Chapter 1

Empirical legal studies

1.1 Introduction

Empirical legal studies, or empirical legal research, is a label given to studies that focus on the law by gathering empirical facts. Empirical legal studies is not a traditional academic discipline like psychology, economics, or biology. Empirical legal studies (or ELS) is a subfield in a sense at the fringes, or at the intersection, of law and social sciences. It is regarded differently by different scholars: by some as an ancillary discipline to law, by others as a particular object science within the broader social sciences. It is also encountered under different names, such as 'empirical legal research' or 'legal realism'/'new legal realism'. Similar – but not exactly identical – areas of study are denoted as 'law in action' or 'legal sociology'.

We will therefore start by defining what we understand empirical legal studies or empirical legal research to be. We believe that it will be impossible to exactly outline or demarcate what empirical legal studies is, and what it is not. Rather, we will attempt to describe and define what is at the core of empirical legal research, what distinguishes it from related fields, and in doing so hopefully outline a prototype. As we will see, some (sub)disciplines share properties with empirical legal research: criminology does, and so do legal sociology and legal anthropology. Rather than embark upon or elicit ontological discussions, we will point out similarities and differences, and leave things there. Our aim is to define what is particular or even quintessential for empirical legal research.

We accept that some disciplines share properties with ELS, or partially overlap with our arena of empirical legal research. As this book focuses mainly on the research methods and techniques for empirical legal research, we believe that any remaining ambiguities or fuzzy demarcations need not bother us much. We assume that legal scholars are the main readership of this book, with ELS revolving around questions relevant for law and its application.

1.2 Various definitions of empirical legal studies

Some examples of questions that are studied under the umbrella of empirical legal research are: 'Do judges understand the evidentiary strength of DNA evidence correctly?', 'Has the new labour law resulted in the aimed-for reduction in temporary contracts?', 'What type of compensation do victims of sexual abuse who participate in compensation schemes wish to receive?', 'Is international sentencing haphazard?', 'Are divorce cases settled faster under a 'one judge – one case' regime?', 'Do judges administer more lenient sentences when evidence is weak?'

These questions have two elements in common: (1) they all enquire after empirical facts, and (2) they all focus on the law, its operations or effects. This is still fairly vague, however. A quick scan of a (non-random and non-exhaustive) selection of textbooks and handbooks in fact results in a jumble of definitions. We discuss a few.

Epstein & Martin (2014, pp. viii–ix) define empirical legal research perhaps most broadly. They state that it is: "Research carried out by law students, lawyers, judges and scholars interested in law and legal institutions". In this definition, we see that it is required that the research be carried out by legally trained persons and that the questions asked pertain to law and legal institutions – but the definition does not contain the element 'empirical'.

Henster & Gasperetti (2017) do incorporate 'empirical' as an element when they define empirical legal studies as the "investigation of legally relevant facts using diverse methods and theories derived from the social sciences". It is the mention of 'facts' in this definition that classifies the studies as empirical. In contrast with Epstein and Martin, Henster and Gasperetti do not require the research to be carried out by legal scholars; the facts should simply be 'legally relevant'.

Leeuw & Schmeets (2016, p. 3) state that empirical legal research "addresses developments and actions in the 'real social world' as relating to legal arrangements, either to influence this world, to facilitate it, or to legalize what has been the 'usual' practice". These authors also – without using the term 'empirical' – refer to research being empirical in that research should address phenomena in the 'real social world'.

In the *Oxford Handbook on Empirical Legal Research* (2010, p. 4), the editors Cane and Kritzer describe empirical legal research as "the systematic collection of information and its analysis according to some generally accepted method". They subsequently note that the systematic nature of the research process is of central importance, both in the collection of data and in their analysis. The authors next state that traditional historical research ('legal history') is in their view *not* part of empirical legal research because of its already long-standing traditions with its own discrete norms, methodologies and standards. Second, they explicitly exclude the traditional analysis of formal legal documents, such as court decisions and legislative materials. Thus, case law analysis and the analysis of jurisprudence (often referred to as 'doctrinal analysis') do not belong to empirical legal research according to these authors.

