be a constitutional right.

While the fact that many of these fundamental rights are incorporated in international treaties or national constitutions automatically make them a priority, due to their place in the hierarchy of norms, they also represent a view on what is most important in society and what should be treasured by any law or policy maker. Therefore, even though these rights may be considered as universal, their content and scope evolves according to changing goals and influences in society. This scope relates to one of the most common critiques on the idea of human rights ─ while pretending to be universal, they ignore social and cultural differences and reflect a Western and individualist bias (O’Byrne, 2003). Moreover, their scope may, in some cases, be limited for legitimate reasons. Judging the legitimacy of these reasons is not purely a legal matter, it is also a political or ethical one. For instance, the right to privacy laid down in article 8 ECHR is not absolute. It may be restricted in accordance with national law, in order to protect a limited number of interests, but only if the restriction is necessary in a democratic society. This protection involves showing that the action taken is in response to a pressing social need, and that the interference with the rights protected is no greater than is necessary to address that pressing social need. It is therefore highly dependent on the context (Ovey and White, 2002), opinions of different socio-political groups in society and personal opinions of the people judging the necessity of the restriction.

Therefore, while a legal assessment is being performed on the basis of European Treaties or national constitutions, it cannot be seen separately from political and socio-economic evaluations. For instance, the question can be asked whether an SDI stimulates access to public sector information (and the goals that are assumed to be
served by this access), or how this access can be improved by legislative measures. It must also be considered whether the privacy of the individual is harmed by sharing spatial data (for example cadastral parcels or addresses) and whether his or her privacy should be considered more important than the purpose of collecting and sharing this spatial data. The first part of the question may be a legal one, the latter lies on the edge of law and policy.

13.4 CONCLUSION

The legal assessment of an SDI has a different starting point and methodology than many other types of assessment. This is mainly due to the specific characteristics of legal research — its main object is not the SDI but the legal framework itself. In addition, the assessment is not based on empirical evidence as it is perceived by natural or applied sciences, but mostly makes use of legislation, case law and jurisprudence. This lack of empirical data may hamper the value of the assessment, in that it is difficult to determine whether or not it rings true. In addition, the value of the law itself, in developing and using an SDI, can also be questioned. Is the existence of legislation really necessary for the well-functioning of an SDI? Is not an SDI more dependent on political goodwill and a general culture change?

While good political, social and cultural conditions are vital for the development of an SDI, the legal framework certainly has a contribution to make, in at least two ways. First, it formalises these political, social and cultural conditions into a binding framework that provides a minimum set of rights and obligations for the parties that are available to everyone and that do not depend on personal or situational circumstances. Essentially the framework provides legal certainty. In addition, it provides the means for responding to problems that arise between different stakeholders in the SDI. Rather than being dependent on goodwill and circumstances, the stakeholders have rights that can be enforced, making the people and organisations involved in the SDI accountable for their actions, beyond the mere political accountability of elections.

Therefore, a legal framework that helps reach the goals of the SDI is important for it to function efficiently. Establishing such a framework should not be done without lawyers keeping a close eye on the coherence, but it also should not be left just to the lawyers, as they cannot fully evaluate the quality of the framework. In the true spirit of
an SDI, sharing information and knowledge between all the stakeholders is indispensable.

REFERENCES