As the authors of the *Oxford Handbook* also write, and as the reader will perhaps have gathered, there are of course examples of research that have both empirical and doctrinal elements. Such studies are in that sense hybrids or syntheses and may be categorized as belonging to both categories. It is namely not the case that doctrinal legal and empirical legal research take place in separate worlds. Davies (2020) states that

these two types of research are mutually dependent activities, which can (and should) mutually influence each other.

A prototypical hybrid – regarded by some as a synthesis between classical dogmatic analysis and ELS – is systematic content analysis of judicial opinions, or, briefly, systematic jurisprudence or case law analysis: that branch of empirical legal endeavour where a systematic selection of cases, such as verdicts, is coded systematically and analysed. The aim of systematic legal analysis is to reveal associations, patterns or developments in legal practice, and to do so in a manner that is structured ('systematic') and replicable (Verbruggen, 2021, pp. 8–9; Hall & Wright, 2008).

Systematic legal analysis can be regarded as a hybrid or synthesis because while the sampling strategy is clearly empirical, the analysis of the content of judicial opinions strongly resembles classic dogmatic analysis: reading and analysing legal decisions. However, the focus of systematic legal analysis is different. The focus is not on the analysis of a small number of the most important legal decisions with conclusions that are strongly authority-based, but on the description and evaluation of an entire set of legal decisions, in which all decisions are equally important and conclusions are based on empirical description, such as tallying or associations. The focus is on systematizing the content of these decisions, describing patterns, trends and quantities. The selection of decisions is systematic and preferably representative for a larger universe of decisions, and the analysis of the decisions is also systematic and transparent, so that the entire research process is objective, reliable, reproducible and replicable.

As we announced, we will not attempt to draw watertight boundaries, and therefore not strive to demarcate the domain of empirical legal research exactly. What is important at this stage is to note that from the various definitions, three characteristics of empirical legal research emerge, namely that (1) an empirical legal study poses questions about the law, that (2) it uses empirical data to answer those questions, and that (3) the answers to the questions are legally relevant. A number of authors do not classify certain types of research as empirical legal studies, because of either the particular type of data used, the questions posed, the methods (case law) or differing paradigmatic views (historical research).

1.3 The trias ELSica or the three pillars of empirical legal research

Our exploration of the various definitions and demarcations as given by handbooks and overview articles has brought us a little further, but we cannot say that it has given us an overview of what the field of empirical legal studies covers. If we combine the various definitions, it emerges that we are dealing with research that poses questions about the law or is after legally relevant facts. Also, the idea is that this research is pursued by legal scholars (which can be interpreted as saying that the findings must be of relevance to lawyers or legal practice), that the research collects and analyses empirical facts, and that traditional historical research on the law and doctrinal analysis are excluded. But what then *is* empirical legal research? What types of substantive issues does ELS address?

If one reviews empirical legal scholarship – whether it deals with administrative law, international law, civil or criminal law – three substantive topics or 'pillars' can be recognized into which empirical legal research can be grouped. We will discuss these briefly.

Law is one of the most important instruments to accommodate desirable human behaviour. Indeed, from the manner in which laws are drafted, and rules and regulations designed, it can be seen that politicians, law makers and legal policy makers make numerous assumptions about the subjects of these legal instruments. For instance, drafters of criminal law assume that sanctions deter potential criminals. Moving to civil and tort law, it is assumed that monetary payouts compensate victims for damages they suffered. But are these assumptions always true? The US which is one of very few developed nations to still have the death penalty, also has very high crime rates. Apparently those extremely severe penalties do not deter criminals, or do they? From recent surveys of victims of sexual abuse joining compensation schemes, it appears that many may not just welcome some kind of monetary compensation, but mainly wish their voice to be heard, their suffering recognized, and that the procedures they entered help to prevent future abuse. The proposal for a EU directive on improving working conditions in platform work assumes that platform workers such as food delivery riders want to be employees rather than freelance, in order to be protected by labour law. But is there an empirical basis for these assumptions? This is the first pillar of empirical legal studies: the study of the *empirical* assumptions on which laws and regulations are based.

Then, laws are administered and enforced, and legal decisions proclaimed. Numerous questions can be posed about this process, ranging from contextual issues such as the training of lawyers and practical obstacles in the judicial process, to questions regarding the length of procedures, to substantive questions about the applications of legal rules and interpretation of legal principles. We briefly mention a number of examples. Are new procedures, such as the 'one judge – one case' principle, practically feasible? Is the training of judges sufficient for them to be able to judge novel forms of evidence? How often and in what type of cases is the *actio pauliana* invoked? What factors influence the length of court proceedings? And lastly, what legal rules are employed in legal decision making? How do judges interpret legal principles, such as proportionality, in international criminal procedures? This we distinguish as a second pillar of empirical legal research: the study of how the law is interpreted and applied *in practice*.

Last, the law aims to influence people's behaviour, and the operation of institutions. Veerman (2021, pp. 221–222) distinguishes two approaches when we talk about that function: the legal and the sociological. The legal approach regards the question of how the standards laid down in the law are applied when conflict needs to be resolved, and what their meaning is. Many laws have been enacted with lofty ideals, such as promoting justice, correcting mistakes, equality before the law. According to Veerman, this legal effect is about the validity of standards and their significance in the application by the court. Research into this traditionally takes place within the legal discipline, by lawyers.

In the sociological approach, on the other hand, the emphasis is on the effects of legislation in or on society. According to Veerman (2021, p. 222), this sociological

approach is about "the social changes that take place after the entry into force of laws, through an adjustment of the behaviour of actors where the changes or adjustments are wholly or partly the result of legislation that has made this behaviour possible or imposed".

That the two should not be studied in isolation is shown by the fact that effectiveness in a sociological sense is perceived by some as essential to legitimacy. Davies (2020) also argues that the doctrinal and empirical study of law should in some way enrich each other. Van Boom, Desmet, & (2018, pp. 5–6) write that the empirical study of law enriches doctrinal legal research, more than through empirical fact checking, because it allows a deeper understanding of not only the plain facts but also the underlying mechanisms of legal interaction, such as insight into both explicit reasoning as well as unconscious processes in legally relevant decision making.

It is predominantly within this more sociological approach that empirical questions have been asked. Many laws have been enacted with lofty ideals, such as promoting justice, repairing wrong, equality before the law. But more mundane goals have also been formulated. For instance, laws came into force in the Netherlands recently that forbid employers to hire staff in consecutive temporary contracts ('revolving-door contracts'), adopted with the explicit purpose that more (young) employees would acquire tenured positions. Did this work out in the foreseen way? Did the law indeed induce or force employers to hire people on permanent contracts? Whether laws and regulations have their intended effects is an important, empirical, question. Such intended effects are also referred to as 'effectiveness'. And studies that then investigate whether laws have been effective are generally referred to as 'evaluation studies' or 'impact assessments'.

However, laws can also have unintended side-effects. The Dutch Rent Act that was enacted in 1950 provided tenants with virtually unlimited protection against eviction. One of the aims of the Act had been to strengthen the legal position of tenants, who were generally in a more vulnerable position than landlords. After the new law, once a landlord had rented out a place, whether by contract or not, and whether payment was official or monetary or in kind, the tenant had indeed a very strong legal position, and – unless a tenant left voluntarily – it was now practically speaking impossible for landlords to vacate rented-out living quarters. The side-effect of this law was, however, that it had now become very 'risky' for home owners to let their premises. And the consequence of this was that shortages of rented spaces quickly became a major problem that those looking for a place to live were faced with. All in all, both the intended *effects* and unintended or side-effects of laws are the object of study in the third pillar of empirical legal research.

It is good practice to study the impact of laws and regulations not only after laws have been enacted, but to try to gauge their likely impact already before the laws are implemented. If such a – more hypothetical – investigation of a law's likely effects already shows that it would have flaws or undesirable side-effects, this can hopefully be remedied before the law comes into effect. Such an evaluation that takes place before a law comes into force, and in fact mostly when a law is still in its design stage, is referred to as an 'ex-ante evaluation'. We will return to the topic of ex-ante evaluations in chapter 5.